Chapter 21A.—RULES OF CRIMINAL PROCEDURE

CROSS REFERENCES

Petty offense rules of procedure before United States commissioners, see such rules following section 576a of this title.

Rules of the Supreme Court, see such rules set out following section 354 of Title 28, Judicial Code and Judiciary.

§ 687. Proceedings in criminal cases prior to and including verdict; power of Supreme Court to prescribe rules.

The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict, or finding of guilty or not guilty by the court if a jury has been waived, or plea of guilty, in criminal cases in district courts of the United States, including the district courts of Alaska, Hawaii, Puerto Rico, Canal Zone, and the Virgin Islands, in the Supreme Courts of Hawaii and Puerto Rico, and in proceedings before United States commissioners. Such rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session, and thereafter all laws in conflict therewith shall be of no further force and effect. (June 29, 1940, ch. 445, 54 Stat. 688; Treaty Jan. 11, 1943, 57 Stat. 767.)

CODIFICATION

The reference to the United States Court for China was omitted as such court is no longer functioning. By the Treaty of Jan. 11, 1943, cited to text, the United States relinquished extraterritorial jurisdiction in China. Rule 54 (a) of the Federal Rules of Criminal Procedure, effective Mar. 21, 1946, and set out following this section, does not include the United States Court for China in its enumeration of courts to which such rules apply.

HISTORY OF RULES

Rules 1–31, 40–60 of the Federal Rules of Criminal Procedure, which are set out following this section, were authorized by the provisions of this section. Pursuant to such provisions, said Rules 1–31, 40–60, prepared by an Advisory Committee appointed by the Supreme Court on Feb. 3, 1941, were, on Dec. 26, 1944, transmitted to the Attorney General of the United States by the Chief Justice. On Jan. 3, 1945, the Attorney General submitted them to Congress. Under Rule 59, the effective date of said Rules 1–31, 40–60 was Mar. 21, 1946.

Rules 32–39 of said rules, relating to judgment and appeals and also set out following this section, were authorized by section 688 of this title, were also prepared by the said Advisory Committee, and they superseded the former Rules of Criminal Procedure After Plea of Guilty, Verdict or Finding of Guilt (Rules 1–13), which were authorized, adopted and promulgated under that section and which were formerly set out following that section. Said Rules 32–39 were promulgated by the Supreme Court as a part of the new Federal Rules of Criminal Procedure, by order dated Feb. 8, 1946, making them effective also on Mar. 21, 1946. Said order also directed that said rules and Rules 1–31, 40–60 be consecutively numbered "as indicated" and that they (Rules 1–60) be known as the Federal Rules of Criminal Procedure.

For history of former Rules 1–13 of the said Rules of Criminal Procedure After Plea of Guilty, Verdict or Finding of Guilt, commonly known as the Criminal Appeals Rules, see note under said section 688 of this title.

CROSS REFERENCES

Extension of this section to proceedings to punish for criminal contempt of court, see section 689 of this title.

Extension of this section to proceedings with respect to direct appeals to the Supreme Court, taken by or on behalf of the United States in certain cases, see section 682 of this title.

FEDERAL RULES OF CRIMINAL PROCEDURE

FOR THE DISTRICT COURTS OF THE UNITED STATES

EFFECTIVE MARCH 21, 1946

ANALYSIS OF RULES AND FORMS

APPENDIX OF FORMS

TABLE

This table shows the Constitution, its amendments, and the sections of the United States Code to which references are made in the Federal Rules of Criminal Procedure and the notes thereto.

[Unless followed by "(T)", to indicate that the reference appears in the text of the Rule, the references appear in the Note to the Rule.]

Constitution and its amendments	Federal Rules of Criminal Procedure
Constitution	18, 21
4th Amendment	9
5th Amendment	7
6th Amendment	21

U. S. C.	Federal Rules of Criminal Procedure
Tit. 1, § 1	54
2	54
3	54
4	54
5	54
6	54
30	27
30a	27
54	27
55	27
Tit. 5, § 291	54
293	54
294	54
295	54
300a	5
309	54
310	6, 54
311	54
312	54
315	54
317	48
490	27
Tit. 6, § 6	46
7	46
8	46
9	46
10	46
11	46
12	46
13	46
14	46
15	46
Tit. 7, § 499m	42
Tit. 8, § 138	18, 26
717 (b)	27
727 (g)	27
Tit. 9, § 7	42
Tit. 11, § 69	42
Tit. 15, § 49	42
78u	41
78aa	18
79y	18
80a–43	18
80b–14	18
100	41
127	27
155	42
298	18
715i	18
717u	18
Tit. 16, § 10	5, 54
10a	54
26	54
27	54
65	54
66	54
70	54
99	54
101	54
102	54
117b	54
117d	54
117f	54
117g	54
128	54
129	54
130	54
131	54
171	54
172	54
173	54
174	54
198b	54
198d	54
198e	54
198f	54
198g	54
204b	54
204d	54
204e	54
204f	54
204g	54
376	54
377	54
378	54
381	54
382	54
395b	54
395e	54
395f	54
395g	54
403c–1	54
403c–5	54
403c–6	54
403c–7	54
403c–8	54
415	54
635	54
706	5, 54
727	54
772	54 (T)
772a	54 (T)
772b	54 (T)
772c	54 (T)
772d	54 (T)
772e	54 (T), 54
772f	54 (T)
772g	54 (T)
Tit. 16, § 772h	54 (T)
772i	54 (T)
Tit. 17, § 36	42
Tit. 18, § 12	41
39	18
98	41 (T), 41
286	54
287	41
336	18
338a	18, 21
338b	18
345	18
392	54 (T)
396e	18
401	18
408	18
408a	31
408d	18
408e	18
409	18
412	18
412a	31
418	18
419d	18
420d	18
468	54
494	18
541	7, 54
553	18
554	6
556	6, 52
556a	12
557	8, 13, 14
561	12
563	44
564	11
565	31
566	31
567	31
576	1, 54 (T), 54
576a	1, 54 (T), 54
576b	1, 54 (T)
576c	1, 54 (T)
576d	1, 54 (T)
587	12
589	12
591	3, 4, 5, 40, 54
593	5
595	5
596	46
597	46
599	46
601	46
603	4
611	41 (T), 41
612	41 (T), 41
613	41 (T), 41
614	41 (T), 41
615	41 (T), 41
616	41 (T), 41
617	41
618	41
619	41
620	41 (T), 41
621	41 (T), 41
622	41
623	41 (T), 41
624	41 (T), 41
625	41 (T), 41
626	41 (T), 41
627	41
641	54
645	54
646	54
647	54
651	54
652	54
653	54
654	54
655	54
656	54
657	54
658	54
659	54
660	54
662	54
662c	54
662d	54
682	37, 54
687	1, 54, 59
688	54
689	1, 42
724	11
753f	7
921	7, 54
922	7, 54
923	7, 54
924	7, 54
925	7, 54
926	7, 54
927	7, 54
928	7, 54
929	7, 54
Tit. 19, § 482	54

U. S. C.	Federal Rules of Criminal Procedure
Tit. 19, § 483	54
1333	42
1592	54
1595	41
1602	54
1603	54
1604	54
1605	54
1606	54
1607	54
1608	54
1609	54
1610	54
1611	54
1612	54
1613	54
1614	54
1615	54
1703	54
1705	54
Tit. 20, § 52	27
Tit. 21, § 17	18
118	18
334	54
337	54
401	54
402	54
403	54
404	54
405	54
406	54
Tit. 22, § 256	54 (T)
257	54 (T)
258	54 (T)
270f	42
402	41
Tit. 25, § 6	27
246	41
Tit. 26, § 3116	41, 54
3117	41
3601	41
3602	41
Tit. 28, § 14	56
15	56
25	21
74	54
75	54
76	54
101	18
102	18
103	18
114	18, 19
121	18
377	4
385	42
386	42
387	42
388	42
389	42
390	42
390a	42
391	52
394	44
411	6
412	6
412a	6
413	6
414	6
415	6
416	6
417	6
417a	6, 24
418	6
419	6
420	6
421	6
422	6
423	6
424	6, 24
425	6
426	6
444	55
445	55
446	55
447	55
448	55
449	55
450	55
451	54
452	54
453	54
454	54
455	54
456	54
457	54
458	54
459	54
460	54
461	54
462	54
463	54
464	54
465	54
466	54
Tit. 28, § 481	54
483	54
485	54
503	4
632	26
633	26
634	26
638	26
644	15
648	42
654	17
656	17
657	46
661	27
662	27
663	27
664	27
665	27
668	27
669	27
670	27
671	27
672	27
673	27
674	27
675	27
676	27
677	27
678	27
679	27
680	27
681	27
682	27
685	27
687	27
688	27
689	27
695	26
695a	26, 27
695b	27
695c	27
695d	27
695e	27
695f	27
695g	27
695h	27
703	41
711	54(T)
712	54(T)
713	54(T)
714	42, 54(T)
715	42, 54(T)
716	42, 54(T)
717	42, 54(T)
718	54(T)
723b	54
723c	54
724	57
750	42
Tit. 29, § 111	42
112	42
160	42
161	42
209	42
211	41
Tit. 31, § 46	27
Tit. 33, § 391	54
392	54
393	54
394	54
395	54
396	54
436	5
446	5
452	5
927	42
Tit. 35, § 56	42
Tit. 38, § 11g	27
Tit. 43, § 57	27
58	27
59	27
83	27
Tit. 44, § 300h	27
307	27
Tit. 46, § 193	26
708	5
Tit. 47, § 33	18
409	42
412	27
505	18
Tit. 48, § 101	54
101a	54
631	54
641	54
642	54
646	54
873a	54
1344	54
1345	54
1345a	42
1405z	54
1406	54
Tit. 49, § 12	42
16	27
Tit. 49, § 41	18
623	18
781	41
Tit. 49, § 782	41
784	41
Tit. 50, § 23	54(T)

I. SCOPE, PURPOSE, AND CONSTRUCTION

Rule 1. Scope

These rules govern the procedure in the courts of the United States and before United States commissioners in all criminal proceedings, with the exceptions stated in Rule 54.

Notes of Advisory Committee on Rules

1. These rules are prescribed under the authority of two acts of Congress, namely: the Act of June 29, 1940, ch. 445, 18 U. S. C. § 687 (Proceedings in criminal cases prior to and including verdict; power of Supreme Court to prescribe rules) and the Act of November 21, 1941, ch. 492, 18 U. S. C. § 689 (Proceedings to punish for criminal contempt of court; application to sections 687 and 688).

2. The courts of the United States covered by the rules are enumerated in Rule 54 (a). In addition to Federal courts in the continental United States they include district courts in Alaska, Hawaii, Puerto Rico and the Virgin Islands. In the Canal Zone only the rules governing proceedings after verdict, finding or plea of guilty are applicable.

3. While the rules apply to proceedings before commissioners when acting as committing magistrates, they do not govern when a commissioner acts as a trial magistrate for the trial of petty offenses committed on Federal reservations. That procedure is governed by rules adopted by order promulgated by the Supreme Court on January 6, 1941 (311 U. S. 733), pursuant to the Act of October 9, 1940, ch. 785, secs. 1–5. See 18 U. S. C. §§ 576–576d (relating to trial of petty offenses on Federal reservations by United States commissioners).

Rule 2. Purpose and Construction

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

Notes of Advisory Committee on Rules

Compare Federal Rules of Civil Procedure 28 U. S. C. foll. § 723c, Rule 1 (Scope of Rules), last sentence: "They [the Federal Rules of Civil Procedure 28 U. S. C. foll. § 723c] shall be construed to secure the just, speedy, and inexpensive determination of every action."

II. PRELIMINARY PROCEEDINGS

Rule 3. The Complaint

The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States.

Notes of Advisory Committee on Rules

The rule generally states existing law and practice, 18 U. S. C. § 591 (Arrest and removal for trial); United States v. Simon, E. D. Pa., 248 F. 980; United States v. Maresca, S. D. N. Y., 266 F. 713, 719–721. It eliminates, however, the requirement of conformity to State law as to the form and sufficiency of the complaint. See, also, Rule 57 (b).

RULE 4. WARRANT OR SUMMONS UPON COMPLAINT

(a) Issuance.

If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

(b) Form.

(1) *Warrant.* The warrant shall be signed by the commissioner and shall contain the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available commissioner.

(2) *Summons.* The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a commissioner at a stated time and place.

(c) Execution or Service; and Return.

(1) *By Whom.* The warrant shall be executed by a marshal or by some other officer authorized by law. The summons may be served by any person authorized to serve a summons in a civil action.

(2) *Territorial Limits.* The warrant may be executed or the summons may be served at any place within the jurisdiction of the United States.

(3) *Manner.* The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant in his possession at the time of the arrest, but upon request he shall show the warrant to the defendant as soon as possible. If the officer does not have the warrant in his possession at the time of the arrest, he shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. The summons shall be served upon a defendant by delivering a copy to him personally, or by leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by mailing it to the defendant's last known address.

(4) *Return.* The officer executing a warrant shall make return thereof to the commissioner or other officer before whom the defendant is brought pursuant to Rule 5. At the request of the attorney for the government any unexecuted warrant shall be returned to the commissioner by whom it was issued and shall be cancelled by him. On or before the return day the person to whom a summons was delivered for service shall make return thereof to the commissioner before whom the summons is returnable. At the request of the attorney for the government made at any time while the complaint is pending, a warrant returned unexecuted and not cancelled or a summons returned unserved or a duplicate thereof may be delivered by the commissioner to the marshal or other authorized person for execution or service.

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a)

1. The rule states the existing law relating to warrants issued by commissioner or other magistrate. United States Constitution, Amendment IV; 18 U. S. C. § 591 (Arrest and removal for trial).

2. The provision for summons is new, although a summons has been customarily used against corporate defendants, 28 U. S. C. § 377 (Power to issue writs); United States v. John Kelso Co., 86 F. 304, N. D. Cal., 1898. See also, Albrecht v. United States, 273 U. S. 1, 8, 47 S. Ct. 250, 71 L. Ed. 505 (1927). The use of the summons in criminal cases is sanctioned by many States, among them Indiana, Maryland, Massachusetts, New York, New Jersey, Ohio, and others. See A. L. I. Code of Criminal Procedure (1931), Commentaries to secs. 12, 13, and 14. The use of the summons is permitted in England by 11 & 12 Vict., c. 42, sec. 1 (1848). More general use of a summons in place of a warrant was recommended by the National Commission on Law Observance and Enforcement, Report on Criminal Procedure (1931) 47. The Uniform Arrest Act, proposed by the Interstate Commission on Crime, provides for a summons. Warner, 28 Va. L. R. 315. See also, Medalie, 4 Lawyers Guild R. 1, 6.

3. The provision for the issuance of additional warrants on the same complaint embodies the practice heretofore followed in some districts. It is desirable from a practical standpoint, since when a complaint names several defendants, it may be preferable to issue a separate warrant as to each in order to facilitate service and return, especially if the defendants are apprehended at different times and places. Berge, 42 Mich. L. R. 353, 356.

4. Failure to respond to a summons is not a contempt of court, but is ground for issuing a warrant.

Note to Subdivision (b)

Compare Rule 9 (b) and forms of warrant and summons, Appendix of Forms.

Note to Subdivision (c) (2)

This rule and Rule 9 (c) (1) modify the existing practice under which a warrant may be served only within the district in which it is issued. Mitchell v. Dexter, 244 F. 926 (C. C. A. 1st, 1917); Palmer v. Thompson, 20 App. D. C. 273 (1902); but see In re Christian, 82 F. 885, C. C. W. D. Ark., 1897; 2 Op. Atty. Gen. 564. When a defendant is apprehended in a district other than that in which the prosecution has been instituted, this change will eliminate some of the steps that are at present followed: the issuance of a warrant in the district where the prosecution is pending; the return of the warrant non est inventus; the filing of a complaint on the basis of the warrant and its return in the district in which the defendant is found; and the issuance of another warrant in the latter district. The warrant originally issued will have efficacy throughout the United States and will constitute authority for arresting the defendant wherever found. Waite, 27 Jour. of Am. Judicature Soc. 101, 103. The change will not modify or affect the rights of the defendant as to removal. See Rule 40. The authority of the marshal to serve process is not limited to the district for which he is appointed, 28 U. S. C. § 503.

Note to Subdivision (c) (3)

1. The provision that the arresting officer need not have the warrant in his possession at the time of the arrest is rendered necessary by the fact that a fugitive may be discovered and apprehended by any one of many officers. It is obviously impossible for a warrant to be in the possession of every officer who is searching for a fugitive or who unexpectedly might find himself in a position to apprehend the fugitive. The rule sets forth the customary practice in such matters, which has the sanction of the courts. "It would be a strong proposition in an ordinary felony case to say that a fugitive from justice for whom a capias or warrant was outstanding could not be apprehended until the apprehending officer had physical possession of the capias or the warrant. If such were the law, criminals could circulate freely from one end of the land to the other, because they could always keep ahead of an officer with the warrant." In re Kosopud, N. D. Ohio, 272 Fed. 330, 336. Waite, 27 Jour. of Am. Judicature

Soc. 101, 103. The rule, however, safeguards the defendant's rights in such case.

2. Service of summons under the rule is substantially the same as in civil actions under Federal Rules of Civil Procedure, Rule 4 (d) (1), 28 U. S. C. foll. § 723c.

Note to Subdivision (c) (4)

Return of a warrant or summons to the commissioner or other officer is provided by 18 U. S. C. § 603 (Writs; copy as jailer's authority). The return of all "copies of process" by the commissioner to the clerk of the court is provided by 18 U. S. C. § 591; and see Rule 5 (c), infra.

RULE 5. PROCEEDINGS BEFORE THE COMMISSIONER

(a) Appearance before the Commissioner.

An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

(b) Statement by the Commissioner.

The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.

(c) Preliminary Examination.

The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him. The commissioner shall admit the defendant to bail as provided in these rules. After concluding the proceeding the commissioner shall transmit forthwith to the clerk of the district court all papers in the proceeding and any bail taken by him.

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a)

1. The time within which a prisoner must be brought before a committing magistrate is defined differently in different statutes. The rule supersedes all statutory provisions on this point and fixes a single standard, i. e., "without unnecessary delay", 18 U. S. C. § 593 (Operating illicit distillery; arrest; bail); 18 U. S. C. § 595 (Persons arrested taken before nearest officer for hearing); 5 U. S. C. § 300a (Division of Investigation; authority of officers to serve warrants and make arrests); 16 U. S. C. § 10 (Arrests by employees of park service for violations of laws and regulations); 16 U. S. C. § 706 (Migratory Bird Treaty Act; arrests; search warrants); D. C. Code (1940), Title 4, sec. 140 (Arrests without warrant); see, also, 33 U. S. C. §§ 436, 446, 452; 46 U. S. C. § 708. What constitutes "unnecessary delay", i. e., reasonable time within which the prisoner should be brought before a committing magistrate, must be determined in the light of all the facts and circumstances of the case. The following authorities discuss the question what constitutes reasonable time for this purpose in various situations: Carroll v. Parry, 48 App. D. C. 453; Janus v. United States, 38 F. 2d 431, C. C. A. 9th; Commonwealth v. Di Stasio, 294 Mass. 273, 1 N. E. 2d 189; State v. Freeman, 86 N. C. 683; Peloquin v. Hibner, 231 Wis. 77, 285 N. W. 380; see, also, Warner, 28 Va. L. R. 315, 339–341.

2. The rule also states the prevailing state practice, A. L. I. Code of Criminal Procedure (1931), Commentaries to secs. 35, 36.

Note to Subdivisions (b) and (c)

1. These rules prescribe a uniform procedure to be followed at preliminary hearings before a commissioner. They supersede the general provisions of 18 U. S. C. § 591 (Arrest and removal for trial). The procedure prescribed by the rules is that generally prevailing. See Wood v. United States, 128 F. 2d 265, 271–272, App. D. C.; A. L. I. Code of Criminal Procedure (1931), secs. 39–60 and Commentaries thereto; Manual for United States Commissioners, pp. 6–10, published by Administrative Office of the United States Courts.

2. Pleas before a commissioner are excluded, as a plea of guilty at this stage has no legal status or function except to serve as a waiver of preliminary examination. It has been held inadmissible in evidence at the trial, if the defendant was not represented by counsel when the plea was entered. Wood v. United States, 128 F. 2d 265, App. D. C. The rule expressly provides for a waiver of examination, thereby eliminating any necessity for a provision as to plea.

III. INDICTMENT AND INFORMATION

RULE 6. THE GRAND JURY

(a) Summoning Grand Juries.

The court shall order one or more grand juries to be summoned at such times as the public interest requires. The grand jury shall consist of not less than 16 nor more than 23 members. The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement.

(b) Objections to Grand Jury and to Grand Jurors.

(1) *Challenges.* The attorney for the government or a defendant who has been held to answer in the district court may challenge the array of jurors on the ground that the grand jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court.

(2) *Motion to Dismiss.* A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

(c) Foreman and Deputy Foreman.

The court shall appoint one of the jurors to be foreman and another to be deputy foreman. The foreman shall have power to administer oaths and affirmations and shall sign all indictments. He or another juror designated by him shall keep a record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court, but the record shall not be made public except on order of the court. During the absence of the foreman, the deputy foreman shall act as foreman.

(d) Who May be Present.

Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

(e) Secrecy of Proceedings and Disclosure.

Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand juror only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

(f) Finding and Return of Indictment.

An indictment may be found only upon the concurrence of 12 or more jurors. The indictment shall be returned by the grand jury to a judge in open court. If the defendant has been held to answer and 12 jurors do not concur in finding an indictment, the foreman shall so report to the court in writing forthwith.

(g) Discharge and Excuse.

A grand jury shall serve until discharged by the court but no grand jury may serve more than 18 months. The tenure and powers of a grand jury are not affected by the beginning or expiration of a term of court. At any time for cause shown the court may excuse a juror either temporarily or permanently, and in the latter event the court may impanel another person in place of the juror excused.

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a)

1. The first sentence of this rule vests in the court full discretion as to the number of grand juries to be summoned and as to the times when they should be convened. This provision supersedes the existing law, which limits the authority of the court to summon more than one grand jury at the same time. At present two grand juries may be convened simultaneously only in a district which has a city or borough of at least 300,000 inhabitants, and three grand juries only in the Southern District of New York, 28 U. S. C. § 421 (Grand juries; when, how and by whom summoned; length of service). This statute has been construed, however, as only limiting the authority of the court to summon more than one grand jury for a single place of holding court, and as not circumscribing the power to convene simultaneously several grand juries at different points within the same district, Morris v. United States, 128 F. 2d 912, C. C. A. 5th; United States v. Perlstein, 39 F. Supp. 965, D. N. J.

2. The provision that the grand jury shall consist of not less than 16 and not more than 23 members continues existing law, 28 U. S. C. § 419 (Grand jurors; number when less than required number).

3. The rule does not affect or deal with the method of summoning and selecting grand juries. Existing statutes on the subjects are not superseded. See 28 U. S. C. §§ 411–426. As these provisions of law relate to jurors for both criminal and civil cases, it seemed best not to deal with this subject.

Note to Subdivision (b) (1)

Challenges to the array and to individual jurors, although rarely invoked in connection with the selection of grand juries, are nevertheless permitted in the Federal courts and are continued by this rule, United States v. Gale, 109 U. S. 65, 69–70, 3 S. Ct. 1, 27 L. Ed. 857; Clawson v. United States, 114 U. S. 477, 5 S. Ct. 949, 29 L. Ed. 179; Agnew v. United States, 165 U. S. 36, 44, 17 S. Ct. 235, 41 L. Ed. 624. It is not contemplated, however, that defendants held for action of the grand jury shall receive notice of the time and place of the impaneling of a grand jury, or that defendants in custody shall be brought to court to attend at the selection of the grand jury. Failure to challenge is not a waiver of any objection. The objection may still be interposed by motion under Rule 6 (b) (2).

Note to Subdivision (b) (2)

1. The motion provided by this rule takes the place of a plea in abatement, or motion to quash. Crowley v. United States, 194 U. S. 461, 469–474, 24 S. Ct. 731, 48 L. Ed. 1075; United States v. Gale, supra.

2. The second sentence of the rule is a restatement of 18 U. S. C. § 554 (a) (Indictments and presentments; objection on ground of unqualified juror barred where twelve qualified jurors concurred; record of number concurring), and introduces no change in existing law.

Note to Subdivision (c)

1. This rule generally is a restatement of existing law, 18 U. S. C. § 554 (a) and 28 U. S. C. § 420. Failure of the foreman to sign or endorse the indictment is an irregularity and is not fatal, Frisbie v. United States, 157 U. S. 160, 163–165, 15 S. Ct. 586, 39 L. Ed. 657.

2. The provision for the appointment of a deputy foreman is new. Its purpose is to facilitate the transaction of business if the foreman is absent. Such a provision is found in the law of at least one State, N. Y. Code Criminal Procedure, sec. 244.

Note to Subdivision (d)

This rule generally continues existing law. See 18 U. S. C. § 556 (Indictments and presentments; defects of form); and 5 U. S. C. § 310 (Conduct of legal proceedings).

Note to Subdivision (e)

1. This rule continues the traditional practice of secrecy on the part of members of the grand jury, except when the court permits a disclosure, Schmidt v. United States, 115 F. 2d 394, C. C. A. 6th; United States v. American Medical Association, 26 F. Supp. 429, D. C.; Cf. Atwell v. United States, 162 Fed. 97, C. C. A. 4th; and see 18 U. S. C. § 554 (a) (Indictments and presentments; objection on ground of unqualified juror barred where twelve qualified jurors concurred; record of number concurring). Government attorneys are entitled to disclosure of grand jury proceedings, other than the deliberations and the votes of the

jurors, inasmuch as they may be present in the grand jury room during the presentation of evidence. The rule continues this practice.

2. The rule does not impose any obligation of secrecy on witnesses. The existing practice on this point varies among the districts. The seal of secrecy on witnesses seems an unnecessary hardship and may lead to injustice if a witness is not permitted to make a disclosure to counsel or to an associate.

3. The last sentence authorizing the court to seal indictments continues present practice.

Note to Subdivision (f)

This rule continues existing law, 18 U. S. C. § 554 (Indictments and presentments; by twelve grand jurors). The purpose of the last sentence is to provide means for a prompt release of a defendant if in custody, or exoneration of bail if he is on bail, in the event that the grand jury considers the case of a defendant held for its action and finds no indictment.

Note to Subdivision (g)

Under existing law a grand jury serves only during the term for which it is summoned, but the court may extend its period of service for as long as 18 months, 28 U. S. C. § 421. During the extended period, however, a grand jury may conduct only investigations commenced during the original term. The rule continues the 18 months' maximum for the period of service of a grand jury, but provides for such service as a matter of course, unless the court terminates it at an earlier date. The matter is left in the discretion of the court, as it is under existing law. The expiration of a term of court as a time limitation is elsewhere entirely eliminated (Rule 45 (c)) and specific time limitations are substituted therefor. This was previously done by the Federal Rules of Civil Procedure for the civil side of the courts (Federal Rules of Civil Procedure, Rule 6 (c), 23 U. S. C. foll. § 723c). The elimination of the requirement that at an extended period the grand jury may continue only investigations previously commenced, will obviate such a controversy as was presented in United States v. Johnson, 319 U. S. 503, 63 S. Ct. 1233, 87 L. Ed. 1546, rehearing denied 320 U. S. 808, 64 S. Ct. 25, 88 L. Ed. 488.

RULE 7. THE INDICTMENT AND THE INFORMATION

(a) Use of Indictment or Information.

An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

(b) Waiver of Indictment.

An offense which may be punished by imprisonment for a term exceeding one year or at hard labor may be prosecuted by information if the defendant, after he has been advised of the nature of the charge and of his rights, waives in open court prosecution by indictment.

(c) Nature and Contents.

The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

(d) Surplusage.

The court on motion of the defendant may strike surplusage from the indictment or information.

(e) Amendment of Information.

The court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

(f) Bill of Particulars.

The court for cause may direct the filing of a bill of particulars. A motion for a bill of particulars may be made only within ten days after arraignment or at such other time before or after arraignment as may be prescribed by rule or order. A bill of particulars may be amended at any time subject to such conditions as justice requires.

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a)

1. This rule gives effect to the following provision of the Fifth Amendment to the Constitution of the United States: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *". An infamous crime has been defined as a crime punishable by death or by imprisonment in a penitentiary or at hard labor, Ex parte Wilson, 114 U. S. 417, 427, 5 S. Ct. 935, 29 L. Ed. 89; United States v. Moreland, 258 U. S. 433, 42 S. Ct. 368, 66 L. Ed. 700, 24 A. L. R. 992. Any sentence of imprisonment for a term of over one year may be served in a penitentiary, if so directed by the Attorney General, 18 U. S. C. § 753f (Commitment of persons by any court of the United States and the juvenile court of the District of Columbia; place of confinement; transfers). Consequently any offense punishable by imprisonment for a term of over one year is an infamous crime.

2. Petty offenses and misdemeanors for which no infamous punishment is prescribed may now be prosecuted by information, 18 U. S. C. § 541 (Felonies and misdemeanors); Duke v. United States, 301 U. S. 492, 57 S. Ct. 835, 81 L. Ed. 1243.

3. For a discussion of the provision for waiver of indictment, see Note to Rule 7 (b), infra.

4. Presentment is not included as an additional type of formal accusation, since presentments as a method of instituting prosecutions are obsolete, at least as concerns the Federal courts.

Note to Subdivision (b)

1. Opportunity to waive indictment and to consent to prosecution by information will be a substantial aid to defendants, especially those who, because of inability to give bail, are incarcerated pending action of the grand jury, but desire to plead guilty. This rule is particularly important in those districts in which considerable intervals occur between sessions of the grand jury. In many districts where the grand jury meets infrequently a defendant unable to give bail and desiring to plead guilty is compelled to spend many days, and sometimes many weeks, and even months, in jail before he can begin the service of his sentence, whatever it may be, awaiting the action of a grand jury. Homer Cummings, 29 A. B. A.

Jour. 654–655; Vanderbilt, 29 A. B. A. Jour. 376, 377; Robinson, 27 Jour. of the Am. Judicature Soc. 38, 45; Medalie, 4 Lawyers Guild R. (3) 1, 3. The rule contains safeguards against improvident waivers.

The Judicial Conference of Senior Circuit Judges, in September 1941, recommended that "existing law or established procedure be so changed, that a defendant may waive indictment and plead guilty to an information filed by a United States attorney in all cases except capital felonies." Report of the Judicial Conference of Senior Circuit Judges (1941) 13. In September 1942 the Judicial Conference recommended that provision be made "for waiver of indictment and jury trial, so that persons accused of crime may not be held in jail needlessly pending trial." Id. (1942) 8.

Attorneys General of the United States have from time to time recommended legislation to permit defendants to waive indictment and to consent to prosecution by information. See Annual Report of the Attorney General of the United States (Mitchell) (1931) 3; Id. (Mitchell) (1932) 6; Id. (Cummings) (1933) 1, (1936) 2, (1937) 11, (1938) 9; Id. (Murphy) (1939) 7.

The Federal Juvenile Delinquency Act, 18 U. S. C. §§ 921–929, now permits a juvenile charged with an offense not punishable by death or life imprisonment to consent to prosecution by information on a charge of juvenile delinquency, 18 U. S. C. § 922.

2. On the constitutionality of this rule, see United States v. Gill, 55 F. 2d 399, D. N. M., holding that the constitutional guaranty of indictment by grand jury may be waived by defendant. It has also been held that other constitutional guaranties may be waived by the defendant, e. g., Patton v. United States, 281 U. S. 276, 50 S. Ct. 253, 74 L. Ed. 854, 70 A. L. R. 263 (trial by jury); Johnson v. Zerbst, 304 U. S. 458, 465, 58 S. Ct. 1019, 82 L. Ed. 1461, 146 A. L. R. 357 (right of counsel); Trono v. United States, 199 U. S. 521, 534, 26 S. Ct. 121, 50 L. Ed. 292, 4 Ann. Cas. 773 (protection against double jeopardy); United States v. Murdock, 284 U. S. 141, 148, 52 S. Ct. 63, 76 L. Ed. 210, 82 A. L. R. 1376 (privilege against self-incrimination); Diaz v. United States, 223 U. S. 442, 450, 32 S. Ct. 250, 56 L. Ed. 500, Ann. Cas. 1913C, 1138 (right of confrontation).

Note to Subdivision (c)

1. This rule introduces a simple form of indictment, illustrated by Forms 1 to 11 in the Appendix of Forms. Cf. Rule 8 (a) of the Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723c. For discussion of the effect of this rule and a comparison between the present form of indictment and the simple form introduced by this rule, see Vanderbilt, 29 A. B. A. Jour. 376, 377; Homer Cummings, 29 A. B. A. Jour. 654, 655; Holtzoff, 3 F. R. D. 445, 448–449; Holtzoff, 12 Geo. Washington L. R. 119, 123–126; Medalie, 4 Lawyers Guild R. (3) 1, 3.

2. The provision contained in the fifth sentence that it may be alleged in a single count that the means by which the defendant committed the offense are unknown, or that he committed it by one or more specified means, is intended to eliminate the use of multiple counts for the purpose of alleging the commission of the offense by different means or in different ways. Cf. Federal Rules of Civil Procedure, Rule 8 (e) (2), 28 U. S. C. foll. § 723c.

3. The law at present regards citations to statutes or regulations as not a part of the indictment. A conviction may be sustained on the basis of a statute or regulation other than that cited. Williams v. United States, 168 U. S. 382, 389, 18 S. Ct. 92, 42 L. Ed. 509; United States v. Hutcheson, 312 U. S. 219, 229, 61 S. Ct. 463, 85 L. Ed. 788. The provision of the rule, in view of the many statutes and regulations, is for the benefit of the defendant and is not intended to cause a dismissal of the indictment, but simply to provide a means by which he can be properly informed without danger to the prosecution.

Note to Subdivision (d)

This rule introduces a means of protecting the defendant against immaterial or irrelevant allegations in an indictment or information, which may, however, be prejudicial. The authority of the court to strike such surplusage is to be limited to doing so on defendant's motion, in the light of the rule that the guaranty of indictment by a grand jury implies that an indictment may not be amended, Ex parte Bain, 121 U. S. 1, 7 S. Ct. 781, 30 L. Ed. 849. By making such a motion, the defendant would, however, waive his rights in this respect.

Note to Subdivision (e)

This rule continues the existing law that, unlike an indictment, an information may be amended, Muncy v. United States, 289 Fed. 780, C. C. A. 4th.

Note to Subdivision (f)

This rule is substantially a restatement of existing law on bills of particulars.

Rule 8. Joinder of Offenses and of Defendants

(a) Joinder of Offenses.

Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants.

Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Notes of Advisory Committee on Rules

Note to Subdivision (a)

This rule is substantially a restatement of existing law, 18 U. S. C. § 557 (Indictments and presentments; joinder of charges).

Note to Subdivision (b)

The first sentence of the rule is substantially a restatement of existing law, 9 Edmunds, Cyclopedia of Federal Procedure, 2d Ed., 4116. The second sentence formulates a practice now approved in some circuits. Caringella v. United States, 78 F. 2d 563, 567, C. C. A. 7th.

Rule 9. Warrant or Summons Upon Indictment or Information

(a) Issuance.

Upon the request of the attorney for the government the court shall issue a warrant for each defendant named in the information, if it is supported by oath, or in the indictment. The clerk shall issue a summons instead of a warrant upon the request of the attorney for the government or by direction of the court. Upon like request or direction he shall issue more than one warrant or summons for the same defendant. He shall deliver the warrant or summons to the marshal or other person authorized by law to execute or serve it. If a defendant fails to appear in response to the summons, a warrant shall issue.

(b) Form.

(1) *Warrant.* The form of the warrant shall be as provided in Rule 4 (b) (1) except that it shall be signed by the clerk, it shall describe the offense charged in the indictment or information and it shall command that the defendant be arrested and brought before the court. The amount of bail may be fixed by the court and endorsed on the warrant.

(2) *Summons.* The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before the court at a stated time and place.

(c) Execution or Service; and Return.

(1) *Execution or Service.* The warrant shall be executed or the summons served as provided in Rule 4 (c) (1), (2) and (3). A summons to a corporation shall be served by delivering a copy to an officer or to a managing or general agent or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the corporation's last known address within the district or at its principal place of business elsewhere in the United States. The officer executing the warrant shall bring the arrested person promptly before the court or, for the purpose of admission to bail, before a commissioner.

(2) *Return.* The officer executing a warrant shall make return thereof to the court. At the request of the attorney for the government any unexecuted warrant shall be returned and cancelled. On or before the return day the person to whom a summons was delivered for service shall make return thereof. At the request of the attorney for the government made at any time while the indictment or information is pending, a warrant returned unexecuted and not cancelled or a summons returned unserved or a duplicate thereof may be delivered by the clerk to the marshal or other authorized person for execution or service.

NOTES OF ADVISORY COMMITTEE ON RULES

1. See Note to Rule 4, supra.

2. The provision of Rule 9 (a) that a warrant may be issued on the basis of an information only if the latter is supported by oath is necessitated by the Fourth Amendment to the Constitution of the United States. See Albrecht v. United States, 273 U. S. 1, 5, 47 S. Ct. 250, 71 L. Ed. 505.

3. The provision of Rule 9 (b) (1) that the amount of bail may be fixed by the court and endorsed on the warrant states a practice now prevailing in many districts and is intended to facilitate the giving of bail by the defendant and eliminate delays between the arrest and the giving of bail, which might ensue if bail cannot be fixed until after arrest.

IV. ARRAIGNMENT AND PREPARATION FOR TRIAL

RULE 10. ARRAIGNMENT

Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to him the substance of the charge and calling on him to plead thereto. He shall be given a copy of the indictment or information before he is called upon to plead.

NOTES OF ADVISORY COMMITTEE ON RULES

1. The first sentence states the prevailing practice.

2. The requirement that the defendant shall be given a copy of the indictment or information before he is called upon to plead, contained in the second sentence, is new.

3. Failure to comply with arraignment requirements has been held not to be jurisdictional, but a mere technical irregularity not warranting a reversal of a conviction, if not raised before trial, Garland v. State of Washington, 232 U. S. 642, 34 S. Ct. 456, 58 L. Ed. 772.

RULE 11. PLEAS

A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere.* The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

NOTES OF ADVISORY COMMITTEE ON RULES

1. This rule is substantially a restatement of existing law and practice, 18 U. S. C. § 564 (Standing mute); Fogus v. United States, 34 F. 2d 97, C. C. A. 4th (duty of court to ascertain that plea of guilty is intelligently and voluntarily made).

2. The plea of nolo contendere has always existed in the Federal courts, Hudson v. United States, 272 U. S. 451, 47 S. Ct. 127, 71 L. Ed. 347; United States v. Norris, 281 U. S. 619, 50 S. Ct. 424, 74 L. Ed. 1076. The use of the plea is recognized by the Probation Act, 18 U. S. C. § 724. While at times criticized as theoretically lacking in logical basis, experience has shown that it performs a useful function from a practical standpoint.

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

(a) Pleadings and Motions.

Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and *nolo contendere.* All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(b) The Motion Raising Defenses and Objections.

(1) *Defenses and Objections Which May Be Raised.* Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.

(2) *Defenses and Objections Which Must Be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

(3) *Time of Making Motion.* The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

(4) *Hearing on Motion.* A motion before trial raising defenses or objections shall be determined

before trial unless the court orders that it be deferred for determination at the trial of the general issue. An issue of fact shall be tried by a jury if a jury trial is required under the Constitution or an act of Congress. All other issues of fact shall be determined by the court with or without a jury or on affidavits or in such other manner as the court may direct.

(5) *Effect of Determination.* If a motion is determined adversely to the defendant he shall be permitted to plead if he had not previously pleaded. A plea previously entered shall stand. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that the defendant be held in custody or that his bail be continued for a specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect the provisions of any act of Congress relating to periods of limitations.

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a)

1. This rule abolishes pleas to the jurisdiction, pleas in abatement, demurrers, special pleas in bar, and motions to quash. A motion to dismiss or for other appropriate relief is substituted for the purpose of raising all defenses and objections heretofore interposed in any of the foregoing modes. "This should result in a reduction of opportunities for dilatory tactics and, at the same time, relieve the defense of embarrassment. Many competent practitioners have been baffled and mystified by the distinctions between pleas in abatement, pleas in bar, demurrers, and motions to quash, and have, at times, found difficulty in determining which of these should be invoked." Homer Cummings, 29 A. B. A. Jour. 655. See also, Medalie, 4 Lawyers Guild R. (3) 1, 4.

2. A similar change was introduced by the Federal Rules of Civil Procedure (Rule 7 (a)) which has proven successful. It is also proposed by the A. L. I. Code of Criminal Procedure (Sec. 209).

Note to Subdivision (b) (1) and (2)

These two paragraphs classify into two groups all objections and defenses to be interposed by motion prescribed by Rule 12 (a). In one group are defenses and objections which must be raised by motion, failure to do so constituting a waiver. In the other group are defenses and objections which at the defendant's option may be raised by motion, failure to do so, however, not constituting a waiver. (Cf. Rule 12 of Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723c.)

In the first of these groups are included all defenses and objections that are based on defects in the institution of the prosecution or in the indictment and information, other than lack of jurisdiction or failure to charge an offense. All such defenses and objections must be included in a single motion. (Cf. Rule 12 (g) of Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723c). Among the defenses and objections in this group are the following. Illegal selection or organization of the grand jury, disqualification of individual grand jurors, presence of unauthorized persons in the grand jury room, other irregularities in grand jury proceedings, defects in indictment or information other than lack of jurisdiction or failure to state an offense, etc. The provision that these defenses and objections are waived if not raised by motion substantially continues existing law, as they are walved at present unless raised before trial by plea in abatement, demurrer, motion to quash, etc.

In the other group of objections and defenses, which the defendant at his option may raise by motion before trial, are included all defenses and objections which are capable of determination without a trial of the general issue. They include such matters as former jeopardy, former conviction, former acquittal, statute of limitations, immunity, lack of jurisdiction, failure of indictment or information to state an offense, etc. Such matters have been heretofore raised by demurrers, special pleas in bar and motions to quash.

Note to Subdivision (b) (3)

This rule, while requiring the motion to be made before pleading, vests discretionary authority in the court to permit the motion to be made within a reasonable time thereafter. The rule supersedes 18 U. S. C. § 556a, fixing a definite limitation of time for pleas in abatement and motions to quash. The rule also eliminates the requirement for technical withdrawal of a plea if it is desired to interpose a preliminary objection or defense after the plea has been entered. Under this rule a plea will be permitted to stand in the meantime.

Note to Subdivision (b) (4)

This rule substantially restates existing law. It leaves with the court discretion to determine in advance of trial defenses and objections raised by motion or to defer them for determination at the trial. It preserves the right to jury trial in those cases in which the right is given under the Constitution or by statute. In all other cases it vests in the court authority to determine issues of fact in such manner as the court deems appropriate.

Note to Subdivision (b) (5)

1. The first sentence substantially restates existing law, 18 U. S. C. § 561 (Indictments and presentments; judgment on demurrer), which provides that in case a demurrer to an indictment or information is overruled, the judgment shall be respondeat ouster.

2. The last sentence of the rule that "Nothing in this rule shall be deemed to affect the provisions of any act of Congress relating to periods of limitations" is intended to preserve the provisions of statutes which permit a reindictment if the original indictment is found defective or is dismissed for other irregularities and the statute of limitations has run in the meantime, 18 U. S. C. § 587 (Defective indictment; defect found after period of limitations; reindictment); Id. sec. 588 (Defective indictment; defect found before period of limitations; reindictment); Id. 18 U. S. C. § 589 (Defective indictment; defense of limitations to new indictment); Id. 18 U. S. C. § 556a (Indictments and presentments; objections to drawing or qualification of grand jury; time for filing; suspension of statute of limitations).

RULE 13. TRIAL TOGETHER OF INDICTMENTS OR INFORMATIONS

The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.

NOTES OF ADVISORY COMMITTEE ON RULES

This rule is substantially a restatement of existing law, 18 U. S. C. § 557 (Indictments and presentments; joinder of charges); Logan v. United States, 144 U. S. 263, 296, 12 S. Ct. 617, 36 L. Ed. 429; Showalter v. United States, 260 Fed. 719, C. C. A. 4th, certiorari denied 250 U. S. 672, 40 S. Ct. 14, 63 L. Ed. 1200; Hostetter v. United States, 16 F. 2d 921, C. C. A. 8th; Capone v. United States, 51 F. 2d 609, 619–620, C. C. A. 7th.

RULE 14. RELIEF FROM PREJUDICIAL JOINDER

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

NOTES OF ADVISORY COMMITTEE ON RULES

This rule is a restatement of existing law under which severance and other similar relief is entirely in the discretion of the court, 18 U. S. C. § 557 (Indictments and presentments; joinder of charges); Pointer v. United States, 151 U. S. 396, 14 S. Ct. 410, 38 L. Ed. 208; Pierce v. United States, 160 U. S. 355, 16 S. Ct. 321, 40 L. Ed. 454; United States v. Ball, 163 U. S. 662, 673, 16 S. Ct. 1192, 41 L. Ed. 300; Stilson v. United States, 250 U. S. 583, 40 S. Ct. 28, 63 L. Ed. 1154.

RULE 15. DEPOSITIONS

(a) When Taken.

If it appears that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment or information may upon motion of a defendant and notice to the parties order that his testimony be taken by deposition and that any designated books, papers, documents or tangible objects, 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 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.

(b) Notice of Taking.

The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time.

(c) Defendant's Counsel and Payment of Expenses.

If a defendant is without counsel the court shall advise him of his right and assign counsel to represent him unless the defendant elects to proceed without counsel or is able to obtain counsel. If it appears that a defendant at whose instance a deposition is to be taken cannot bear the expense thereof, the court may direct that the expenses of travel and subsistence of the defendant's attorney for attendance at the examination shall be paid by the government. In that event the marshal shall make payment accordingly.

(d) How Taken.

A deposition shall be taken in the manner provided in civil actions. The court at the request of a defendant may direct that a deposition be taken on written interrogatories in the manner provided in civil actions.

(e) Use.

At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if it appears: That the witness is dead; or that the witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or that the witness is unable to attend or testify because of sickness or infirmity; or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require him to offer all of it which is relevant to the part offered and any party may offer other parts.

(f) Objections to Admissibility.

Objections to receiving in evidence a deposition or part thereof may be made as provided in civil actions.

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a)

1. This rule continues the existing law permitting defendants to take depositions in certain limited classes of cases under dedimus potestatem and in perpetuam rei memoriam, 28 U. S. C. § 644. This statute has been generally held applicable to criminal cases, Clymer v. United States, 38 F. 2d 581, C. C. A. 10th; Wong Yim v. United States, 118 F. 2d 667, C. C. A. 9th, certiorari denied 313 U. S. 589, 61 S. Ct. 1112, 85 L. Ed. 1544; United States v. Cameron, 15 Fed. 794, C. C. E. D. Mo.; United States v. Hofmann, 24 F. Supp. 847, S. D. N. Y. Contra, Luxemberg v. United States, 45 F. 2d 497, C. C. A. 4th, certiorari denied 283 U. S. 820, 51 S. Ct. 345, 75 L. Ed. 1436. The rule continues the limitation of the statute that the taking of depositions is to be restricted to cases in which they are necessary "in order to prevent a failure of justice."

2. Unlike the practice in civil cases in which depositions may be taken as a matter of right by notice without permission of the court (Rules 26 (a) and 30, Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723c), this rule permits depositions to be taken only by order of the court, made in the exercise of discretion and on notice to all parties. It was contemplated that in criminal cases depositions would be used only in exceptional situations, as has been the practice heretofore.

3. This rule introduces a new feature in authorizing the taking of the deposition of a witness committed for failure to give bail (see Rule 46 (b)). This matter is, however, left to the discretion of the court. The purpose of the rule is to afford a method of relief for such a witness, if the court finds it proper to extend it.

Note to Subdivision (b)

This subdivision, as well as subdivisions (d) and (f), sets forth the procedure to be followed in the event that the court grants an order for the taking of a deposition. The procedure prescribed is similar to that in civil cases, Rules 28–31, Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723c.

Note to Subdivision (c)

This rule introduces a new feature for the purpose of protecting the rights of an indigent defendant.

Note to Subdivision (d)

See Note to Subdivision (b), supra.

Note to Subdivision (e)

In providing when and for what purpose a deposition may be used at the trial, this rule generally follows the corresponding provisions of the Federal Rules of Civil Procedure, Rule 26 (d) (3), 28 U. S. C. foll. § 723c. The only difference is that in civil cases a deposition may be introduced at the trial if the witness is at a greater distance than 100 miles from the place of trial, while this rule requires that the witness be out of the United States. The distinction results from the fact that a subpoena in a civil case runs only within the district where issued or 100 miles from the place of trial (Rule 45 (e) (1), Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723c), while a subpoena in a criminal case runs throughout the United States (see Rule 17 (e) (1), infra).

Note to Subdivision (f)

See Note to Subdivision (b), supra.

Rule 16. Discovery and Inspection

Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.

Notes of Advisory Committee on Rules

Whether under existing law discovery may be permitted in criminal cases is doubtful, United States v. Rosenfeld, 57 F. 2d 74, C. C. A. 2d, certiorari denied, 286 U. S. 556, 52 S. Ct. 642, 76 L. Ed. 1290. The courts have, however, made orders granting to the defendant an opportunity to inspect impounded documents belonging to him, United States v. B. Goedde and Co., 40 Fed. Supp. 523, 534, E. D. Ill. The rule is a restatement of this procedure. In addition, it permits the procedure to be invoked in cases of objects and documents obtained from others by seizure or by process, on the theory that such evidential matter would probably have been accessible to the defendant if it had not previously been seized by the prosecution. The entire matter is left within the discretion of the court.

Rule 17. Subpoena

(a) For Attendance of Witnesses; Form; Issuance.

A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. A subpoena shall be issued by a commissioner in a proceeding before him, but it need not be under the seal of the court.

(b) Indigent Defendants.

The court or a judge thereof may order at any time that a subpoena be issued upon motion or request of an indigent defendant. The motion or request shall be supported by affidavit in which the defendant shall state the name and address of each witness and the testimony which he is expected by the defendant to give if subpoenaed, and shall show that the evidence of the witness is material to the defense, that the defendant cannot safely go to trial without the witness and that the defendant does not have sufficient means and is actually unable to pay the fees of the witness. If the court or judge orders the subpoena to be issued the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the government.

(c) For Production of Documentary Evidence and of Objects.

A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

(d) Service.

A subpoena may be served by the marshal, by his deputy or by any other person who is not a party and who is not less than 18 years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named and by tendering to him the fee for 1 day's attendance and the mileage allowed by law.

(e) Place of Service.

(1) *In United States.* A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the United States.

(2) *Abroad.* A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in the Act of July 3, 1926, ch. 762, §§ 2, 3, 4, 44 Stat. 835–836; 28 U. S. C. §§ 712, 713, 714.

(f) For Taking Deposition; Place of Examination.

(1) *Issuance.* An order to take a deposition authorizes the issuance by the clerk of the court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein.

(2) *Place.* A resident of the district in which the deposition is to be taken may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person. A non-resident of the district may be required to attend only in the county where he is served with a subpoena or within 40 miles from the place of service or at such other place as is fixed by the court.

(g) Contempt.

Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a commissioner.

Notes of Advisory Committee on Rules

Note to Subdivision (a)

This rule is substantially the same as Rule 45 (a) of the Federal Rules of Civil Procedure.

Note to Subdivision (b)

This rule preserves the existing right of an indigent defendant to secure attendance of witnesses at the expense of the Government, 28 U. S. C. § 656 (Witnesses for indigent defendants). Under existing law, however, the right is limited to witnesses who are within the district in which the court is held or within one hundred miles of the place of trial. No procedure now exists whereby an indigent defendant can procure at Government expense the attendance of witnesses found in another district and more than 100 miles of the place of trial. This limitation

is abrogated by the rule so that an indigent defendant will be able to secure the attendance of witnesses at the expense of the Government no matter where they are located. The showing required by the rule to justify such relief is the same as that now exacted by 28 U. S. C. § 656.

Note to Subdivision (c)

This rule is substantially the same as Rule 45 (b) of the Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723c.

Note to Subdivision (d)

This rule is substantially the same as Rule 45 (c) of the Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723c. The provision permitting persons other than the marshal to serve the subpoena, and requiring the payment of witness fees in Government cases is new matter.

Note to Subdivision (e)

(1) This rule continues existing law, 28 U. S. C. § 654 (Witnesses; subpoenas; may run into another district). The rule is different in civil cases in that in such cases, unless a statute otherwise provides, a subpoena may be served only within the district or within 100 miles of the place of trial, 28 U. S. C. § 654; Rule 45 (e) (1) of the Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723c.

(2) This rule is substantially the same as Rule 45 (e) (2) of the Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723c. See Blackmer v. United States, 284 U. S. 421, upholding the validity of the statute referred to in the rule.

Note to Subdivision (f)

This rule is substantially the same as Rule 45 (d) of the Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723c.

Note to Subdivision (g)

This rule is substantially the same as Rule 45 (f) of the Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723c.

V. VENUE

Rule 18. District and Division

Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed, but if the district consists of two or more divisions the trial shall be had in a division in which the offense was committed.

Notes of Advisory Committee on Rules

1. The Constitution of the United States, Article III, Section 2, Paragraph 8, provides:

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Amendment VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law * * *.

28 U. S. C. § 114 provides:

All prosecutions for crimes or offenses shall be had within the division of such districts where the same were committed, unless the court, or the judge thereof, upon the application of the defendant, shall order the cause to be transferred for prosecution to another division of the district.

The word "prosecutions," as used in this statute, does not include the finding and return of an indictment. The prevailing practice of impaneling a grand jury for the entire district at a session in some division and of distributing the indictments among the divisions in which the offenses were committed is deemed proper and legal, Salinger v. Loisel, 265 U. S. 224, 237, 44 S. Ct. 519, 68 L. Ed. 989. The court stated that this practice is "attended with real advantages." The rule is a restatement of existing law and is intended to sanction the continuance of this practice. For this reason, the rule requires that only the trial be held in the division in which the offense was committed and permits other proceedings to be had elsewhere in the same district.

2. Within the framework of the foregoing constitutional provisions and the provisions of the general statute, 28 U. S. C. § 114, supra, numerous statutes have been enacted to regulate the venue of criminal proceedings, particularly in respect to continuing offenses and offenses consisting of several transactions occurring in different districts. Armour Packing Co. v. United States, 209 U. S. 56, 73–77, 28 S. Ct. 428, 52 L. Ed. 681; United States v. Johnson, 323 U. S. 273, 65 S. Ct. 249, 89 L. Ed. 236. These special venue provisions are not affected by the rule. Among these statutes are the following:

U. S. C. Title 8:
- § 138 (Importation of aliens for immoral purposes; attempt to reenter after deportation; penalty)

U. S. C. Title 15:
- § 78aa (Regulation of Securities Exchanges; jurisdiction of offenses and suits)
- § 79y (Control of Public Utility Holding Companies; jurisdiction of offenses and suits)
- § 80a–43 (Investment Companies; jurisdiction of offenses and suits)
- § 80b–14 (Investment Advisers; jurisdiction of offenses and suits)
- § 298 (Falsely Stamped Gold or Silver, etc., violations of law; penalty; jurisdiction of prosecutions)
- § 715i (Interstate Transportation of Petroleum Products; restraining violations; civil and criminal proceedings; jurisdiction of District Courts; review)
- § 717u (Natural Gas Act; jurisdiction of offenses; enforcement of liabilities and duties)

U. S. C. Title 18:
- § 89 (Enforcement of neutrality; United States defined; jurisdiction of offenses; prior offenses; partial invalidity of provisions)
- § 336 (Lottery, or gift enterprise circulars not mailable; place of trial)
- § 838a (Mailing threatening communications)
- § 338b (Same; mailing in foreign country for delivery in the United States)
- § 345 (Using or attempting to use mails for transmission of matter declared nonmailable by title; jurisdiction of offense)
- § 396e (Transportation or importation of convict-made goods with intent to use in violation of local law; jurisdiction of violations)
- § 401 (White slave traffic; jurisdiction of prosecutions)
- § 408 (Motor vehicles; transportation, etc., of stolen vehicles)
- § 408d (Threatening communications in interstate commerce)
- § 408e (Moving in interstate or foreign commerce to avoid prosecution for felony or giving testimony)
- § 409 (Larceny, etc., of goods in interstate or foreign commerce; penalty)
- § 412 (Embezzlement, etc., by officers of carrier; jurisdiction; double jeopardy)
- § 418 (National Stolen Property Act; jurisdiction)
- § 419d (Transportation of stolen cattle in interstate or foreign commerce; jurisdiction of offense)
- § 420d (Interference with trade and commerce by violence, threats, etc., jurisdiction of offenses)
- § 494 (Arming vessel to cruise against citizen; trials)
- § 553 (Place of committal of murder or manslaughter determined)

U. S. C. Title 21:
- § 17 (Introduction into, or sale in, State or Territory or District of Columbia of dairy or food products falsely labeled or branded; penalty; jurisdiction of prosecutions)
- § 118 (Prevention of introduction and spread of contagion; duty of district attorneys)

U. S. C. Title 28:
§ 101 (Capital cases)
§ 102 (Offenses on the high seas)
§ 103 (Offenses begun in one district and completed in another)
§ 121 (Creation of new district or division)
U. S. C. Title 47:
§ 33 (Submarine Cables; jurisdiction and venue of actions and offenses)
§ 505 (Special Provisions Relating to Radio; venue of trials)
U. S. C. Title 49:
§ 41 (Legislation Supplementary to Interstate Commerce Act; liability of corporation carriers and agents; offenses and penalties—(1) Liability of corporation common carriers; offenses; penalties; Jurisdiction)
§ 623 (Civil Aeronautics Act; venue and prosecution of offenses)

Rule 19. Transfer Within the District

In a district consisting of two or more divisions the arraignment may be had, a plea entered, the trial conducted or sentence imposed, if the defendant consents, in any division and at any time.

Notes of Advisory Committee on Rules

This rule is in effect a restatement of existing law, which permits transfers from one division to another on the application of the defendant, 28 U. S. C. § 114. It is designed to assist in the expeditious disposition of criminal cases and to accord the defendant an opportunity for a speedier trial or more expeditious disposition than would frequently be possible if it were mandatory that every step in the proceeding be conducted in the division in which the prosecution is pending.

Rule 20. Transfer From the District for Plea and Sentence

A defendant arrested in a district other than that in which the indictment or information is pending against him may state in writing, after receiving a copy of the indictment or information, that he wishes to plead guilty or *nolo contendere,* to waive trial in the district in which the indictment or information is pending and to consent to disposition of the case in the district in which he was arrested, subject to the approval of the United States attorney for each district. Upon receipt of the defendant's statement and of the written approval of the United States attorneys, the clerk of the court in which the indictment or information is pending shall transmit the papers in the proceeding or certified copies thereof to the clerk of the court for the district in which the defendant is held and the prosecution shall continue in that district. If after the proceeding has been transferred the defendant pleads not guilty, the clerk shall return the papers to the court in which the prosecution was commenced and the proceeding shall be restored to the docket of that court. The defendant's statement shall not be used against him unless he was represented by counsel when it was made.

Notes of Advisory Committee on Rules

This rule introduces a new procedure in the interest of defendants who intend to plead guilty and are arrested in a district other than that in which the prosecution has been instituted. This rule would accord to a defendant in such a situation an opportunity to secure a disposition of the case in the district where the arrest takes place, thereby relieving him of whatever hardship may be involved in a removal to the place where the prosecution is pending. In order to prevent possible interference with the administration of justice, however, the consent of the United States attorneys involved is required.

Rule 21. Transfer From the District or Division for Trial

(a) For Prejudice in the District or Division.

The court upon motion of the defendant shall transfer the proceeding as to him to another district or division if the court is satisfied that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that district or division.

(b) Offense Committed in Two or More Districts or Divisions.

The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged.

(c) Proceedings on Transfer.

When a transfer is ordered the clerk shall transmit to the clerk of the court to which the proceeding is transferred all papers in the proceeding or duplicates thereof and any bail taken, and the prosecution shall continue in that district or division.

Notes of Advisory Committee on Rules

Note to Subdivisions (a) and (b)

1. This rule introduces an addition to existing law. "Lawyers not thoroughly familiar with Federal practice are somewhat astounded to learn that they may not move for a change of venue, even if they are able to demonstrate that public feeling in the vicinity of the crime may render impossible a fair and impartial trial. This seems to be a defect in the federal law, which the proposed rules would cure." Homer Cummings, 29 A. B. A. Jour. 655; Medalie, 4 Lawyers Guild R. (3) 1, 5.

2. The rule provides for two kinds of motions that may be made by the defendant for a change of venue. The first is a motion on the ground that so great a prejudice exists against the defendant that he cannot obtain a fair and impartial trial in the district or division where the case is pending. Express provisions to a similar effect are found in many State statutes. See, e. g., Ala. Code (1940), Title 15, sec. 267; Cal. Pen. Code (Deering, 1941), sec. 1033; Conn. Gen. Stat. (1930), sec. 6445; Mass. Gen. Laws (1932) c. 277, sec. 51 (in capital cases); N. Y. Code of Criminal Procedure, sec. 344. The second is a motion for a change of venue in cases involving an offense alleged to have been committed in more than one district or division. In such cases the court, on defendant's motion, will be authorized to transfer the case to another district or division in which the commission of the offense is charged, if the court is satisfied that it is in the interest of justice to do so. The effect of this provision would be to modify the existing practice under which in such cases the Government has the final choice of the jurisdiction where the prosecution should be conducted. The matter will now be left in the discretion of the court.

3. The rule provides for a change of venue only on defendant's motion and does not extend the same right to the prosecution, since the defendant has a constitutional right to a trial in the district where the offense was committed. Constitution of the United States, Article III, Sec. 2, Par. 3; Amendment VI. By making a motion for a change of venue, however, the defendant waives this constitutional right.

4. This rule is in addition to and does not supersede existing statutes enabling a party to secure a change of judge on the ground of personal bias or prejudice, 28 U. S. C. § 25; or enabling the defendant to secure a change

of venue as of right in certain cases involving offenses committed in more than one district, 18 U. S. C. § 338a (d) (Mailing threatening communications); Id. 18 U. S. C. § 403d (d). (Threatening communications in interstate commerce).

Note to Subdivision (c)

Cf. 28 U. S. C. § 114 and Rule 20, supra.

Rule 22. Time of Motion to Transfer

A motion to transfer under these rules may be made at or before arraignment or at such other time as the court or these rules may prescribe.

Notes of Advisory Committee on Rules

Cf. Rule 12 (b) (3).

VI. TRIAL

Rule 23. Trial by Jury or by the Court

(a) Trial by Jury.

Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

(b) Jury of Less Than Twelve.

Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12.

(c) Trial without a Jury.

In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially.

Notes of Advisory Committee on Rules

Note to Subdivision (a)

1. This rule is a formulation of the constitutional guaranty of trial by jury, Constitution of the United States, Article III, Sec. 2, Par. 3: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury * * *"; Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *." The right to a jury trial, however, does not apply to petty offenses, District of Columbia v. Clawans, 300 U. S. 617, 57 S. Ct. 660, 81 L. Ed. 843; Schick v. United States, 195 U. S. 65, 24 S. Ct. 826, 49 L. Ed. 99, 1 Ann. Cas. 585; Frankfurter and Corcoran, 39 Harv. L. R. 917. Cf. Rule 38 (a) of the Federal Rules of Civil Procedure.

2. The provision for a waiver of jury trial by the defendant embodies existing practice, the constitutionality of which has been upheld, Patton v. United States, 281 U. S. 276, 50 S. Ct. 253, 74 L. Ed. 854, 70 A. L. R. 263; Adams v. United States ex rel. McCann, 317 U. S. 269, 63 S. Ct. 236, 87 L. Ed. 268, 143 A. L. R. 435; Cf. Rules 38 and 39 of Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723c. Many States by express statutory provision permit waiver of jury trial in criminal cases. See A. L. I. Code of Criminal Procedure Commentaries, pp. 807–811.

Note to Subdivision (b)

This rule would permit either a stipulation before the trial that the case be tried by a jury composed of less than 12 or a stipulation during the trial consenting that the case be submitted to less than 12 jurors. The second alternative is useful in case it becomes necessary during the trial to excuse a juror owing to illness or for some other cause and no alternate juror is available. The rule is a restatement of existing practice, the constitutionality of which was approved in Patton v. United States, 281 U. S. 276, 50 S. Ct. 253, 74 L. Ed. 854, 70 A. L. R. 263.

Note to Subdivision (c)

This rule changes existing law in so far as it requires the court in a case tried without a jury to make special findings of fact if requested. Cf. Connecticut practice, under which a judge in a criminal case tried by the court without a jury makes findings of fact, State v. Frost, 105 Conn. 326, 135 A. 446.

Rule 24. Trial Jurors

(a) Examination.

The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

(b) Peremptory Challenges.

If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

(c) Alternate Jurors.

The court may direct that not more than 4 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, and 2 peremptory challenges if 3 or 4 alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by these rules may not be used against an alternate juror.

Notes of Advisory Committee on Rules

Note to Subdivision (a)

This rule is similar to Rule 47 (a) of the Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723c, and also embodies the practice now followed by many Federal courts in criminal cases. Uniform procedure in civil and criminal cases on this point seems desirable.

Note to Subdivision (b)

This rule embodies existing law, 28 U. S. C. § 424 (Challenges), with the following modifications. In capital cases the number of challenges is equalized as between the defendant and the United States so that both sides have 20 challenges, which only the defendant has at present. While continuing the existing rule that multiple defendants are deemed a single party for purposes of challenges, the rule vests in the court discretion to allow additional peremptory challenges to multiple defendants and to permit such challenges to be exercised separately or jointly. Experience with cases involving numerous defendants indicates the desirability of this modification.

Note to Subdivision (c)

This rule embodies existing law, 28 U. S. C. § 417a (Alternate jurors), as well as the practice prescribed for civil cases by Rule 47 (b) of the Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723c, except that the number of possible alternate jurors that may be empaneled is increased from two to four, with a corresponding adjustment of challenges.

Rule 25. Judge; Disability

If by reason of absence from the district, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

Notes of Advisory Committee on Rules

This rule is similar to Rule 63 of the Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723c. See also, 28 U. S. C. § 776 (Bill of exceptions; authentication; signing of by judge).

Rule 26. Evidence

In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Notes of Advisory Committee on Rules

1. This rule contemplates the development of a uniform body of rules of evidence to be applicable in trials of criminal cases in the Federal courts. It is based on Funk v. United States, 290 U. S. 371, 54 S. Ct. 212, 78 L. Ed. 369, 93 A. L. R. 1136, and Wolfle v. United States, 291 U. S. 7, 54 S. Ct. 279, 78 L. Ed. 617, which indicated that in the absence of statute the Federal courts in criminal cases are not bound by the State law of evidence, but are guided by common law principles as interpreted by the Federal courts "in the light of reason and experience." The rule does not fetter the applicable law of evidence to that originally existing at common law. It is contemplated that the law may be modified and adjusted from time to time by judicial decisions. See Homer Cummings, 29 A. B. A. Jour. 655; Vanderbilt, 29 A. B. A. Jour. 377; Holtzoff, 12 George Washington L. R. 119, 131–132; Holtzoff, 3 F. R. D. 445, 453; Howard, 51 Yale L. Jour. 763; Medalie, 4 Lawyers Guild R. (3) 1, 5–6.

2. This rule differs from the corresponding rule for civil cases (Federal Rules of Civil Procedure, Rule 43 (a), 28 U. S. C. foll. § 723c), in that this rule contemplates a uniform body of rules of evidence to govern in criminal trials in the Federal courts, while the rule for civil cases prescribes partial conformity to State law and, therefore, results in a divergence as between various districts. Since in civil actions in which Federal jurisdiction is based on diversity of citizenship, the State substantive law governs the rights of the parties, uniformity of rules of evidence among different districts does not appear necessary. On the other hand, since all Federal crimes are statutory and all criminal prosecutions in the Federal courts are based on acts of Congress, uniform rules of evidence appear desirable if not essential in criminal cases, as otherwise the same facts under differing rules of evidence may lead to a conviction in one district and to an acquittal in another.

3. This rule expressly continues existing statutes governing the admissibility of evidence and the competency and privileges of witnesses. Among such statutes are the following:

8 U. S. C.
- § 138 (Importation of aliens for immoral purposes; attempt to re-enter after deportation; penalty)

28 U. S. C.
- § 632 (Competency of witnesses governed by State laws; defendants in criminal cases)
- § 633 (Competency of witnesses governed by State laws; husband or wife of defendant in prosecution for bigamy)
- § 634 (Testimony of witnesses before Congress)
- § 638 (Comparison of handwriting to determine genuineness)
- § 695 (Admissibility)
- § 695a (Foreign documents)

46 U. S. C.
- § 193 (Bills of lading to be issued; contents)

Rule 27. Proof of Official Record

An official record or an entry therein or the lack of such a record or entry may be proved in the same manner as in civil actions.

Notes of Advisory Committee on Rules

This rule incorporates by reference Rule 44 of the Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723c, which provided a simple and uniform method of proving public records and entry or lack of entry therein. The rule does not supersede statutes regulating modes of proof in respect to specific official records. In such cases parties have the option of following the general rule or the pertinent statute. Among the many statutes are:

U. S. C. Title 28:
- § 661 (Copies of department or corporation records and papers; admissibility; seal)
- § 662 (Same; in office of General Counsel of the Treasury)
- § 663 (Instruments and papers of Comptroller of Currency; admissibility)
- § 664 (Organization certificates of national banks; admissibility)
- § 665 (Transcripts from books of Treasury in suits against delinquents; admissibility)
- § 666 (Same; certificate by Secretary or Assistant Secretary)
- § 668 (Same; indictments for embezzlement of public moneys)
- § 669 (Copies of returns in returns office admissible)
- § 670 (Admissibility of copies of statements of demands by Post Office Department)
- § 671 (Admissibility of copies of post office records and statement of accounts)
- § 672 (Admissibility of copies of records in General Land Office)
- § 673 Admissibility of copies of records, and so forth, of Patent Office)
- § 674 (Copies of foreign letters patent as prima facie evidence)
- § 675 (Copies of specifications and drawings of patents admissible)
- § 676 (Extracts from Journals of Congress admissible when injunction of secrecy removed)
- § 677 (Copies of records in offices of United States consuls admissible)

U. S. C. Title 28:
§ 678 (Books and papers in certain district courts)
§ 679 (Records in clerks' offices, western district of North Carolina)
§ 680 (Records in clerks' offices of former district of California)
§ 681 (Original records lost or destroyed; certified copy admissible)
§ 682 (Same; when certified copy not obtainable)
§ 685 (Same; certified copy of official papers)
§ 687 (Authentication of legislative acts; proof of judicial proceedings of State)
§ 688 (Proofs of records in offices not pertaining to courts)
§ 689 (Copies of foreign records relating to land titles)
§§ 695a–695h (Foreign documents)
U. S. C. Title 1:
§ 30 (Statutes at Large; contents: admissibility in evidence)
§ 30a ("Little and Brown's" edition of laws and treaties competent evidence of Acts of Congress)
§ 54 (Codes and Supplements as establishing prima facie the Laws of United States and District of Columbia, citation of Codes and Supplements)
§ 55 (Copies of Supplements to Code of Laws of United States and of District of Columbia Code and Supplements; conclusive evidence of original)
U. S. C. Title 5:
§ 490 (Records of Department of Interior; authenticated copies as evidence)
U. S. C. Title 8:
§ 717 (b) (Former citizens of United States excepted from certain requirements; citizenship lost by spouse's alienage or loss of United States citizenship, or by entering armed forces of foreign state or acquiring its nationality)
§ 727 (g) (Administration of naturalization laws; rules and regulations; instruction in citizenship; forms; oaths; depositions; documents in evidence; photographic studio)
U. S. C. Title 15:
§ 127 (Trade-marks; copies of records as evidence)
U. S. C. Title 20:
§ 52 (Smithsonian Institution; evidence of title to site and buildings)
U. S. C. Title 25:
§ 6 (Bureau of Indian Affairs; seal; authenticated and certified documents; evidence)
U. S. C. Title 31:
§ 46 (Laws governing General Accounting Office; copies of books, records, etc., thereof as evidence)
U. S. C. Title 33:
§ 11g (Seal of Veterans' Administration; authentication of copies of records)
U. S. C. Title 43:
§ 57 (Authenticated copies or extracts from records as evidence)
§ 58 (Transcripts from records of Louisiana)
§ 59 (Official papers in office of surveyor general in California; papers; copies)
§ 83 (Transcripts of records as evidence)
U. S. C. Title 44:
§ 300h (National Archives; seal; reproduction of archives; fee; admissibility in evidence of reproductions)
§ 307 (Filing document as constructive notice; publication in Register as presumption of validity; judicial notice; citation)
U. S. C. Title 47:
§ 412 (Documents filed with Federal Communications Commission as public records; prima facie evidence; confidential records)
U. S. C. Title 49:
§ 16 (Orders of Commission and enforcement thereof; forfeitures—(13) copies of schedules, tariffs, contracts, etc., kept as public records; evidence)

Rule 28. Expert Witnesses

The court may order the defendant or the government or both to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any, and may thereafter be called to testify by the court or by any party. He shall be subject to cross-examination by each party. The court may determine the reasonable compensation of such a witness and direct its payment out of such funds as may be provided by law. The parties also may call expert witnesses of their own selection.

Notes of Advisory Committee on Rules

The power of the court to call its own witnesses, though rarely invoked, is recognized in the Federal courts, Young v. United States, 107 F. 2d 490, C. C. A. 5th; Litsinger v. United States, 44 F. 2d 45, C. C. A. 7th. This rule provides a procedure whereby the court may, if it chooses, exercise this power in connection with expert witnesses. The rule is based, in part, on the Uniform Expert Testimony Act, drafted by the Commissioners on Uniform State Laws, Hand Book of the National Conference of Commissioners on Uniform State Laws (1937), 337; see, also, Wigmore—Evidence, 3d Ed., sec. 563; A. L. I. Code of Criminal Procedure, secs. 307–309; National Commission on Law of Observance and Enforcement—Report on Criminal Procedure, 37. Similar provisions are found in the statutes of a number of States: Wisconsin—Wis. Stat. (1941), sec. 357.12; Indiana—Ind. Stat. Ann. (Burns, 1933), sec. 9–1702; California—Cal. Pen. Code (Deering, 1941), sec. 1027.

Rule 29. Motion for Acquittal

(a) Motion for Judgment of Acquittal.

Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) Reservation of Decision on Motion.

If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the motion is denied and the case is submitted to the jury, the motion may be renewed within 5 days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned the court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal. If no verdict is returned the court may order a new trial or enter judgment of acquittal.

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a)

1. The purpose of changing the name of a motion for a directed verdict to a motion for judgment of acquittal is to make the nomenclature accord with the realities. The change of nomenclature, however, does not modify the nature of the motion or enlarge the scope of matters that may be considered.

2. The second sentence is patterned on New York Code of Criminal Procedure, sec. 410.

3. The purpose of the third sentence is to remove the doubt existing in a few jurisdictions on the question whether the defendant is deemed to have rested his case if he moves for a directed verdict at the close of the prosecution's case. The purpose of the rule is expressly to preserve the right of the defendant to offer evidence in his own behalf, if such motion is denied. This is a restatement of the prevailing practice, and is also in accord with the practice prescribed for civil cases by Rule 50 (a) of the Federal Rules of Civil Procedure, following 28 U. S. C. § 723c.

Note to Subdivision (b)

This rule is in substance similar to Rule 50 (b) of the Federal Rules of Civil Procedure, following 28 U. S. C. § 723c, and permits the court to render judgment for the defendant notwithstanding a verdict of guilty. Some Federal courts have recognized and approved the use of a judgment non obstante veredicto for the defendant in a criminal case, Ex parte United States, 101 F. 2d 870, C. C. A. 7th, affirmed by an equally divided court, United States v. Stone, 308 U. S. 519, 60 S. Ct. 177, 84 L. Ed. 441. The rule sanctions this practice.

RULE 30. INSTRUCTIONS

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

NOTES OF ADVISORY COMMITTEE ON RULES

This rule corresponds to Rule 51 of the Federal Rules of Civil Procedure, following 28 U. S. C. § 723c the second sentence alone being new. It seemed appropriate that on a point such as instructions to juries there should be no difference in procedure between civil and criminal cases.

RULE 31. VERDICT

(a) Return.

The verdict shall be unanimous. It shall be returned by the jury to the judge in open court.

(b) Several Defendants.

If there are two or more defendants, the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed; if the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

(c) Conviction of Less Offense.

The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

(d) Poll of Jury.

When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a)

This rule is a restatement of existing law and practice. It does not embody any regulation of sealed verdicts, it being contemplated that this matter would be governed by local practice in the various district courts. The rule does not affect the existing statutes relating to qualified verdicts in cases in which capital punishment may be imposed, 18 U. S. C. § 408a (Kidnapped persons); 18 U. S. C. § 412a (Wrecking trains); 18 U. S. C. § 567 (Verdicts; qualified verdicts).

Note to Subdivision (b)

This rule is a restatement of existing law, 13 U. S. C. § 566 (Verdicts; several joint defendants).

Note to Subdivision (c)

This rule is a restatement of existing law, 18 U. S. C. § 565 (Verdicts; less offense than charged).

Note to Subdivision (d)

This rule is a restatement of existing law and practice, Mackett v. United States, 90 F. 2d 462, 465, C. C. A. 7th; Bruce v. Chestnut Farms Chevy Chase Dairy, 126 F. 2d 224, App. D. C.

VII. JUDGMENT

RULE 32. SENTENCE AND JUDGMENT

(a) Sentence.

Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

(b) Judgment.

A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(c) Presentence Investigation.

(1) *When Made.* The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

(2) *Report.* The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the Court.

(d) Withdrawal of Plea of Guilty.

A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

(e) Probation.

After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation as provided by law.

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a)

This rule is substantially a restatement of existing procedure. Rule I of the Criminal Appeals Rules of 1933, 292 U. S. 661 [18 U. S. C. formerly foll. § 688]. See Rule 43 relating to the presence of the defendant.

Note to Subdivision (b)

This rule is substantially a restatement of existing procedure. Rule I of the Criminal Appeals Rules of 1933, 292 U. S. 661 [18 U. S. C. formerly foll. § 688].

Note to Subdivision (c)

The purpose of this provision is to encourage and broaden the use of presentence investigations, which are now being utilized to good advantage in many cases. See, "The Presentence Investigation" published by Administrative Office of the United States Courts, Division of Probation.

Note to Subdivision (d)

This rule modifies existing practice by abrogating the ten-day limitation on a motion for leave to withdraw a plea of guilty. See Rule II (4) of the Criminal Appeals Rules of 1933, 292 U. S. 661 [18 U. S. C. formerly foll. § 688].

Note to Subdivision (e)

See 18 U. S. C. § 724 et seq.

RULE 33. NEW TRIAL

The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

NOTES OF ADVISORY COMMITTEE ON RULES

This rule enlarges the time limit for motions for new trial on the ground of newly discovered evidence, from 60 days to two years; and for motions for new trial on other grounds from three to five days. Otherwise, it substantially continues existing practice. See Rule II of the Criminal Appeals Rules of 1933, 292 U. S. 661 [18 U. S. C. formerly foll. § 688]. Cf. Rule 59 (a) of the Federal Rules of Civil Procedure.

RULE 34. ARREST OF JUDGMENT

The court shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 5 days after determination of guilt or within such further time as the court may fix during the 5-day period.

NOTES OF ADVISORY COMMITTEE ON RULES

This rule continues existing law except that it enlarges the time for making motions in arrest of judgment from 3 days to 5 days. See Rule II (2) of Criminal Appeals Rules of 1933, 292 U. S. 661 [18 U. S. C. formerly foll. § 688].

RULE 35. CORRECTION OR REDUCTION OF SENTENCE

The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

NOTES OF ADVISORY COMMITTEE ON RULES

The first sentence of the rule continues existing law. The second sentence introduces a flexible time limitation on the power of the court to reduce a sentence, in lieu of the present limitation of the term of court. Rule 45 (c) abolishes the expiration of a term of court as a time limitation, thereby necessitating the introduction of a specific time limitation as to all proceedings now governed by the term of court as a limitation. The Federal Rules of Civil Procedure (Rule 6 (c)), 28 U. S. C. foll. § 723c, abolishes the term of court as a time limitation in respect to civil actions. The two rules together thus do away with the significance of the expiration of a term of court which has largely become an anachronism.

RULE 36. CLERICAL MISTAKES

Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

NOTES OF ADVISORY COMMITTEE ON RULES

This rule continues existing law. Rupinski v. United States, 4 F. 2d 17, C. C. A. 6th. The rule is similar to Rule 60 (a) of the Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723c.

VIII. APPEAL

RULE 37. TAKING APPEAL; AND PETITION FOR WRIT OF CERTIORARI

(a) Taking Appeal.

(1) *Notice of Appeal.* An appeal permitted by law from a district court to the Supreme Court or to a circuit court of appeals is taken by filing with the clerk of the district court a notice of appeal in duplicate. Petitions for allowance of appeal, citations and assignments of error in cases governed by these rules are abolished. The notice of appeal shall set forth the title of the case, the name and address of the appellant and of appellant's attorney, a general

statement of the offense, a concise statement of the judgment or order, giving its date and any sentence imposed, the place of confinement if the defendant is in custody and a statement that the appellant appeals from the judgment or order. If the appeal is directly to the Supreme Court, the notice shall be accompanied by a jurisdictional statement as prescribed by the rules of the Supreme Court. The notice of appeal shall be signed by the appellant or appellant's attorney, or by the clerk if the notice is prepared by the clerk as provided in paragraph (2) of this subdivision. The duplicate notice of appeal and a statement of the docket entries shall be forwarded immediately by the clerk of the district court to the clerk of the appellate court. Notification of the filing of the notice of appeal shall be given by the clerk by mailing copies thereof to adverse parties, but his failure so to do does not affect the validity of the appeal.

(2) *Time for Taking Appeal.* An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from.

(b) Petition for Review on Writ of Certiorari.

(1) *Petition.* Petition to the Supreme Court for writ of certiorari shall be made as prescribed in its rules.

(2) *Time of Making Petition.* Petition for writ of certiorari may be made within 30 days after entry of the judgment or within such further time not exceeding 30 days as the Court or a justice thereof for cause shown may fix within the 30-day period following judgment. If the judgment was entered in a district court in Alaska, Hawaii, Puerto Rico, Canal Zone or Virgin Islands, the petition shall be deemed in time if mailed under a postmark dated within such 30-day period.

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a) (1)

The first sentence abolishes the present somewhat complicated procedure for taking direct appeals to the Supreme Court and establishes the same practice in respect to such appeals as prevails in respect to appeals to circuit courts of appeals. In both instances, an appeal is taken by filing a notice of appeal with the clerk of the district court. The third sentence continues the existing rule as to the form of a notice of appeal, except that it dispenses with the requirement that the notice shall contain a statement of the grounds of appeal.

Note to Subdivision (a) (2)

The first sentence enlarges the time for taking an appeal from 5 days to 10 days. See Rule III of Criminal Appeals Rules of 1933, 292 U. S. 661 [18 U. S. C. formerly foll. § 688]. The second sentence introduces a new practice for the purpose of protecting a defendent not represented by counsel. The last sentence relating to appeals by the Government continues existing law, 18 U. S. C. § 682.

Note to Subdivision (b)

This rule continues existing law except that it grants to the Supreme Court or a justice thereof the authority to extend the time for filing a petition for a writ of certiorari for an additional 30 days.

RULE 38. STAY OF EXECUTION, AND RELIEF PENDING REVIEW

(a) Stay of Execution.

(1) *Death.* A sentence of death shall be stayed if an appeal is taken.

(2) *Imprisonment.* A sentence of imprisonment shall be stayed if an appeal is taken and the defendant elects not to commence service of the sentence or is admitted to bail.

(3) *Fine.* A sentence to pay a fine or a fine and costs, if an appeal is taken, may be stayed by the district court or by the circuit court of appeals upon such terms as the court deems proper. The court may require the defendant pending appeal to deposit the whole or any part of the fine and costs in the registry of the district court, or to give bond for the payment thereof, or to submit to an examination of assets, and it may make any appropriate order to restrain the defendant from dissipating his assets.

(4) *Probation.* An order placing the defendant on probation shall be stayed if an appeal is taken.

(b) Bail.

Admission to bail upon appeal or certiorari shall be as provided in these rules.

(c) Application for Relief Pending Review.

If application is made to a circuit court of appeals or to a circuit judge or to a justice of the Supreme Court for bail pending appeal or for an extension of time for docketing the record on appeal or for any other relief which might have been granted by the district court, the application shall be upon notice and shall show that application to the court below or a judge thereof is not practicable or that application has been made and denied, with the reasons given for the denial, or that the action on the application did not afford the relief to which the applicant considers himself to be entitled.

NOTES OF ADVISORY COMMITTEE ON RULES

This rule substantially continues existing law except that it provides that in case an appeal is taken from a judgment imposing a sentence of imprisonment, a stay shall be granted only if the defendant so elects, or is admitted to bail. Under the present rule the sentence is automatically stayed unless the defendant elects to commence service of the sentence pending appeal. The new rule merely changes the burden of making the election. See Rule V of the Criminal Appeals Rules, 1933, 292 U. S. 661 [18 U. S. C. formerly foll. § 688].

RULE 39. SUPERVISION OF APPEAL

(a) Supervision in Appellate Court.

The supervision and control of the proceedings on appeal shall be in the appellate court from the time the notice of appeal is filed with its clerk, except as otherwise provided in these rules. The appellate court may at any time entertain a motion to dismiss the appeal, or for directions to the district court, or to modify or vacate any order made by the district

court or by any judge in relation to the prosecution of the appeal, including any order fixing or denying bail.

(b) The Record on Appeal.

(1) *Preparation and Form.* The rules and practice governing the preparation and form of the record on appeal in civil actions shall apply to the record on appeal in all criminal proceedings, except as otherwise provided in these rules.

(2) *Use of Typewritten Record.* The circuit court of appeals may dispense with the printing of the record on appeal and review the proceedings on the typewritten record.

(c) Docketing of Appeal and Record on Appeal.

The record on appeal shall be filed with the appellate court and the proceeding there docketed within 40 days from the date the notice of appeal is filed in the district court, but if more than one appeal is taken from the same judgment to the same appellate court, the district court may prescribe the time for filing and docketing, which in no event shall be less than 40 days from the date the first notice of appeal is filed. In all cases the district court or the appellate court or, if the appellate court is not in session, any judge thereof may for cause shown extend the time for filing and docketing.

(d) Setting the Appeal for Argument.

Unless good cause is shown for an earlier hearing, the appellate court shall set the appeal for argument on a date not less than 30 days after the filing in that court of the record on appeal and as soon after the expiration of that period as the state of the calendar will permit. Preference shall be given to appeals in criminal cases over appeals in civil cases.

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a)

This rule substantially continues the existing practice. See second paragraph of Rule IV of the Criminal Appeals Rules of 1933, 292 U. S. 661 [18 U. S. C. formerly foll. § 688].

Note to Subdivisions (b) and (c)

This rule changes the existing practice by prescribing the same procedure for the preparation of the record on appeal in a criminal case as the Federal Rules of Civil Procedure prescribe for civil cases (see Rules 73 (g) and 75 of the Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723). The new rule supersedes Rules VII, VIII, and IX of the Criminal Appeals Rules of 1933, 292 U. S. 661 [18 U. S. C. foll. § 688]. One of the results of the change is the abolition of bills of exceptions.

Note to Subdivision (d)

This rule continues the existing procedure prescribed by Rule X of the Criminal Appeals Rules of 1933, 292 U. S. 661 [18 U. S. C. formerly foll. § 688].

IX. SUPPLEMENTARY AND SPECIAL PROCEEDINGS

RULE 40. COMMITMENT TO ANOTHER DISTRICT; REMOVAL

(a) Arrest in Nearby District.

If a person is arrested on a warrant issued upon a complaint in a district other than the district of the arrest but in the same state, or on a warrant issued upon a complaint in another state but at a place less than 100 miles from the place of arrest, or without a warrant for an offense committed in another district in the same state or in another state but at a place less than 100 miles from the place of the arrest, he shall be taken before the nearest available commissioner or other nearby officer described in Rule 5 (a); preliminary proceedings shall be conducted in accordance with Rule 5 (b) and (c); and if held to answer, he shall be held to answer to the district court for the district in which the prosecution is pending, or if the arrest was without a warrant, for the district in which the offense was committed. If such an arrest is made on a warrant issued on an indictment or information, the person arrested shall be taken before the district court in which the prosecution is pending or, for the purpose of admission to bail, before a commissioner in the district of the arrest in accordance with provisions of Rule 9 (c) (1).

(b) Arrest in Distant District.

(1) *Appearance before Commissioner or Judge.* If a person is arrested upon a warrant issued in another state at a place 100 miles or more from the place of arrest, or without a warrant for an offense committed in another state at a place 100 miles or more from the place of arrest, he shall be taken without unnecessary delay before the nearest available commissioner or a nearby judge of the United States in the district in which the arrest was made.

(2) *Statement by Commissioner or Judge.* The commissioner or judge shall inform the defendant of the charge against him, of his right to retain counsel and of his right to have a hearing or to waive a hearing by signing a waiver before the commissioner or judge. The commissioner or judge shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him, shall allow him reasonable opportunity to consult counsel and shall admit him to bail as provided in these rules.

(3) *Hearing; Warrant of Removal or Discharge.* The defendant shall not be called upon to plead. If the defendant waives hearing, the judge shall issue a warrant of removal to the district where the prosecution is pending. If the defendant does not waive hearing, the commissioner or judge shall hear the evidence. If the commissioner hears the evidence he shall report his findings and recommendations to the judge. At the hearing the defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If it appears from the commissioner's report or from the evidence adduced before the judge that sufficient ground has been shown for ordering the removal of the defendant, the judge shall issue a warrant of removal to the district where the prosecution is pending. Otherwise he shall discharge the defendant. If the prosecution is by indictment, a warrant of removal shall issue upon production of a certified copy of the indictment and upon proof that the defendant is the person named in the indictment. If the prosecution is by information or complaint, a warrant of removal shall issue upon the production of a certified copy of the information or complaint and upon proof that there is probable cause to believe that the

defendant is guilty of the offense charged. If a warrant of removal is issued, the defendant shall be admitted to bail for appearance in the district in which the prosecution is pending in accordance with Rule 46. After a defendant is held for removal or is discharged, the papers in the proceeding and any bail taken shall be transmitted to the clerk of the district court in which the prosecution is pending.

(4) *Hearing and Removal on Arrest without a Warrant.* If a person is arrested without a warrant, the hearing may be continued for a reasonable time, upon a showing of probable cause to believe that he is guilty of the offense charged; but he may not be removed as herein provided unless a warrant issued in the district in which the offense was committed is presented.

NOTES OF ADVISORY COMMITTEE ON RULES

1. This rule modifies and revamps existing procedure. The present practice has developed as a result of a series of judicial decisions, the only statute dealing with the subject being exceedingly general, 18 U. S. C. § 591 (Arrest and removal for trial):

For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any United States commissioner, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. * * * Where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had.

The scope of a removal hearing, the issues to be considered, and other similar matters are governed by judicial decisions. Beavers v. Henkel, 194 U. S. 73, 24 S. Ct. 605, 48 L. Ed. 882; Tinsley v. Treat, 205 U. S. 20, 27 S. Ct. 430, 51 L. Ed. 689; Henry v. Henkel, 235 U. S. 219; Rodman v. Pothier, 264 U. S. 399, 44 S. Ct. 360, 68 L. Ed. 759; Morse v. United States, 267 U. S. 80, 45 S. Ct. 209, 69 L. Ed. 522; Fetters v. United States ex rel. Cunningham, 283 U. S. 638, 51 S. Ct. 596, 75 L. Ed. 1321; United States ex rel. Kassin v. Mulligan, 295 U. S. 396, 55 S. Ct. 781, 79 L. Ed. 1501; see, also, 9 Edmunds, Cyclopedia of Federal Procedure 3905, et seq.

2. The purpose of removal proceedings is to accord safeguards to a defendant against an improvident removal to a distant point for trial. On the other hand, experience has shown that removal proceedings have at times been used by defendants for dilatory purposes and in attempting to frustrate prosecution by preventing or postponing transportation even as between adjoining districts and between places a few miles apart. The object of the rule is adequately to meet each of these two situations.

3. For the purposes of removal, all cases in which the accused is apprehended in a district other than that in which the prosecution is pending have been divided into two groups: first, those in which the place of arrest is either in another district of the same State, or if in another State, then less than 100 miles from the place where the prosecution is pending; and second, cases in which the arrest occurs in a State other than that in which the prosecution is pending and the place of arrest is 100 miles or more distant from the latter place.

In the first group of cases, removal proceedings are abolished. The defendant's right to the usual preliminary hearing is, of course, preserved, but the committing magistrate, if he holds defendant would bind him over to the district court in which the prosecution is pending. As ordinarily there are no removal proceedings in State prosecutions as between different parts of the same State, but the accused is transported by virtue of the process under which he was arrested, it seems reasonable that no removal proceedings should be required in the Federal courts as between districts in the same State. The provision as to arrest in another State but at a place less than 100 miles from the place where the prosecution is pending was added in order to preclude obstruction against bringing the defendant a short distance for trial.

In the second group of cases mentioned in the first paragraph, removal proceedings are continued. The practice to be followed in removal hearings will depend on whether the demand for removal is based upon an indictment or upon an information or complaint. In the latter case, proof of identity and proof of reasonable cause to believe the defendant guilty will have to be adduced in order to justify the issuance of a warrant of removal. In the former case, proof of identity coupled with a certified copy of the indictment will be sufficient, as the indictment will be conclusive proof of probable cause. The distinction is based on the fact that in case of an indictment, the grand jury, which is an arm of the court, has already found probable cause. Since the action of the grand jury is not subject to review by a district judge in the district in which the grand jury sits, it seems illogical to permit such review collaterally in a removal proceeding by a judge in another district.

4. For discussions of this rule see, Homer Cummings, 29 A. B. A. Jour. 654, 656; Holtzoff, 3 F. R. D. 445, 450–452; Holtzoff, 12 George Washington L. R. 119, 127–130; Holtzoff, The Federal Bar Journal, October 1944, 18–37; Berge, 42 Mich. L. R. 353, 374; Medalie, 4 Lawyers Guild R. (3) 1,4.

Note to Subdivision (b)

The rule provides that all removal hearings shall take place before a United States commissioner or a Federal judge. It does not confer such jurisdiction on State or local magistrates. While theoretically under existing law State and local magistrates have authority to conduct removal hearings, nevertheless as a matter of universal practice, such proceedings are always conducted before a United States commissioner or a Federal judge, 9 Edmunds, Cyclopedia of Federal Procedure 3919.

RULE 41. SEARCH AND SEIZURE

(a) Authority to Issue Warrant.

A search warrant authorized by this rule may be issued by a judge of the United States or of a state or territorial court of record or by a United States commissioner within the district wherein the property sought is located.

(b) Grounds for Issuance.

A warrant may be issued under this rule to search for and seize any property

(1) Stolen or embezzled in violation of the laws of the United States; or

(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or

(3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of the Act of June 15, 1917, ch. 30, title VIII, § 4, 40 Stat. 226, and title XI, § 22, 40 Stat. 230, as amended by the Act of March 28, 1940, ch. 72, § 8, 54 Stat. 80; 18 U. S. C. § 98.

(c) Issuance and Contents.

A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant

identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

(d) Execution and Return with Inventory.

The warrant may be executed and returned only within 10 days after its date. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The judge or commissioner shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) Motion for Return of Property and to Suppress Evidence.

A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

(f) Return of Papers to Clerk.

The judge or commissioner who has issued a search warrant shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.

(g) Scope and Definition.

This rule supersedes the Act of June 15, 1917, ch. 30, title XI, §§ 1–6, 10, 11, 12–16, 40 Stat. 228, 229, 18 U. S. C. §§ 611–616, 620, 621, 623–626, and any other provision of chapter 30 of that Act inconsistent with this rule. It does not modify any other act, inconsistent with this rule, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers and any other tangible objects.

NOTES OF ADVISORY COMMITTEE ON RULES

This rule is a codification of existing law and practice.

Note to Subdivision (a)

This rule is a restatement of existing law, 18 U. S. C. § 611.

Note to Subdivision (b)

This rule is a restatement of existing law, 18 U. S. C. § 612; Conyer v. United States, 80 F. 2d 292, C. C. A. 6th. This provision does not supersede or repeal special statutory provisions permitting the issuance of search warrants in specific circumstances. See Subdivision (g) and Note thereto, infra.

Note to Subdivision (c)

This rule is a restatement of existing law, 18 U. S. C. §§ 613–616, 620; Dumbra v. United States, 268 U. S. 435, 45 S. Ct. 546, 69 L. Ed. 1032.

Note to Subdivision (d)

This rule is a restatement of existing law, 18 U. S. C. §§ 621–624.

Note to Subdivision (e)

This rule is a restatement of existing law and practice, with the exception hereafter noted, 18 U. S. C. §§ 625, 626; Weeks v. United States, 232 U. S. 383, 34 S. Ct. 841, 58 L. Ed. 652; Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 S. Ct. 182, 64 L. Ed. 319; Agello v. United States, 269 U. S. 20, 46 S. Ct. 4, 70 L. Ed. 145; Gouled v. United States, 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647. While under existing law a motion to suppress evidence or to compel return of property obtained by an illegal search and seizure may be made either before a commissioner subject to review by the court on motion, or before the court, the rule provides that such motion may be made only before the court. The purpose is to prevent multiplication of proceedings and to bring the matter before the court in the first instance. While during the life of the Eighteenth Amendment when such motions were numerous it was a common practice in some districts for commissioners to hear such motions, the prevailing practice at the present time is to make such motions before the district court. This practice, which is deemed to be preferable, is embodied in the rule.

Note to Subdivision (f)

This rule is a restatement of existing law, 18 U. S. C. § 627; Cf. Rule 5 (c) (last sentence).

Note to Subdivision (g)

While Rule 41 supersedes the general provisions of 18 U. S. C. §§ 611–626, relating to search warrants, it does not supersede, but preserves, all other statutory provisions permitting searches and seizures in specific situations. Among such statutes are the following:

U. S. C. Title 18:
§ 287 (Search warrant for suspected counterfeits; forfeiture)
U. S. C. Title 19:
§ 1595 (Customs duties; searches and seizures)
U. S. C. Title 26:
§ 3117 (Officers and agents authorized to investigate, issue search warrants, and prosecute for violations)
§ 3602 (Search Warrants)

For statutes which incorporate by reference 18 U. S. C. § 98, and therefore are now controlled by this rule, see, e. g.:

U. S. C. Title 18:
§ 12 (Subversive activities; undermining loyalty, discipline, or morale of armed forces; searches and seizures)
U. S. C. Title 26:
§ 3116 (Forfeitures and seizures)

Statutory provision for a warrant for detention of war materials seized under certain circumstances is found in 22 U. S. C. § 402 (Seizure of war materials intended for unlawful export.)

Other statutes providing for searches and seizures or entry without warrants are the following:

U. S. C. Title 19:
§ 482 (Search of vehicles and persons)
U. S. C. Title 25:
§ 246 (Searches and seizures)
U. S. C. Title 26:
§ 3601 (Entry of premises for examination of taxable objects)
U. S. C. Title 29:
§ 211 (Investigations, inspections, and records)
U. S. C. Title 49:
§ 781 (Unlawful use of vessels, vehicles, and aircrafts; contraband article defined)
§ 782 (Seizure and forfeiture)
§ 784 (Application of related laws)

Rule 42. Criminal Contempt

(a) Summary Disposition.

A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing.

A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

Notes of Advisory Committee on Rules

The rule-making power of the Supreme Court with respect to criminal proceedings was extended to proceedings to punish for criminal contempt of court by the Act of November 21, 1941 (55 Stat. 779), 18 U. S. C. § 689.

Note to Subdivision (a)

This rule is substantially a restatement of existing law, Ex parte Terry, 128 U. S. 289; Cooke v. United States, 267 U. S. 517, 534, 45 S. Ct. 390, 69 L. Ed. 767.

Note to Subdivision (b)

This rule is substantially a restatement of the procedure prescribed in 28 U. S. C. §§ 386–390, and 29 U. S. C. § 111.

2. The requirement in the second sentence that the notice shall describe the criminal contempt as such is intended to obviate the frequent confusion between criminal and civil contempt proceedings and follows the suggestion made in McCann v. New York Stock Exchange, 80 F. 2d 211, C. C. A. 2d. See also Nye v. United States, 313 U. S. 33, 42–43, 61 S. Ct. 810, 85 L. Ed. 1172.

3. The fourth sentence relating to trial by jury preserves the right to a trial by jury in those contempt cases in which it is granted by statute, but does not enlarge the right or extend it to additional cases. The respondent in a contempt proceeding may demand a trial by jury as of right if the proceeding is brought under the Act of March 23, 1932, c. 90, sec. 11, 47 Stat. 72, 29 U. S. C. § 111 (Norris-La Guardia Act), or the Act of October 15, 1914, c. 323, sec. 22, 38 Stat. 738, 28 U. S. C. § 387 (Clayton Act).

4. The provision in the sixth sentence disqualifying the judge affected by the contempt if the charge involves disrespect to or criticism of him, is based, in part, on 29 U. S. C. § 112 (Contempts; demand for retirement of judge sitting in proceeding) and the observations of Chief Justice Taft in Cooke v. United States, 267 U. S. 517, 539, 45 S. Ct. 390, 69 L. Ed. 767.

5. Among the statutory provisions defining criminal contempts are the following:

U. S. C. Title 7:
§ 499m (Perishable Agricultural Commodities Act; investigation of complaints; procedure; penalties; etc.—(c) Disobedience to subpoenas; remedy; contempt)
U. S. C. Title 9:
§ 7 (Witnesses before arbitrators; fees, compelling attendance)
U. S. C. Title 11:
§ 69 (Referees; contempts before)
U. S. C. Title 15:
§ 49 (Federal Trade Commission; documentary evidence; depositions; witnesses)
§ 78u (Regulation of Securities Exchanges; investigation; injunctions and prosecution of offenses)
§ 100 (Trade-marks; destruction of infringing labels; service of injunction, and proceedings for enforcement)
§ 155 (China Trade Act; authority of registrar in obtaining evidence)
U. S. C. Title 17:
§ 36 (Injunctions; service and enforcement)
U. S. C. Title 19:
§ 1333 (Tariff Commission; testimony and production of papers—(b) Witnesses and evidence)
U. S. C. Title 22:
§ 270f (International Bureaus; Congresses, etc.; perjury; contempts; penalties)
U. S. C. Title 28:
§ 385 (Administration of oaths; contempts)
§ 386 (Contempts; when constituting also criminal offense)
§ 387 (Same; procedure; bail; attachment; trial; punishment) (Clayton Act; jury trial; section)
§ 388 (Same; review of conviction)
§ 389 (Same; not specifically enumerated)
§ 390 (Same; limitations)
§ 390a ("Person" or "persons" defined)
§ 648 (Depositions under dedimus potestatem; witnesses; when required to attend)

U. S. C. Title 28:
§ 703 (Punishment of witness for contempt)
§ 714 (Failure of witness to obey subpoena; order to show cause in contempt proceedings)
§ 715 (Direction in order to show cause for seizure of property of witness in contempt)
§ 716 (Service of order to show cause)
§ 717 (Hearing on order to show cause; judgment; satisfaction)
§ 750 (Garnishees in suits by United States against a corporation; garnishee failing to appear)

U. S. C. Title 29:
§ 111 (Contempts; speedy and public trial; jury) (Norris-La Guardia Act)
§ 112 (Contempts; demands for retirement of judge sitting in proceeding)
§ 160 (Prevention of unfair labor practices—(h) Jurisdiction of courts unaffected by limitations prescribed in sections 101–115 of Title 29)
§ 161 (Investigatory powers of Board—(2) Court aid in compelling production of evidence and attendance of witnesses)
§ 209 (Fair Labor Standards Act; attendance of witnesses)

U. S. C. Title 33:
§ 927 (Longshoremen's and Harbor Workers' Compensation Act; powers of deputy commissioner)

U. S. C. Title 35:
§ 56 (Failing to attend or testify)

U. S. C. Title 47:
§ 409 (Federal Communications Commission; hearing; subpoenas; oaths; witnesses; production of books and papers; contempts; depositions; penalties)

U. S. C. Title 48:
§ 1345a (Canal Zone; general jurisdiction of district court; issue of process at request of officials; witnesses; contempt)

U. S. C. Title 49:
§ 12 (Interstate Commerce Commission; authority and duties of commission; witnesses; depositions—(3) Compelling attendance and testimony of witnesses, etc.)

FEDERAL RULES OF CIVIL PROCEDURE

Rule 45 (Subpoena) subdivision (f) (Contempt).

X. GENERAL PROVISIONS

RULE 43. PRESENCE OF THE DEFENDANT

The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by counsel for all purposes. In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence. The defendant's presence is not required at a reduction of sentence under Rule 35.

NOTES OF ADVISORY COMMITTEE ON RULES

1. The first sentence of the rule setting forth the necessity of the defendant's presence at arraignment and trial is a restatement of existing law, Lewis v. United States, 146 U. S. 370, 13 S. Ct. 136, 36 L. Ed. 1011; Diaz v. United States, 223 U. S. 442, 455, 32 S. Ct. 250, 56 L. Ed. 500, Ann. Cas. 1913C 1138. This principle does not apply to hearings on motions made prior to or after trial, United States v. Lynch, 132 F. 2d 111, C. C. A. 3d.

2. The second sentence of the rule is a restatement of existing law that, except in capital cases, the defendant may not defeat the proceedings by voluntarily absenting himself after the trial has been commenced in his presence, Diaz v. United States, 223 U. S. 442, 455, 32 S. Ct. 250, 56 L. Ed. 500, Ann. Cas. 1913C 1138; United States v. Noble, 294 Fed. 689 (D. Mont.)—affirmed, 300 Fed. 689, C. C. A. 9th; United States v. Barracota, 45 F. Supp. 38, S. D. N. Y.; United States v. Vassalo, 52 F. 2d 699, E. D. Mich.

3. The fourth sentence of the rule empowering the court in its discretion, with the defendant's written consent, to conduct proceedings in misdemeanor cases in defendant's absence adopts a practice prevailing in some districts comprising very large areas. In such districts appearance in court may require considerable travel, resulting in expense and hardship not commensurate with the gravity of the charge, if a minor infraction is involved and a small fine is eventually imposed. The rule, which is in the interest of defendants in such situations, leaves it discretionary with the court to permit defendants in misdemeanor cases to absent themselves and, if so, to determine in what types of misdemeanors and to what extent. Similar provisions are found in the statutes of a number of States. See A. L. I. Code of Criminal Procedure, pp. 881–882.

4. The purpose of the last sentence of the rule is to resolve a doubt that at times has arisen as to whether it is necessary to bring the defendant to court from an institution in which he is confined, possibly at a distant point, if the court determines to reduce the sentence previously imposed. It seems in the interest of both the Government and the defendant not to require such presence, because of the delay and expense that are involved.

RULE 44. ASSIGNMENT OF COUNSEL

If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel.

NOTES OF ADVISORY COMMITTEE ON RULES

1. This rule is a restatement of existing law in regard to the defendant's constitutional right of counsel as defined in recent judicial decisions. The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense.

28 U. S. C. § 394 provides:

In all the courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as, by the rules of the said courts, respectively, are permitted to manage and conduct causes therein.

18 U. S. C. § 563, which is derived from the Act of April 30, 1790 (1 Stat. 118), provides:

Every person who is indicted of treason or other capital crime, shall be allowed to make his full defense by counsel learned in the law; and the court before which he is tried or some judge thereof, shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire, and they shall have free access to him at all seasonable hours.

The present extent of the right of counsel has been defined recently in Johnson v. Zerbst, 304 U. S. 458, 58 S. Ct. 1019, 82 L, Ed. 1461; Walker v. Johnston, 312 U. S. 275, 61 S. Ct. 574, 85 L. Ed. 830; and Glasser v. United States, 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680, rehearing denied 315 U. S. 827, 62 S. Ct. 629, 637, two cases, 86 L. Ed. 1222. The rule is a restatement of the principles enunciated in these decisions. See, also, Holtzoff, 20 N. Y. U. L. Q. R. 1.

2. The rule is intended to indicate that the right of the defendant to have counsel assigned by the court relates only to proceedings in court and, therefore, does not include preliminary proceedings before a committing magis-

trate. Although the defendant is not entitled to have counsel assigned to him in connection with preliminary proceedings, he is entitled to be represented by counsel retained by him, if he so chooses, Rule 5 (b) (Proceedings before the Commissioner; Statement by the Commissioner) and Rule 40 (b) (2) (Commitment to Another District; Removal—Arrest in Distant District—Statement by Commissioner or Judge). As to defendant's right of counsel in connection with the taking of depositions, see Rule 15 (c) (Depositions—Defendant's Counsel and Payment of Expenses).

Rule 45. Time

(a) Computation.

In computing any period of time the day of the act or event after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a holiday. When a period of time prescribed or allowed is less than 7 days, intermediate Sundays and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday.

(b) Enlargement.

When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect; but the court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal.

(c) Unaffected by Expiration of Term.

The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of court. The expiration of a term of court in no way affects the power of a court to do any act in a criminal proceeding.

(d) For Motions; Affidavits.

A written motion, other than one which may be heard *ex parte*, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing unless a different period is fixed by rule or order of the court. For cause shown such an order may be made on *ex parte* application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and opposing affidavits may be served not less than 1 day before the hearing unless the court permits them to be served at a later time.

(e) Additional Time After Service by Mail.

Whenever a party has the right or is required to do an act within a prescribed period after the service of a notice or other paper upon him and the notice or other paper is served upon him by mail, 3 days shall be added to the prescribed period.

Notes of Advisory Committee on Rules

The rule is in substance the same as Rule 6 of the Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723c. It seems desirable that matters covered by this rule should be regulated in the same manner for civil and criminal cases, in order to preclude possibility of confusion.

Note to Subdivision (a)

This rule supersedes the method of computing time prescribed by Rule 13 of the Criminal Appeals Rules, promulgated on May 7, 1934, 292 U. S. 661.

Note to Subdivision (c)

This rule abolishes the expiration of a term of court as a time limitation for the taking of any step in a criminal proceeding, as is done for civil cases by Rule 6 (c) of the Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723c. In view of the fact that the duration of terms of court varies among the several districts and the further fact that the length of time for the taking of any step limited by a term of court depends on the stage within the term when the time begins to run, specific time limitations have been substituted for the taking of any step which previously had to be taken within the term of court.

Note to Subdivision (d)

Cf. Rule 47 (Motions) and Rule 49 (Service and filing of papers).

Rule 46. Bail

(a) Right to Bail.

(1) *Before Conviction.* A person arrested for an offense not punishable by death shall be admitted to bail. A person arrested for an offense punishable by death may be admitted to bail by any court or judge authorized by law to do so in the exercise of discretion, giving due weight to the evidence and to the nature and circumstances of the offense.

(2) *Upon Review.* Bail may be allowed pending appeal or certiorari only if it appears that the case involves a substantial question which should be determinated by the appellate court. Bail may be allowed by the trial judge or by the appellate court or by any judge thereof or by the circuit justice. The court or the judge or justice allowing bail may at any time revoke the order admitting the defendant to bail.

(b) Bail for Witness.

If it appears by affidavit that the testimony of a person is material in any criminal proceeding and if it is shown that it may become impracticable to secure his presence by subpoena, the court or commissioner may require him to give bail for his appearance as a witness, in an amount fixed by the court or commissioner. If the person fails to give bail the court or commissioner may commit him to the custody of the marshal pending final disposition of the proceeding in which the testimony is needed, may order his release if he has been detained for an unreasonable length of time and may modify at any time the requirement as to bail.

(c) Amount.

If the defendant is admitted to bail, the amount thereof shall be such as in the judgment of the commissioner or court or judge or justice will insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant.

(d) Form, and Place of Deposit.

A person required or permitted to give bail shall execute a bond for his appearance. One or more sureties may be required, cash or bonds or notes of the United States may be accepted and in proper cases no security need be required. Bail given originally on appeal shall be deposited in the registry of the district court from which the appeal is taken.

(e) Justification of Sureties.

Every surety, except a corporate surety which is approved as provided by law, shall justify by affidavit and may be required to describe in the affidavit the property by which he proposes to justify and the encumbrances thereon, the number and amount of other bonds and undertakings for bail entered into by him and remaining undischarged and all his other liabilities. No bond shall be approved unless the surety thereon appears to be qualified.

(f) Forfeiture.

(1) *Declaration.* If there is a breach of condition of a bond, the district court shall declare a forfeiture of the bail.

(2) *Setting Aside.* The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.

(3) *Enforcement.* When a forfeiture has not been set aside, the court shall on motion enter a judgment of default and execution may issue thereon. By entering into a bond the obligors submit to the jurisdiction of the district court and irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the obligors to their last known addresses.

(4) *Remission.* After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this subdivision.

(g) Exoneration.

When the condition of the bond has been satisfied or the forfeiture thereof has been set aside or remitted, the court shall exonerate the obligors and release any bail. A surety may be exonerated by a deposit of cash in the amount of the bond or by a timely surrender of the defendant into custody.

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a) (1)

This rule is substantially a restatement of existing law, 18 U. S. C. §§ 596, 597.

Note to Subdivision (a) (2)

This rule is substantially a restatement of Rule 6 of Criminal Appeals Rules, with the addition of a reference to bail pending certiorari. This rule does not supersede 18 U. S. C. § 682 (Appeals; on behalf of the United States; rules of practice and procedure), which provides for the admission of the defendant to bail on his own recognizance pending an appeal taken by the Government.

Note to Subdivision (b)

This rule is substantially a restatement of existing law, 28 U. S. C. § 657.

Note to Subdivision (d)

This rule is a restatement of existing practice, and is based in part on 6 U. S. C. § 15 (Bonds or notes of United States in lieu of recognizance, stipulation, bond, guaranty, or undertaking; place of deposit; return to depositor; contractors' bonds).

Note to Subdivision (e)

This rule is similar to Sec. 79 of A. L. I. Code of Criminal Procedure introducing, however, an element of flexibility. Corporate sureties are regulated by 6 U. S. C. §§ 6–14.

Note to Subdivision (f)

1. With the exception hereafter noted, this rule is substantially a restatement of existing law in somewhat greater detail than contained in 18 U. S. C. § 601 (Remission of penalty of recognizance).

2. Subdivision (f) (2) changes existing law in that it increases the discretion of the court to set aside a forfeiture. The present power of the court is limited to cases in which the defendant's default has not been willful.

3. The second sentence of paragraph (3) is similar to Rule 73 (f) of the Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723c. This paragraph also substitutes simple motion procedure for enforcing forfeited bail bonds for the procedure by scire facias, which was abolished by Rule 81 (b) of the Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723c.

Note to Subdivision (g)

This rule is a restatement of existing law and practice. It is based in part on 18 U. S. C. § 599 (Surrender by bail).

RULE 47. MOTIONS

An application to the court for an order shall be by motion. A motion other than one made during a trial or hearing shall be in writing unless the court permits it to be made orally. It shall state the grounds upon which it is made and shall set forth the relief or order sought. It may be supported by affidavit.

NOTES OF ADVISORY COMMITTEE ON RULES

1. This rule is substantially the same as the corresponding civil rule (first sentence of Rule 7 (b) (1), Federal Rules of Civil Procedure), 28 U. S. C. foll. § 723c except that it authorizes the court to permit motions to be made orally and does not require that the grounds upon which a motion is made shall be stated "with particularity," as is the case with the civil rule.

2. This rule is intended to state general requirements for all motions. For particular provisions applying to specific motions, see Rules 6 (b) (2), 12, 14, 15, 16, 17 (b) and (c), 21, 22, 29 and Rule 41 (e). See also Rule 49.

3. The last sentence providing that a motion may be supported by affidavit is not intended to permit "speaking motions" (e. g. motion to dismiss an indictment for insufficiency supported by affidavits), but to authorize the use of affidavits when affidavits are appropriate to establish a fact (e. g. authority to take a deposition or former jeopardy).

RULE 48. DISMISSAL

(a) By Attorney for Government.

The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

(b) By Court.

If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer

to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a).

1. The first sentence of this rule will change existing law. The common-law rule that the public prosecutor may enter a nolle prosequi in his discretion, without any action by the court, prevails in the Federal courts, Confiscation Cases, 7 Wall. 454, 457; United States v. Woody, 2 F. 2d 262 (D. Mont.). This provision will permit the filing of a nolle prosequi only by leave of court. This is similar to the rule now prevailing in many States. A. L. I. Code of Criminal Procedure, Commentaries, pp. 895–897.

2. The rule confers the power to file a dismissal by leave of court on the Attorney General, as well as on the United States attorney, since under existing law the Attorney General exercises "general superintendence and direction" over the United States attorneys "as to the manner of discharging their respective duties," 5 U. S. C. § 317. Moreover it is the administrative practice for the Attorney General to supervise the filing of a nolle prosequi by United States attorneys. Consequently it seemed appropriate that the Attorney General should have such power directly.

3. The rule permits the filing of a dismissal of an indictment, information or complaint. The word "complaint" was included in order to resolve a doubt prevailing in some districts as to whether the United States attorney may file a nolle prosequi between the time when the defendant is bound over by the United States commissioner and the finding of an indictment. It has been assumed in a few districts that the power does not exist and that the United States attorney must await action of the grand jury, even if he deems it proper to dismiss the prosecution. This situation is an unnecessary hardship to some defendants.

4. The second sentence is a restatement of existing law, Confiscation Cases, 7 Wall. 454–457; United States v. Shoemaker, 27 Fed. Cases No. 16,279, C. C. Ill. If the trial has commenced, the defendant has a right to insist on a disposition on the merits and may properly object to the entry of a nolle prosequi.

Note to Subdivision (b)

This rule is a restatement of the inherent power of the court to dismiss a case for want of prosecution. Ex parte Altman, 34 F. Supp. 106, S. D. Cal.

RULE 49. SERVICE AND FILING OF PAPERS

(a) Service: When Required.

Written motions other than those which are heard *ex parte*, written notices, designations of record on appeal and similar papers shall be served upon the adverse parties.

(b) Service: How Made.

Whenever under these rules or by an order of the court service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made in the manner provided in civil actions.

(c) Notice of Orders.

Immediately upon the entry of an order made on a written motion subsequent to arraignment the clerk shall mail to each party affected thereby a notice thereof and shall make a note in the docket of the mailing.

(d) Filing.

Papers required to be served shall be filed with the court. Papers shall be filed in the manner provided in civil actions.

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a)

This rule is substantially the same as Rule 5 (a) of the Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723c, with such adaptations as are necessary for criminal cases.

Note to Subdivision (b)

The first sentence of this rule is in substance the same as the first sentence of Rule 5 (b) of the Federal Rules of Civil Procedure. The second sentence incorporates by reference the second and third sentences of Rule 5 (b) of the Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723c.

Note to Subdivision (c)

This rule is an adaptation for criminal proceedings of Rule 77 (d) of the Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723c. No consequence attaches to the failure of the clerk to give the prescribed notice, but in a case in which the losing party in reliance on the clerk's obligation to send a notice failed to file a timely notice of appeal, it was held competent for the trial judge, in the exercise of sound discretion, to vacate the judgment because of clerk's failure to give notice and to enter a new judgment, the term of court not having expired. Hill v. Hawes, 320 U. S. 520, 64 S. Ct. 334, 88 L. Ed. 283. rehearing denied 321 U. S. 801, 64 S. Ct. 515, 88 L. Ed. 1088.

Note to Subdivision (d)

This rule incorporates by reference Rule 5 (d) and (e) of the Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723c.

RULE 50. CALENDARS

The district courts may provide for placing criminal proceedings upon appropriate calendars. Preference shall be given to criminal proceedings as far as practicable.

NOTES OF ADVISORY COMMITTEE ON RULES

This rule is a restatement of the inherent residual power of the court over its own calendars, although as a matter of practice in most districts the assignment of criminal cases for trial is handled by the United States attorney. Cf. Federal Rules of Civil Procedure, Rules 40 and 78, 28 U. S. C. foll. § 723c. The direction that preference shall be given to criminal proceedings as far as practicable is generally recognized as desirable in the orderly administration of justice.

RULE 51. EXCEPTIONS UNNECESSARY

Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him.

NOTES OF ADVISORY COMMITTEE ON RULES

1. This rule is practically identical with Rule 46 of the Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723c. It relates to a matter of trial practice which should be the same in civil and criminal cases in the interest of avoiding confusion. The corresponding civil rule has been construed in Ulm v. Moore-McCormack Lines, Inc., 115 F. 2d 492, C. C. A. 2d, and Bucy v. Nevada Construction Company, 125 F. 2d 213, 218, C. C. A. 9th. See, also, Orfield, 22 Texas L. R. 194, 221. As to the method

of taking objections to instructions to the jury, see Rule 30.

2. Many States have abolished the use of exceptions in criminal and civil cases. See, e. g., Cal. Pen. Code (Deering, 1941), sec. 1259; Mich. Stat. Ann. (Henderson, 1938), secs. 28.1046, 28.1053; Ohio Gen Code Ann. (Page, 1938), secs. 11560, 13442-7; Oreg. Comp. Laws Ann. (1940), secs. 5-704, 26-1001.

RULE 52. HARMLESS ERROR AND PLAIN ERROR

(a) Harmless Error.

Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error.

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a)

This rule is a restatement of existing law, 28 U. S. C. § 391 (second sentence): "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties"; 18 U. S. C. § 556; "No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant, * * *." A similar provision is found in Rule 61 of the Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723c.

Note to Subdivision (b)

This rule is a restatement of existing law, Wiborg v. United States, 163 U. S. 632, 658, 16 S. Ct. 1127, 1197, 2 cases, 41 L. Ed. 289; Hemphill v. United States, 112 F. 2d 505, C. C. A. 9th, reversed 312 U. S. 657, 61 S. Ct. 729, 85 L. Ed. 1106, conformed to 120 F. 2d 115, certiorari denied 314 U. S. 627, 62 S. Ct. 111, 86 L. Ed. 503. Rule 27 of the Rules of the Supreme Court, 28 U. S. C. foll. § 354, provides that errors not specified will be disregarded, "save as the court, at its option, may notice a plain error not assigned or specified." Similar provisions are found in the rules of several circuit courts of appeals.

RULE 53. REGULATION OF CONDUCT IN THE COURT ROOM

The taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court.

NOTES OF ADVISORY COMMITTEE ON RULES

While the matter to which the rule refers has not been a problem in the Federal courts as it has been in some State tribunals, the rule was nevertheless included with a view to giving expression to a standard which should govern the conduct of judicial proceedings, Orfield, 22 Texas L. R. 194, 222-3; Robbins, 21 A. B. A. Jour. 301, 304. See, also, Report of the Special Committee on Cooperation between Press, Radio and Bar, as to Publicity Interfering with Fair Trial of Judicial and Quasi-Judicial Proceedings (1937), 62 A. B. A. Rep. 851, 862-865; (1932) 18 A. B. A. Jour. 762; (1926) 12 Id. 488; (1925) 11 Id. 64.

RULE 54. APPLICATION AND EXCEPTION

(a) Courts and Commissioners.

(1) *Courts.* These rules apply to all criminal proceedings in the district courts of the United States, which include the District Court of the United States for the District of Columbia, the District Court for the Territory of Alaska, the United States District Court for the Territory of Hawaii, the District Court of the United States for Puerto Rico and the District Court of the Virgin Islands; in the United States circuit courts of appeals, which include the United States Court of Appeals for the District of Columbia; and in the Supreme Court of the United States. The rules governing proceedings after verdict or finding of guilt or plea of guilty apply in the United States District Court for the District of the Canal Zone.

(2) *Commissioners.* The rules applicable to criminal proceedings before commissioners apply to similar proceedings before judges of the United States or of the District of Columbia. They do not apply to criminal proceedings before other officers empowered to commit persons charged with offenses against the United States.

(b) Proceedings.

(1) *Removed Proceedings.* These rules apply to criminal prosecutions removed to the district courts of the United States from state courts and govern all procedure after removal, except that dismissal by the attorney for the prosecution shall be governed by state law.

(2) *Offenses Outside a District or State.* These rules apply to proceedings for offenses committed upon the high seas or elsewhere out of the jurisdiction of any particular state or district, except that such proceedings may be had in any district authorized by the Act of March 3, 1911, ch. 231, § 41, 36 Stat. 1100, Judicial Code § 41, 28 U. S. C. § 102.

(3) *Peace Bonds.* These rules do not alter the power of judges of the United States or of United States commissioners to hold to security of the peace and for good behavior under the Act of March 3, 1911, ch. 231, § 270, 36 Stat. 1163, Judicial Code § 270, 28 U. S. C. § 392, and under Revised Statutes § 4069, 50 U. S. C. § 23, but in such cases the procedure shall conform to these rules so far as they are applicable.

(4) *Trials before Commissioners.* These rules do not apply to proceedings before United States commissioners and in the district courts under the Act of October 9, 1940, ch. 785, 54 Stat. 1058-1059, 18 U. S. C. §§ 576-576d, relating to petty offenses on federal reservations.

(5) *Other Proceedings.* These rules are not applicable to extradition and rendition of fugitives; forfeiture of property for violation of a statute of the United States; or the collection of fines and penalties. They do not apply to proceedings under the Federal Juvenile Delinquency Act so far as they are inconsistent with that Act. They do not apply to summary trials for offenses against the navigation laws under Revised Statutes §§ 4300-4305, 33 U. S. C. §§ 391-396, or to proceedings involving disputes between seamen under Revised Statutes §§ 4079-4081, as amended, 22 U. S. C. §§ 256-258, or to proceedings for fishery offenses under the Act of June 28, 1937, ch. 392, 50 Stat. 325-327, 16 U. S. C. §§ 772-772i, or to proceedings against a witness in a foreign country under the Act of July 3, 1926, ch. 762, 44 Stat. 835, 28 U. S. C. §§ 711-718.

(c) Application of Terms.

As used in these rules the term "State" includes District of Columbia, territory and insular possession. "Law" includes statutes and judicial decisions. "Act of Congress" includes any act of Congress locally applicable to and in force in the District of Columbia, in a territory or in an insular possession. "District court" includes all district courts named in subdivision (a), paragraph (1) of this rule. "Civil action" refers to a civil action in a district court. "Oath" includes affirmations. "District judge" includes a justice of the District Court of the United States for the District of Columbia. "Judge of a circuit court of appeals" includes a justice of the United States Court of Appeals for the District of Columbia. "Senior circuit judge" includes the chief justice of the United States Court of Appeals for the District of Columbia. "Attorney for the government" means the attorney general, an authorized assistant of the attorney general, a United States attorney and an authorized assistant of a United States attorney. The words "demurrer," "motion to quash," "plea in abatement," "plea in bar" and "special plea in bar," or words to the same effect, in any act of Congress shall be construed to mean the motion raising a defense or objection provided in Rule 12.

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a) (1)

1. The Act of June 28, 1940 (54 Stat. 688; 18 U. S. C. § 687), authorizing the Supreme Court to prescribe rules of criminal procedure for the district courts of the United States in respect to proceedings prior to and including verdict or finding of guilty or not guilty or plea of guilty, is expressly applicable to the district courts of Alaska, Hawaii, Puerto Rico, Canal Zone, Virgin Islands, the Supreme Courts of Hawaii and Puerto Rico, and the United States Court for China. This is likewise true of the Act of February 24, 1933 (47 Stat. 904; 18 U. S. C. § 688), authorizing the Supreme Court to prescribe rules in respect to proceedings after verdict or finding or after plea of guilty. In this respect these two statutes differ from the Act of June 19, 1934 (48 Stat. 1064; 28 U. S. C. §§ 723b, 723c), authorizing the Supreme Court to prescribe rules of civil procedure. The last-mentioned Act comprises only district courts of the United States and the courts of the District of Columbia. The phrase "district courts of the United States" was held not to include district courts in the territories and insular possessions, Mookini v. United States, 303 U. S. 201, 58 S. Ct. 543, 82 L. Ed. 748, conformed to 95 F. 2d 960. By subsequent legislation the Federal Rules of Civil Procedure were extended to the District Court of the United States for Hawaii and to appeals therefrom (Act of June 19, 1939; 53 Stat. 841; 48 U. S. C. § 646) and to the District Court of the United States for Puerto Rico and to appeals, therefrom (Act of February 12, 1940; 54 Stat. 22; 43 U. S. C. § 873a).

2. While the specific reference in the rule to the District Court of the United States for the District of Columbia is probably superfluous, since that court has the same powers and exercises the same jurisdiction as other district courts of the United States in addition to such local powers and jurisdiction as have been conferred upon it by statute (D. C. Code, 1940, Title 11, § 305), nevertheless it was listed in the rule in view of the fact that the Federal Rules of Civil Procedure contain a somewhat similar provision (Rule 81 (d), 28 U. S. C. foll. § 723c).

3. The United States Court for China has been omitted from the rule in view of the fact that the court has recently been abolished with the abandonment by the United States of its extraterritorial jurisdiction in China.

4. Although, as indicated above, the rule-making power of the Supreme Court in respect to criminal cases extends to the Supreme Courts of Hawaii and Puerto Rico, the rules are not made applicable to those two courts, in view of the fact that they are purely local appellate courts having no appellate jurisdiction over the district courts of the United States in those territories. Alaska and Hawaii have dual systems of courts: local courts exercising purely local jurisdiction and United States district courts exercising Federal jurisdiction. The Supreme Court of each of the two territories hears appeals only from the local courts.

5. Alaska.—There is a district court for the Territory of Alaska consisting of four divisions, established on a territorial basis, 48 U. S. C. §§ 101, 101a. As the only court in the Territory, it acts in a dual capacity: it has jurisdiction over cases arising under the laws of the United States as well as those arising under local laws. Although a legislative rather than a constitutional court, it is, nevertheless, deemed a court of the United States and has the jurisdiction of district courts of the United States, 48 U. S. C. §§ 101, 101a; Steamer Coquitlam v. United States, 163 U. S. 346, 16 S. Ct. 1117, 41 L. Ed. 184; McAllister v. United States, 141 U. S. 174, 179, 11 S. Ct. 949, 35 L. Ed. 693; Ex parte Krause, 228 Fed. 547, 549, W. D. Wash. Criminal procedure is now regulated by Acts of Congress, by the Alaska Code of Criminal Procedure (Alaska Comp. Laws, 1933, pp. 959–1018), and by rules promulgated by the district court.

6. Hawaii.—Hawaii has a dual system of courts. The United States District Court for the Territory of Hawaii, a legislative court, has the jurisdiction of district courts of the United States and proceeds therein "in the same manner as a district court," 48 U. S. C. §§ 641, 642. In addition, there are circuit courts having jurisdiction over cases arising under local laws. Appeals from the circuit courts run to the Supreme Court of the Territory, 48 U. S. C. § 631. These rules are made applicable to the district court, but not to the local courts. The Federal Rules of Civil Procedure have been made applicable to the district court and to appeals therefrom, 48 U. S. C. § 646.

7. Puerto Rico.—Puerto Rico has a dual system of courts. The District Court of the United States for Puerto Rico, a legislative court, has jurisdiction of all cases cognizable in the district courts of the United States and proceeds "In the same manner," 48 U. S. C. § 863.

In addition, there are local courts for the trial of cases arising under local law, appeals therefrom running to the Supreme Court of the Territory. These rules are made applicable to the district court, but not to the local courts. The Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723c, have been extended to the district court, 48 U. S. C. § 873a.

8. Virgin Islands.—In the Virgin Islands there is a District Court of the Virgin Islands, a legislative court, consisting of two divisions and exercising both Federal and local jurisdiction, 48 U. S. C. §§ 1405z, 1406. Heretofore the rules of practice and procedure have been prescribed "by law or ordinance or by rules and regulations of the district judge not inconsistent with law or ordinance," 48 U. S. C. § 1405z.

9. Canal Zone.—In the Canal Zone there is a United States District Court for the District of the Canal Zone, a legislative court, exercising both Federal and local jurisdiction, 48 U. S. C. §§ 1344, 1345. Criminal procedure is regulated by the Code of Criminal Procedure of the Canal Zone (Canal Zone Code, Title 6; 48 Stat. 1122), and by rules of practice and procedure prescribed by the district judge, 48 U. S. C. § 1344. There are no grand juries in the district, all prosecutions being instituted by information. In the light of these circumstances and because of the peculiar status of the Canal Zone and its quasi-military nature, these rules have been made applicable to its district court, only with respect to proceedings after verdict or finding of guilty or plea of guilty.

10. By order dated March 31, 1941, effective July 1, 1941, the Supreme Court extended the rules of practice and procedure after plea of guilty, verdict or finding of guilty, in criminal cases, to the district courts of Alaska, Hawaii, Puerto Rico, Canal Zone, and Virgin Islands, and all subsequent proceedings in such cases in the United States

circuit courts of appeals and in the Supreme Court of the United States, 312 U. S. 721.

Note to Subdivision (a) (2)

1. Rules 3, 4, and 5, supra, relate to proceedings before United States commissioners.

2. Justices and judges of the United States, as well as United States commissioners, may issue warrants and conduct proceedings as committing magistrates, 18 U. S. C. § 591 (Arrest and removal for trial); 9 Edmunds, Cyclopedia of Federal Procedure, 2d Ed., secs. 3800, 3819.

3. In the District of Columbia judges of the Municipal Court have authority to issue warrants and conduct proceedings as committing magistrates, D. C. Code, 1940, Title 11, secs. 602, 755. These proceedings are governed by these rules. The Municipal Court of the District of Columbia is also a local court for the trial of misdemeanors, but when so acting it is not a court of the United States. These rules, therefore, do not apply to such proceedings.

4. State and local judges and magistrates may issue warrants and act as committing magistrates in Federal cases, 18 U. S. C. § 591. Only a very small proportion of cases are brought before them, however, and then ordinarily only in an emergency. Since these judicial officers may not be familiar with Federal procedure, these rules have not been made applicable to such proceedings.

Note to Subdivision (b) (1)

1. Certain types of State criminal prosecutions, principally those in which defendant is an officer appointed under or acting by authority of a revenue law of the United States and is prosecuted on account of an act done under color of his office, are removable to a Federal court on defendant's motion, 28 U. S. C. § 74 (Removal of suits from State courts; causes against persons denied civil rights); sec. 76 (Removal of suits from State courts; suits and prosecutions against revenue officers). In such cases the Federal court applies the substantive law of the State, but follows Federal procedure; State of Tennessee v. Davis, 100 U. S. 257, 25 L. Ed. 648; Carter v. Tennessee, 18 F. 2d 850, C. C. A. 6th; Miller v. Kentucky, 40 F. 2d 820, C. C. A. 6th. See also, State of Maryland v. Soper, 270 U. S. 9, 46 S. Ct. 185, 70 L. Ed. 449. The rule is, therefore, a restatement of existing law, except that it does not affect whatever power the State prosecutor may have as to dismissal.

2. The rule does not affect the mode of removing a case from a State to a Federal court and leaves undisturbed the statutes governing this matter, 28 U. S. C. §§ 74–76.

Note to Subdivision (b) (2)

This rule should be read in conjunction with Rule 18, which provides that "Except as otherwise permitted by statute or by these rules, the prosecution shall be held in a district in which the offense was committed * * *".

Note to Subdivision (b) (4)

United States commissioners specially designated for that purpose by the court by which they are appointed have trial jurisdiction over petty offenses committed on Federal reservations if the defendant waives his right to be tried in the district court and consents to be tried before the commissioner. Act of October 9, 1940, 54 Stat. 1058, 18 U. S. C. § 576. A petty offense is an offense the penalty for which does not exceed confinement in a common jail without hard labor for a period of six months or a fine of $500, or both, 18 U. S. C. § 541. Appeals from convictions by commissioners lie to the district court. 18 U. S. C. 576a. These rules do not apply to trials before United States commissioners in such cases, since rules of procedure and practice in such matters were specially prescribed by the Supreme Court on January 6, 1941, 311 U. S. 733 et seq. The substantive law applicable in such cases with respect to offenses other than so-called Federal offenses is governed by 18 U. S. C. § 468 (Laws of States adopted for punishing wrongful acts; effect of repeal). In addition, National Park commissioners have limited trial jurisdiction with respect to offenses committed in National Parks. Trials before commissioners in such cases are not governed by these rules, although when a National Park commissioner conducts a proceeding as a committing magistrate, these rules are applicable.

Among the statutes relating to jurisdiction of and proceedings before National Park commissioners are the following:

U. S. C. Title 16:

§ 10 (Arrests by employees of park service for violation of laws and regulations)
§ 10a (Arrests by employees for violation of regulations made under § 9a)
§ 27 (Yellowstone National Park; commissioner; jurisdiction and powers)
§ 66 (Yosemite and Sequoia National Parks; commissioners; appointment; jurisdiction)
§ 70 (Same; arrests by commissioners for certain offenses; holding persons arrested for trial; bail)
§ 101 (Mount Rainier National Park; commissioner; arrest; bail)
§ 102 (Same; commissioner; direction of process of; arrests by other officers)
§ 117b (Mesa Verde National Park; application of Colorado laws to offenses)
§ 117f (Same; criminal offenses not covered by section 117c; jurisdiction of commissioner)
§ 117g (Same; process to whom issued; arrests without process)
§ 129 (Crater Lake National Park; commissioner; appointment; powers and duties)
§ 130 (Same; commissioner; arrests by; bail)
§ 131 (Same; commissioner; direction of process; arrest without process)
§ 172 (Glacier National Park; commissioner; jurisdiction; powers and duties)
§ 173 (Same; commissioner; arrest of offenders, confinement, and bail)
§ 174 (Same; commissioner; process directed to marshal; arrest without process)
§ 198b (Rocky Mountain National Park; punishment of offenses; Colorado laws when followed)
§ 198e (Same; United States Commissioner; appointment; jurisdiction; issuing process; appeals; rules of procedure)
§ 198f (Same; United States Commissioner; arrest of persons for offenses not covered by section 198c; bail)
§ 198g (Same; United States Commissioner; process to whom directed; arrest without process)
§ 204b (Lassen Volcanic National Park; application of California laws to offenses)
§ 204e (Same; United States Commissioner; appointment; jurisdiction of offenses; appeals; rules of procedure)
§ 204f (Same; criminal offenses not covered by section 204c; jurisdiction of commissioner)
§ 204g (Same; process to whom issued; arrests without process)
§ 376 (Hot Springs National Park; prosecutions for violations of law or rules and regulations)
§ 377 (Same; prosecutions for other offenses)
§ 378 (Same; process directed to marshal; arrests by others)
§ 381 (Same; execution of sentence on conviction)
§ 382 (Same; imprisonment for nonpayment of fines or costs)
§ 395b (Hawaii National Park; application of Hawaiian laws to offenses)
§ 395e (Same; United States Commissioner; appointment; jurisdiction of offenses; appeals; rules of procedure; acting commissioners)
§ 395f (Same; criminal offenses not covered by section 395c; jurisdiction of commissioner)
§ 395g (Same; process to whom issued; arrests without process)
§ 403c–1 (Shenandoah National Park and Great Smoky Mountains National Park; notice of assumption of police jurisdiction over Shenandoah Park by United States; exceptions)
§ 403c–5 (Same; United States Commissioner; appointment; jurisdiction of offenses; appeals; rules of procedure)
§ 403c–6 (Same; jurisdiction of other commissioners)
§ 403c–7 (Same; commissioner's jurisdiction of offenses not covered by section 403c–3).

U. S. C. Title 16:
§ 403c–8 (Same; process to whom directed; arrest without process)
§ 415 (National Military Parks; arrest and prosecution of offenders)

Note to Subdivision (b) (5)

1. Foreign extradition proceedings are governed by the following statutes:

U. S. C. Title 18:
§ 651 (Fugitives from foreign country)
§ 652 (Fugitives from country under control of United States)
§ 653 (Surrender of fugitive)
§ 654 (Time allowed for extradition)
§ 655 (Evidence on hearing)
§ 656 (Witnesses for indigent defendants)
§ 657 (Place and character of hearing)
§ 658 (Continuance of provisions limited)
§ 659 (Protection of accused)
§ 660 (Agent receiving offenders; powers)

Interstate rendition or extradition proceedings are governed by the following statutes:

U. S. C. Title 18:
§ 662 (Fugitives from State or Territory)
§ 662c (Fugitives from State or Territory; arrest and removal)
§ 662d (Fugitives from State or Territory; provisional arrest and detention)

2. Proceedings relating to forfeiture of property used in connection with a violation of a statute of the United States are governed by various statutes, among which are following:

U. S. C. Title 16:
§ 26 (Yellowstone Park; regulations for hunting and fishing in; punishment for violation; forfeitures)
§ 65 (Yosemite and Sequoia National Parks; seizure and forfeiture of guns, traps, teams, horses, and so forth)
§ 99 (Mount Rainier National Park; protection of game and fish; forfeitures of guns, traps, teams, and so forth)
§ 117d (Mesa Verde National Park; forfeiture of property used for unlawful purpose)
§ 128 (Crater Lake National Park; hunting and fishing; forfeitures or seizure of guns, traps, teams, etc., for violating regulations)
§ 171 (Glacier National Park; hunting and fishing; forfeitures and seizures of guns, traps, teams, and so forth)
§ 198d (Rocky Mountain National Park; forfeiture of property used in commission of offenses)
§ 204d (Lassen Volcanic National Park; forfeiture of property used for unlawful purposes)
§ 635 (Importing illegally taken skins; forfeiture)
§ 706 (Arrests; search warrants)
§ 727 (Upper Mississippi River Wild Life and Fish Refuge; powers of employees of Department of the Interior; searches and seizures)
§ 772e (Penalties and forfeitures)

U. S. C. Title 18:
§ 286 (Forfeiture of counterfeit obligations, etc.; failure to deliver)
§ 645 (Confiscation of firearms possessed by convicted felons)
§ 646 (Remission or mitigation of forfeitures under liquor laws; possession pending trial)
§ 647 (Use of confiscated motor vehicles)

U. S. C. Title 19:
§ 483 (Forfeitures; penalty for aiding unlawful importation)
§ 1592 (Fraud; penalty against goods)
§ 1602 (Seizure; report to collector)
§ 1603 (Seizure; collector's reports)
§ 1604 (Seizure; prosecution)
§ 1605 (Seizure; custody)
§ 1606 (Seizure; appraisement)
§ 1607 (Seizure; value $1,000 or less)
§ 1608 (Seizure; claims; judicial condemnation)

U. S. C. Title 19:
§ 1609 (Seizure; summary of forfeiture and sale)
§ 1610 (Seizure; value more than $1,000)
§ 1611 (Seizure; sale unlawful)
§ 1612 (Seizure; summary sale)
§ 1613 (Disposition of proceeds of forfeited property)
§ 1614 (Release of seized property)
§ 1615 (Burden of proof in forfeiture proceedings)
§ 1703 (Seizure and forfeiture of vessels)
§ 1705 (Destruction of forfeited vessel)

U. S. C. Title 21:
§ 334 (Seizure)
§ 337 (Proceedings in name of United States; provision as to subpenas)
§ 401 (Seizure of war materials intended for unlawful export generally; forfeiture)
§ 402 (Seizure of war materials intended for unlawful export generally; warrant for detention of seized property)
§ 403 (Seizure of war materials intended for unlawful export generally; petition for restoration of seized property)
§ 404 (Seizure of war materials intended for unlawful export generally; libel and sale of seized property)
§ 405 (Seizure of war materials intended for unlawful export generally; method of trial; bond for redelivery)
§ 406 (Seizure of war materials intended for unlawful export generally; sections not to interfere with foreign trade)

U. S. C. Title 26:
§ 3116 (Forfeitures and seizures)

3. Collection of fines and penalties is accomplished in the same manner as the collection of a civil judgment. See Rule 69 (a) of the Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723c. For mode of discharging indigent convicts imprisoned for non-payment of fine, see 18 U. S. C. § 641.

4. The Federal Juvenile Delinquency Act, 18 U. S. C. §§ 921–929, authorizes prosecution of a juvenile delinquent on the charge of juvenile delinquency, if the juvenile consents to this procedure. In such cases the court may be convened at any time and place, in chambers or otherwise, and the trial is without a jury. The purpose of excepting proceedings under the Act is to make inapplicable to them the requirement of an arraignment in open court (Rule 10) and other similar provisions.

5. As habeas corpus proceedings are regarded as civil proceedings, they are not governed by these rules. The procedure in such cases is prescribed by 28 U. S. C. §§ 451–466. Appeals in habeas corpus proceedings are governed by the Federal Rules of Civil Procedure (Rule 81 (a) (2) of the Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723c).

Note to Subdivision (c)

1. This rule is analogous to Rule 81 (e) of the Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723c.

2. 1 U. S. C. §§ 1–6, containing general rules of construction, should be read in conjunction with this rule.

3. In connection with the definition of "attorney for the Government", see the following statutes:

U. S. C. Title 5:
§ 291 (Establishment of Department)
§ 293 (Solicitor General)
§ 294 (Assistant to Attorney General)
§ 295 (Assistant Attorneys General)
§ 309 (Conduct and argument of cases by Attorney General and Solicitor General)
§ 310 (Conduct of legal proceedings)
§ 311 (Performance of duty by officers of Department)
§ 312 (Counsel to aid district attorneys)
§ 315 (Appointment and oath of special attorneys or counsel)

U. S. C. Title 28:
§ 481 (District attorneys)
§ 483 (Assistant district attorneys)
§ 485 (District attorneys; duties)

4. The last sentence of this rule has particular reference to 18 U. S. C. § 682 (Appeals; on behalf of the United

States; rules of practice and procedure), which authorizes the United States to appeal in criminal cases from a decision on a motion to quash, a demurrer or a special plea in bar, if the defendant has not been placed in jeopardy. It is intended that the right of the Government to appeal in such cases should not be affected as the result of the substitution of a motion under Rule 12 for a demurrer, motion to quash and a special plea in bar. The rule is equally applicable to any other statute employing the same terminology.

Rule 55. Records

The clerk of the district court and each United States commissioner shall keep such records in criminal proceedings as the Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of Senior Circuit Judges, may prescribe.

Notes of Advisory Committee on Rules

The Federal Rules of Civil Procedure Rule 79, 28 U. S. C. foll. § 723c, prescribed in detail the books and records to be kept by the clerk in civil cases. Subsequently to the effective date of the civil rules, however, the Act establishing the Administrative Office of the United States Courts became law (Act of August 7, 1939; 53 Stat. 1223; 28 U. S. C. §§ 444–450). One of the duties of the Director of that Office is to have charge, under the supervision and direction of the Conference of Senior Circuit Judges, of all administrative matters relating to the offices of the clerks and other clerical and administrative personnel of the courts, 28 U. S. C. § 446. In view of this circumstance it seemed best not to prescribe the records to be kept by the clerks of the district courts and by the United States commissioners, in criminal proceedings, but to vest the power to do so in the Director of the Administrative Office of the United States Courts with the approval of the Conference of Senior Circuit Judges.

Rule 56. Courts and Clerks

The circuit court of appeals and the district court shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making motions and orders. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Sundays and legal holidays.

Notes of Advisory Committee on Rules

1. The first sentence of this rule is substantially the same as Rule 77 (a) of the Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723c, except that it is applicable to circuit courts of appeals as well as to district courts.

2. In connection with this rule, see 28 U. S. C. § 14 (Monthly adjournments for trial of criminal causes) and 28 U. S. C. § 15 (Special terms). These sections "indicate a policy of avoiding the hardships consequent upon a closing of the court during vacations," Abbott v. Brown, 241 U. S. 606, 611, 36 S. Ct. 689, 60 L. Ed. 1199.

3. The second sentence of the rule is identical with the first sentence of Rule 77 (c) of the Federal Rules of Civil Procedure, 23 U. S. C. foll. § 723.

4. The term "legal holidays" includes Federal holidays as well as holidays prescribed by the laws of the State where the clerk's office is located.

Rule 57. Rules of Court

(a) Rules by District Courts and Circuit Courts of Appeals.

Rules made by district courts and circuit courts of appeals for the conduct of criminal proceedings shall not be inconsistent with these rules. Copies of all rules made by a district court or by a circuit court of appeals shall upon their promulgation be furnished to the Administrative Office of the United States Courts. The clerk of each court shall make appropriate arrangements, subject to the approval of the Director of the Administrative Office of the United States Courts, to the end that all rules made as provided herein be published promptly and that copies of them be available to the public.

(b) Procedure Not Otherwise Specified.

If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute.

Notes of Advisory Committee on Rules

Note to Subdivision (a)

This rule is substantially a restatement of 28 U. S. C. § 731 (Rules of practice in district courts). A similar provision is found in Rule 83 of the Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723c.

Note to Subdivision (b)

1. One of the purposes of this rule is to abrogate any existing requirement of conformity to State procedure on any point whatsoever. The Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723c, have been held to repeal the Conformity Act, 28 U. S. C. § 724, Sibbach v. Wilson, 312 U. S. 1, 10, 61 S. Ct. 422, 85 L. Ed. 479.

2. While the rules are intended to constitute a comprehensive procedural code for criminal cases in the Federal courts, nevertheless it seemed best not to endeavor to prescribe a uniform practice as to some matters of detail, but to leave the individual courts free to regulate them, either by local rules or by usage. Among such matters are the mode of impaneling a jury, the manner and order of interposing challenges to jurors, the manner of selecting the foreman of a trial jury, the matter of sealed verdicts, the order of counsel's arguments to the jury, and other similar details.

Rule 58. Forms

The forms contained in the Appendix of Forms are illustrative and not mandatory.

Notes of Advisory Committee on Rules

This rule is similar to Rule 84 of the Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723c. The forms are found in the Appendix (Forms 1–27). The practice of appending illustrative forms to serve as guides has been found useful in connection with many criminal codes. See A. L. I. Code of Criminal Procedure, Commentaries to secs. 152, 153 and 188. See, also, Criminal Appeals Rules, 292 U. S. 661, and Petty Offense Rules, 311 U. S. 733. Forms are contained in the English Indictments Act, 1915, 5 & 6 Geo. V, c. 90.

Rule 59. Effective Date

These rules take effect on the day which is 3 months subsequent to the adjournment of the first regular session of the 79th Congress, but if that day is prior to September 1, 1945, then they take effect on September 1, 1945. They govern all criminal proceedings thereafter commenced and so far as just and practicable all proceedings then pending.

Notes of Advisory Committee on Rules

This rule is based on the Act of June 29, 1940 (54 Stat. 688; 18 U. S. C. § 687). It is substantially the same as Rule 86 of the Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723c.

Rule 60. Title

These rules may be known and cited as the Federal Rules of Criminal Procedure.

Notes of Advisory Committee on Rules

This rule is similar to Rule 85 of the Federal Rules of Civil Procedure, 28 U. S. C. foll. § 723c, which reads as follows:

These rules may be known and cited as the Federal Rules of Civil Procedure.

APPENDIX OF FORMS

(See Rule 58)

FORM 1.—INDICTMENT FOR MURDER IN THE FIRST DEGREE OF FEDERAL OFFICER

In the District Court of the United States for the _____ District of _____, _____ Division

UNITED STATES OF AMERICA
v.
JOHN DOE
No. _____
(18 U. S. C. §§ 452, 253)

The grand jury charges:

On or about the _____ day of _____, 19__, in the _____ District of _____, John Doe with premeditation and by means of shooting murdered John Roe, who was then an officer of the Federal Bureau of Investigation of the Department of Justice engaged in the performance of his official duties.

A True Bill.

_____,
Foreman.

_____,
United States Attorney.

FORM 2.—INDICTMENT FOR MURDER IN THE FIRST DEGREE ON FEDERAL RESERVATION

In the District Court of the United States for the _____ District of _____, _____ Division.

UNITED STATES OF AMERICA
v.
JOHN DOE
No. _____
(18 U. S. C. §§ 451, 452)

The grand jury charges:

On or about the _____ day of _____, 19____, in the _____ District of _____, and on lands acquired for the use of the United States and under the (exclusive) (concurrent) jurisdiction of the United States, John Doe with premeditation shot and murdered John Roe.

A True Bill.

_____,
Foreman.

_____,
United States Attorney.

FORM 3.—INDICTMENT FOR MAIL FRAUD

In the District Court of the United States for the _____ District of _____, _____ Division.

UNITED STATES OF AMERICA
v.
JOHN DOE ET AL.
No. _____
(Criminal Code § 215, 18 U. S. C. § 338)

The grand jury charges:

1. Prior to the _____ day of _____, 19____, and continuing to the _____ day of _____, 19____,[1] the defendants John Doe, Richard Roe, John Stiles and Richard Miles devised and intended to devise a scheme and artifice to defraud purchasers of stock of XY Company, a California corporation, and to obtain money and property by means of the following false and fraudulent pretenses, representations and promises, well knowing at the time that the pretenses, representations and promises would be false when made: That the XY Company owned a mine at or near San Bernardino, California; that the mine was in actual operation; that gold ore was being obtained at the mine and sold at a profit; that the current earnings of the company would be sufficient to pay dividends on its stock at the rate of six per cent per annum.

2. On the _____ day of _____, 19____, in the _____ District of _____, the defendants for the purpose of executing the aforesaid scheme and artifice and attempting to do so, caused to be placed in an authorized depository for mail matter a letter addressed to Mrs. Mary Brown, 110 Main Street, Stockton, California, to be sent or delivered by the Post Office Establishment of the United States.

SECOND COUNT

1. The Grand Jury realleges all of the allegations of the first count of this indictment, except those contained in the last paragraph thereof.

2. On the _____ day of _____, 19____, in the _____ District of _____, the defendants, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, caused to be placed in an authorized depository for mail matter a letter addressed to Mr. John J. Jones, 220 First Street, Batavia, New York, to be sent or delivered by the Post Office Establishment of the United States.

A True Bill.

_____,
Foreman.

_____,
United States Attorney.

[1] Insert last mailing date alleged.

FORM 4.—INDICTMENT FOR SABOTAGE

In the District Court of the United States for the _____ District of _____, _____ Division.

UNITED STATES OF AMERICA
v.
JOHN DOE
No. _____
(50 U. S. C. § 103)

The grand jury charges:

On or about the _____ day of _____, 19__, within the _____ District of _____, while the United States was at war, John Doe, with reason to believe that his act might injure, interfere with or obstruct the United States in preparing for or carrying on the war, wilfully made and caused to be made in a defective manner certain war material consisting of shells, in that he placed and caused to be placed certain material in a cavity of the shells so as to make them appear to be solid metal, whereas in fact the shells were hollow.

A True Bill.

_____,
Foreman.

_____,
United States Attorney.

FORM 5.—INDICTMENT FOR INTERNAL REVENUE VIOLATION

In the District Court of the United States for the _____ District of _____, _____ Division.

UNITED STATES OF AMERICA v. JOHN DOE | No. _____ (26 U. S. C. § 2833)

The grand jury charges:

On or about the _____ day of _____, 19__, in the _____ District of _____, John Doe carried on the business of a distiller without having given bond as required by law.

A True Bill.

_____,
Foreman.

_____,
United States Attorney.

FORM 6.—INDICTMENT FOR INTERSTATE TRANSPORTATION OF STOLEN MOTOR VEHICLE

In the District Court of the United States for the _____ District of _____, _____ Division.

UNITED STATES OF AMERICA v. JOHN DOE | No. _____ (18 U. S. C. § 408)

The grand jury charges:

On or about the _____ day of _____, 19__, John Doe transported a stolen motor vehicle from _____, State of _____, to _____, State of _____, in _____ District of _____, and he then knew the motor vehicle to have been stolen.

A True Bill.

_____,
Foreman.

_____,
United States Attorney.

FORM 7.—INDICTMENT FOR RECEIVING STOLEN MOTOR VEHICLE

In the District Court of the United States for the _____ District of _____, _____ Division.

UNITED STATES OF AMERICA v. JOHN DOE | No. _____ (18 U. S. C. § 408)

The grand jury charges:

On or about the _____ day of _____, 19__, in the _____ District of _____, John Doe received and concealed a stolen motor vehicle, which was moving as interstate commerce, and he then knew the motor vehicle to have been stolen.

A True Bill.

_____,
Foreman.

_____,
United States Attorney.

FORM 8.—INDICTMENT FOR IMPERSONATION OF FEDERAL OFFICER

In the District Court of the United States for the _____ District of _____, _____ Division.

UNITED STATES OF AMERICA v. JOHN DOE | No. _____ (18 U. S. C. § 76)

The grand jury charges:

On or about the _____ day of _____, 19___, in the _____ District of _____, John Doe with intent to defraud the United States and Mary Major falsely pretended to be an officer and employee acting under the authority of the United States, namely, an agent of the Federal Bureau of Investigation, and falsely took upon himself to act as such, in that he falsely stated that he was a special agent of the Federal Bureau of Investigation engaged in pursuit of a person charged with an offense against the United States.

A True Bill.

_____,
Foreman.

_____,
United States Attorney.

FORM 9.—INDICTMENT FOR OBTAINING MONEY BY IMPERSONATION OF FEDERAL OFFICER

In the District Court of the United States for the _____ District of _____, _____ Division.

UNITED STATES OF AMERICA v. JOHN DOE | No. _____ (18 U. S. C. § 76)

The grand jury charges:

On or about the _____ day of _____, 19___, in the _____ District of _____, John Doe with intent to defraud the United States and Mary Major, falsely pretended to be an officer and employee acting under the authority of the United States, namely, an agent of the Alcohol Tax Unit of the Department of the Treasury, and in such pretended character demanded and obtained from Mary Major the sum of $100.

A True Bill.

_____,
Foreman.

_____,
United States Attorney.

FORM 10.—INDICTMENT FOR PRESENTING FRAUDULENT CLAIM AGAINST THE UNITED STATES

In the District Court of the United States for the _____ District of _____, _____ Division.

UNITED STATES OF AMERICA v. JOHN DOE | No. _____ (18 U. S. C. § 80)

The grand jury charges:

On or about the _____ day of _____, 19___, in the _____ District of _____,

John Doe presented to the War Department of the United States for payment a claim against the Government of the United States for having delivered to the Government 100,000 lineal feet of No. 1 white pine lumber, and he then knew the claim to be fraudulent in that he had not delivered the lumber to the Government.

A True Bill.

_____,
Foreman.

_____,
United States Attorney.

FORM 11.—INFORMATION FOR FOOD AND DRUG VIOLATION

In the District Court of the United States for the _____ District of _____, _____ Division.

UNITED STATES OF AMERICA *v.* JOHN DOE ET AL.	No. _____ (21 U. S. C. §§ 331, 333, 342)

The United States Attorney charges:

On or about the _____ day of _____, 19__, in the _____ District of _____, John Doe unlawfully caused to be introduced into interstate commerce by delivery for shipment from the city [1] of _____, _____ (State), to the city [1] of _____, _____ (State), a consignment of cans containing articles of food which were adulterated in that they consisted in whole or in part of decomposed vegetable substance.

_____,
United States Attorney.

FORM 12.—WARRANT FOR ARREST OF DEFENDANT

In the District Court of the United States for the _____ District of _____, _____ Division.

UNITED STATES OF AMERICA *v.* JOHN DOE	No. _____

To _____: [2]

You are hereby commanded to arrest John Doe and bring him forthwith before the District Court for the _____ District of _____ in the city of _____ to answer to an indictment charging him with robbery of property of the First National Bank of _____, in violation of 12 U. S. C. § 588b.

_____,
Clerk.

By _____,
Deputy Clerk.

[1] Name of city is stated only to preclude a motion for a bill of particulars and not because such a statement is an essential fact to be alleged.

[2] Insert designation of officer to whom warrant is issued, e. g., "any United States Marshal or any other authorized officer"; or "United States Marshal for _____ District of _____"; or "any United States Marshal"; or "any Special Agent of the Federal Bureau of Investigation"; or "any United States Marshal or any Special Agent of the Federal Bureau of Investigation"; or "any agent of the Alcohol Tax Unit."

FORM 13.—SUMMONS

In the District Court of the United States for the _____ District of _____, _____ Division.

UNITED STATES OF AMERICA *v.* JOHN DOE	No. _____

To JOHN DOE:

You are hereby summoned to appear before the District Court for the District of _____ at the Post Office Building in the city of _____ on the _____ day of _____, 19___ at 10 o'clock A. M. to answer to an information charging you with unlawful transportation of intoxicating liquor on which the internal revenue tax had not been paid.

_____,
Clerk.

By _____,
Deputy Clerk.

This summons was received by me at _____ on _____

_____,
Defendant.

FORM 14.—WARRANT OF REMOVAL

In the District Court of the United States for the _____ District of _____, _____ Division.

To _____:

The grand jury of the United States for the _____ District of _____ having indicted John Doe on a charge of murder in the first degree, and John Doe having been arrested in this District and, after (waiving) hearing, having been committed by a United States Commissioner to your custody pending his removal to that district,

You are hereby commanded to remove John Doe forthwith to the _____ District of _____ and there deliver him to the United States Marshal for that District or to some other officer authorized to receive him.

_____,
United States District Judge.

Dated at _____ this _____ day of _____ 19____.

FORM 15.—SEARCH WARRANT (UNDER 18 U. S. C. § 287)

To _____:

Affidavit having been made before me by John Doe that he has reason to believe that on the premises known as _____ Street, in the city of _____, in the District of _____, there is now being concealed certain property, namely, certain dies, hubs, molds and plates, fitted and intended to be used for the manufacture of counterfeit coins of the United States, and as I am satisfied that there is probable cause to believe that the property so fitted and intended to be used is being concealed on the premises above described,

You are hereby commanded to search the place named for the property specified, serving this warrant and making the search in the daytime, and if

the property be found there to seize it, prepare a written inventory of the property seized and bring the property before me.

Dated this _____ day of _____.

_____,
U. S. Commissioner for the _____
*District of*_____.

FORM 16.—MOTION FOR THE RETURN OF SEIZED PROPERTY AND THE SUPPRESSION OF EVIDENCE

In the District Court of the United States for the _____ District of _____, _____ Division.

No. _____

John Doe hereby moves this Court to direct that certain property of which he is the owner, a schedule of which is annexed hereto, and which on the night of _____, 19____, at the premises known as _____ Street, in the city of _____, in the District of _____, was unlawfully seized and taken from him by two deputies of the United States Marshal for this District, whose true names are unknown to the petitioner, be returned to him and that it be suppressed as evidence against him in any criminal proceeding.

The petitioner further states that the property was seized against his will and without a search warrant.

_____,
Attorney for Petitioner.

FORM 17.—APPEARANCE BOND

In the District Court of the United States for the _____ District of _____, _____ Division.

We, the undersigned, jointly and severally acknowledge that we and our personal representatives are bound to pay to the United States of America the sum of _____ Dollars ($_____).

The condition of this bond is that the defendant _____ is to appear in the District Court of the United States[1] for the _____ District of _____ at _____[2] in accordance with all orders and directions of the Court[3] relating to the appearance of the defendant before the Court[3] in the case of *United States* v. _____, File number _____; and if the defendant appears as ordered, then this bond is to be void, but if the defendant fails to perform this condition payment of the amount of the bond shall be due forthwith. If the bond is forfeited and if the forfeiture is not set aside or remitted, judgment may be entered upon motion in the District Court of the United States for the _____ District of _____ against each debtor jointly and severally for the amount above stated together with interest and costs, and execution may be issued or payment secured as provided by the Federal Rules of Criminal Procedure and by other laws of the United States.

This bond is signed on this _____ day of _____, 19__ at _____.

_____,	_____,
Name of Defendant.	*Address.*
_____,	_____,
Name of Surety.	*Address.*
_____,	_____,
Name of Surety.	*Address.*

Signed and acknowledged before me this _____ day of _____, 19____.

_____

Approved: _____.

JUSTIFICATION OF SURETIES

1, the undersigned surety, on oath say that I reside at _____; and that my net worth is the sum of _____ Dollars ($_____).

I further say that _____[4]

_____,
Surety.

Sworn to and subscribed before me this _____ day of _____, 19____ at _____.

_____

FORM 18.—WAIVER OF INDICTMENT

In the District Court of the United States for the _____ District of _____, _____ Division.

UNITED STATES OF AMERICA
v.
JOHN DOE
No. _____
(18 U. S. C. § 408)

John Doe, the above named defendant, who is accused of violating the National Motor Vehicle Theft Act, being advised of the nature of the charge and of his rights, hereby waives in open court prosecution by indictment and consents that the proceeding may be by information instead of by indictment.

_____,
Defendant.

_____,
Witness.

_____,
Counsel for Defendant.

FORM 19.—MOTION BY DEFENDANT TO DISMISS THE INDICTMENT

In the District Court of the United States for the _____ District of _____, _____ Division.

UNITED STATES OF AMERICA
v.
JOHN DOE
No. _____

The defendant moves that the indictment be dismissed on the following grounds:

1. The court is without jurisdiction because the offense if any is cognizable only in the _____ Division of the _____ District of _____.

2. The indictment does not state facts sufficient to constitute an offense against the United States.

[1] If appearance is to be before a commissioner, change the words following "appear" to "before _____, United States Commissioner."

[2] Insert place.

[3] Change "Court" to "Commissioner" if necessary. See Note 1.

[4] These lines are to provide for additional justification if the Commissioner or Court so directs.

3. The defendant has been acquitted (convicted, in jeopardy of conviction) of the offense charged therein in the case of *United States* v. _____ in the District Court for the _____ District of _____, Case No. _____ terminated on _____.

4. The offense charged is the same offense for which the defendant was pardoned by the President of the United States on _____ day of _____, 19____.

5. The indictment was not found within three years next after the alleged offense was committed.

Signed: _____,

_____.

Address

FORM 20.—SUBPOENA TO TESTIFY

In the District Court of the United States for the _____ District of _____, _____ Division.

To _____:

You are hereby commanded to appear in the District Court of the United States for the _____ District of _____ at the Courthouse, in the city of _____, on the _____ day of _____, 19____ at 10 o'clock A. M. to testify in the case of *United States* v. *John Doe*.

This subpoena is issued on application of the (United States) (defendant).

_____,
Clerk.

By _____,
Deputy Clerk.

FORM 21.—SUBPOENA TO PRODUCE DOCUMENT OR OBJECT

In the District Court of the United States for the _____ District of _____, _____ Division.

To _____:

You are hereby commanded to appear in the District Court of the United States for the _____ District of _____ at the Courthouse, in the city of _____, on the _____ day of _____, 19___ at 10 o'clock A. M. to testify in the case of *United States* v. *John Doe* and bring with you _____

_____

_____

_____

This subpoena is issued upon application of the (United States) (defendant).

_____.
Clerk.

By _____,
Deputy Clerk.

FORM 22.—WARRANT FOR ARREST OF WITNESS

In the District Court of the United States for the _____ District of _____, _____ Division.

_____ v. _____ } No. _____

To _____:

You are hereby commanded to arrest John Doe and bring him forthwith before the District Court for the _____ District of _____ in the city of _____, for the reason that he wilfully failed to appear after having been served with subpoena to appear at the trial of the case of *United States* v. *Roe* on the _____ day of _____, 19___.

You are further commanded to detain him in your custody until he is discharged by the Court.

Upon order of Honorable _____, United States District Judge at _____ this _____ day of _____, 19___.

_____,
Clerk.

By _____,
Deputy Clerk.

FORM 23.—MOTION FOR NEW TRIAL

In the District Court of the United States for the _____ District of _____, _____ Division.

UNITED STATES OF AMERICA v. JOHN DOE } No. _____

The defendant moves the court to grant him a new trial for the following reasons:

1. The court erred in denying defendant's motion for acquittal made at the conclusion of the evidence.

2. The verdict is contrary to the weight of the evidence.

3. The verdict is not supported by substantial evidence.

4. The court erred in sustaining objections to questions addressed to the witness Richard Roe.

5. The court erred in admitting testimony of the witness Richard Roe to which objections were made.

6. The court erred in charging the jury and in refusing to charge the jury as requested.

7. The defendant was substantially prejudiced and deprived of a fair trial by reason of the following circumstances: the attorney for the government stated in his argument that the defendant had not taken the witness stand and that the defendant had been convicted of crime.

8. The court erred in denying the defendant's motion for a mistrial.

_____,
Attorney for Defendant.

FORM 24.—MOTION IN ARREST OF JUDGMENT

In the District Court of the United States for the _____ District of _____, _____ Division.

UNITED STATES OF AMERICA v. JOHN DOE } No. _____

The defendant moves the court to arrest the judgment for the following reasons:

1. The indictment does not state facts sufficient to constitute an offense against the United States.

2. This court is without jurisdiction of the offense, in that the offense if any was not committed in this district.

_____,
Attorney for Defendant.

FORM 25.—JUDGMENT AND COMMITMENT

In the District Court of the United States for the _____ District of _____, _____ Division.

UNITED STATES OF AMERICA
v.
_____ } No. _____

JUDGMENT AND COMMITMENT

On this _____ day of _____, 19_____, came the attorney for the government and the defendant appeared in person and [1]_____

_____

It is Adjudged that the defendant has been convicted upon his plea of [2]_____ of the offense of _____ as charged [3] _____; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of [4]_____

_____

It is Adjudged that [5]_____

_____

It is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

_____,
United States District Judge.

The Court recommends commitment to: [6]_____

_____

_____,
Clerk.

[Endorsement [1]]

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on _____ to _____

Defendant noted appeal on _____

Defendant released on _____

Defendant elected, on _____, not to commence service of the sentence.

Defendant's appeal determined on _____

Defendant delivered on _____ to _____ at _____, the institution designated by the Attorney General, with a certified copy of the within Judgment and Commitment.

_____,
United States Marshal.

[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

[2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

[3] Insert "in count(s) number _____" if required.

[4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be further imprisoned until payment of fine or fine and costs, or until he is otherwise discharged as provided by law.

[5] Enter any order with respect to suspension and probation.

[6] For use of Court wishing to recommend a particular institution.

FORM 26.—NOTICE OF APPEAL

In the District Court of the United States for the _____ District of _____, _____ Division.

UNITED STATES OF AMERICA
v.
JOHN DOE } No. _____

Name and address of appellant _____

Name and address of appellant's attorney_____

_____.

Offense _____

Concise statement of judgment or order, giving date, and any sentence _____

Name of institution where now confined, if not on bail _____

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the _____ Circuit from the above-stated judgment.

Dated _____.

_____,
Appellant.[1]

FORM 27.—STATEMENT OF DOCKET ENTRIES

In the District Court of the United States for the _____ District of _____, _____ Division.

UNITED STATES OF AMERICA
v.
JOHN DOE } No. _____

1. Indictment or information for _____ _____ Filed _____, 19___.
2. Arraignment _____, 19___.
3. Plea to indictment or information _____ _____, 19___.
4. Motion to withdraw plea of guilty denied _____ _____, 19___.
5. Trial by jury, or by court if jury waived _____ _____, 19___.
6. Verdict or finding of guilt _____ _____, 19___.

[1] Or "Appellant's Attorney" or "Clerk" as the case may be.

NOTE.—Compare Form of Notice of Appeal under Rule 3, form No. 1, annexed to Rules of Criminal Procedure after Plea of Guilty, Verdict or Finding of Guilt, following 18 U. S. C. § 688. See Rule 39 (a) (1) (Taking Appeal; and Petition for Writ of Certiorari—Taking Appeal: Notice of Appeal) Federal Rules of Criminal Procedure.

7. Judgment—(with terms of sentence) or order _____ Entered _____, 19___.
8. Notice of appeal filed _____, 19___.
Dated _____.

Attest _____,
Clerk.

NOTE.—Compare Form of Clerk's Statement of Docket Entries to be Forwarded under Rule 4, Form No. 3 (to accompany duplicate notice of appeal to the United States Circuit Court of Appeals), annexed to Rules of Criminal Procedure after Plea of Guilty, Verdict of Finding of Guilt, following 18 U. S. C. § 688.

§ 688. Proceedings in criminal cases after verdict, after finding of guilt by court or after plea of guilty; power of Supreme Court to prescribe by rule.

The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases in district courts of the United States, including the District Courts of Alaska, Hawaii, Puerto Rico, Canal Zone, District of Columbia, and Virgin Islands, in the Supreme Courts of Hawaii, and Puerto Rico, in the United States Court for China, in the United States Circuit Courts of Appeals, in the United States Court of Appeals for the District of Columbia, and in the Supreme Court of the United States: *Provided*, That nothing herein contained shall be construed to give the Supreme Court the power to abridge the right of the accused to apply for withdrawal of a plea of guilty, if such application be made within ten days after entry of such plea, and before sentence is imposed.

The right of appeal shall continue in those cases in which appeals are now authorized by law, but the rules made as herein authorized may prescribe the times for and manner of taking appeals and applying for writs of certiorari and preparing records and bills of exceptions and the conditions on which supersedeas or bail may be allowed.

The Supreme Court may fix the dates when such rules shall take effect and the extent to which they shall apply to proceedings then pending, and after they become effective all laws in conflict therewith shall be of no further force. (Feb. 24, 1933, ch. 119, §§ 1–3, 47 Stat. 904; Mar. 8, 1934, ch. 49, 48 Stat. 399; June 7, 1934, ch. 426, 48 Stat. 926; June 25, 1936, ch. 804, 49 Stat. 1921.)

RULES OF CRIMINAL PROCEDURE AFTER PLEA OF GUILTY, VERDICT OR FINDING OF GUILT

Under authority of this section, the Rules of Criminal Procedure After Plea of Guilty, Verdict or Finding of Guilt (Rules 1–13), commonly known as the Criminal Appeals Rules, were promulgated by order of the Supreme Court of the United States dated May 7, 1934, to be applicable to such proceedings on and after Sept. 1, 1934. The same court, by order dated Mar. 17, 1941, made said rules applicable, on and after July 1, 1941, to all such proceedings in criminal cases in the district courts of Alaska, Hawaii, Puerto Rico, Canal Zone and the Virgin Islands, and in all subsequent proceedings in such cases in the United States Circuit Courts of Appeals and in the Supreme Court. Said rules, including amendments to Rules 1, 2, 5, and 11 on May 24, 1937, May 31, 1938, Oct. 21, 1940, and Feb. 11, 1943, respectively, are now covered by Rules 32–39 of the Federal Rules of Criminal Procedure, effective Mar. 21, 1946, which were also promulgated under authority of this section, and which are set out following section 687 of this title. See note under that section for history of those rules.

TABLE

Showing distribution of former Rules of Criminal Procedure after Plea of Guilty, Verdict or Finding of Guilt into the Federal Rules of Criminal Procedure.

Criminal Rules after Plea of Guilty, Verdict, etc.:	*Federal Rules of Criminal Procedure*
1	32, 38 (b)
2 (1) (2) (3)	33, 34
2 (4)	32 (d)
3	37
4	39
5	38
6	38 (b), 46 (a) (2)
7	38 (b)
8	37 (a) (1)
9	39, 51
10	39 (d)
11	37 (b)
12	57
13	45, 54 (c)

CROSS REFERENCES

Extension of this section to proceedings to punish for criminal contempt of court, see section 689 of this title.

§ 689. Proceedings to punish for criminal contempt of court; application to sections 687 and 688.

The provisions of sections 687 and 688 of this title are extended to proceedings to punish for criminal contempt of court. (Nov. 21, 1941, ch. 492, 55 Stat. 779.)

Part 3.—PRISONERS AND THEIR TREATMENT

Chapter 22.—GENERAL PROVISIONS