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NEW FEDERAL CRIMINAL RULES

FROM SUSPICION TO ACCUSATION

OSMOND K. FRAENKEL†

Whoever sets out to formulate rules for the administration of the criminal law is confronted with the limitations on the power of the Government embodied in the Bill of Rights. It is a commonplace that these provisions result in some impairment of the efficiency of law enforcement agencies. But it is part of our fundamental belief that this price is worth paying, since it safeguards the freedom of the whole population. Perhaps nowhere is this conflict between the rights of the individual and the safety of the state more acute than in that part of criminal procedure with which we are here concerned. For at every step, from suspicion through indictment, the police and prosecutors are restricted by constitutional guaranties which sometimes thwart their desires.

In many fields some restrictions may be found desirable beyond those required by the Bill of Rights. Thus the Congress has outlawed wiretapping,¹ despite the Olmstead decision² that this form of detective enterprise is not barred by the Fourth Amendment. In each instance consideration must be given to conflicting public interests: the need of the state that crime be detected and punished, and the equally great need that the agencies of crime detection do not become agencies of oppression. We shall endeavor to keep these various threads in mind as we proceed. There are two main fields into which this portion of the subject falls: efforts to obtain evidence from the suspect himself (for other methods of securing evidence generally raise no problems); and the various steps by which the suspect is brought to the bar of justice.

OBTAINING EVIDENCE FROM THE SUSPECT

When suspicion of crime arises, we are met with the conflict we have already mentioned. How can suspicion be turned into certainty, or, at least, into proof sufficient to be taken account of in the courts? Easy ways are to tap the telephone of the suspect, to install a dictograph in his room, or to place a detectaphone on the walls outside, in order to hear what he says; to raid his house and office so as to be able to scrup-

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tinize his private papers; finally, to call him in and, if he refuses to talk, to use that silence against him later—if, indeed, he be not "third degreed" into confession. This section will consider the restrictions which have been placed around the use of these methods of detection.

Wiretapping. Although this convenient method of obtaining proof of crime has until now been held to be not within the protection of the Fourth Amendment, it has been banned by legislation. Congress has declared it objectionable because of the inevitable invasion of the privacy of many persons in addition to the particular suspect and because it offers an easy opportunity for blackmail. Successive Attorneys General have heretofore been unable to convince Congress of the propriety of wiretapping even when restricted to such crimes as sabotage, espionage and kidnapping, and where it was proposed to allow the tapping only on direct authorization from the Attorney General.

It is difficult to see how any rule dealing with wiretapping could be promulgated without departing from principles which Congress has frequently refused to modify. But if the subject be considered open, the New York law should be studied. In New York, by recent constitutional amendment, wiretapping has been prohibited except by court order based on an affidavit showing probable cause—thus analogizing this method of inquiry to the search warrant. It should be kept in mind, however, that the analogy is imperfect. The secrecy of wiretapping and the long period of time during which it is generally practiced make it particularly susceptible to abuse. Search warrants can be directed solely at the person under suspicion; tapping of telephone wires necessarily involves overhearing conversations of many persons not at all suspect. This is particularly so when a hotel or pay station wire is tapped, as has often been the case. Furthermore, wiretapping involves search for evidence, as distinct from search for instrumentalities of crime—and search for

3. See note 2 supra. The question may be reconsidered by the Supreme Court in Goldman v. United States, 118 F. (2d) 310 (C.C.A. 2d, 1941), cert. granted, 62 Sup. Ct. 119 (1941).
4. See S. 3756, 75th Cong., 3d Sess. (1938); H. J. Res. 571, 76th Cong., 3d Sess. (1940); H. R. 2266, H. R. 3099 and H. R. 4228, 77th Cong., 1st Sess. (1941), and particularly the hearings on the latter group.
5. N. Y. Const., Art. I, §12 provides: "The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof."
evidence is unconstitutional. In this connection conversations in which past criminal acts are recited may be distinguished from conversations in which a crime is being planned — the latter, like instrumentalities of crime, being liable to seizure or tapping. But in no case should the rule against wiretapping be relaxed without requiring advance judicial scrutiny of the propriety of the tapping and providing judicial review if the wiretaps are instrumental in procuring conviction.

Notice should be taken here, also, of the cases which have ruled that not only the wiretaps themselves are banned, but also any material obtained by their use. The most interesting variation is the Goldstein case, now awaiting decision by the Supreme Court. In that case a large number of persons were charged with conspiring to defraud insurance companies by presenting fake disability claims. Two of the persons involved pleaded guilty and testified for the Government against others who claimed innocence. The defendants urged that the two who had confessed should not be allowed to testify, claiming that the confessions had been procured by illegal wiretapping. The trial court, after an extensive preliminary hearing, admitted the testimony on the ground that the defendants had failed to sustain the burden of showing that the tapping was the inducing cause of the confessions. The Circuit Court of Appeals for the Second Circuit held this error since the burden should have been placed upon the Government. Although the Government had failed in its burden, the Circuit Court affirmed the convictions. One ground of decision, admitted by the Government to have been mistaken, was that the Communications Act which prohibits wiretapping did not prohibit use of the wiretaps; the court also held that the defendants who were brought to trial could not object since none of their own conversations had been illegally overheard — on this point a decision from the Supreme Court may be forthcoming by the time this paper appears.

10. In its brief in opposition to application for certiorari, p. 16, n. 9, the Government conceded that the Communications Act as construed by Nardone v. United States, 308 U.S. 338 (1940), forbids the use of information derived from wiretaps. But in its brief after certiorari was granted, the Government argued that the prohibition was limited to a use for some private purpose and that, while the use of contents of intercepted messages was forbidden, use of their existence was not.
11. See note 1 supra.
12. The forthcoming decision may, however, ignore this point, since the Government argues that the trial court had properly found that the wiretapping was not the inducing cause of the testimony. The Court had followed its similar ruling in the related case of United States v. Weiss, 34 F. Supp. 99 (S. D. N. Y. 1940).
To some extent, this involves the question whether a person can object to the unconstitutional seizure of papers from the possession of another. The lower federal courts have uniformly held that only those who claim ownership or right of possession in the property can object to its seizure.\textsuperscript{12} The Supreme Court may, of course, in the \textit{Goldstein} case reject the analogy and, without passing on the search and seizure question, rule only on the effect of the Communications Act.\textsuperscript{14} In that event the codifying committee must determine whether, in relation to searches, the rules should impose restrictions not required by the Constitution on the use of evidence unconstitutionally seized; to allow a defendant, for example, to challenge material so seized from a third person which is to be used against him. The rules should, therefore, take cognizance of this type of situation by outlining a procedure for the conduct of the necessary preliminary hearing and specifying who could complain of both illegal wiretapping or seizure.

\textit{Dictographs and Detectaphones.} Both these devices consist of microphones. The dictograph is put inside the room in which it is expected that the conversations will take place and is connected by wires to listeners on the outside; its installation thus ordinarily involves a trespass. The detectaphone is put outside the room, on the exterior wall (or, in case of adjoining rooms, on the dividing wall); thus its installation may not involve a trespass. In the case of the dictograph the voices are directly picked up by the microphone; in the case of the detectaphone they are picked up through the wall. This latter device amounts to a "tapping" of walls, rather than of wires.

There is as yet no Supreme Court pronouncement with regard to either of these devices, though, by the time this article appears in print, that Court in the \textit{Goldman} case\textsuperscript{15} may have clarified the status of the detectaphone. The trial court assumed in that case that had the conversations been overheard through a dictograph (which was actually installed, but found ineffective) they would have been inadmissible as the product of a trespass, and thus of an unconstitutional search. But the detectaphone was considered merely a form of eavesdropping by both the trial court and the Circuit Court of Appeals, and the conversations were admitted.


\textsuperscript{14} There is room for the conclusion that, since the law expressly prohibits the use of prohibited wiretaps, anyone can object to such use, whereas the policy of the Fourth Amendment does not require a similar extension of the rule. Moreover, the point may not be decided at all because of the Government's contention on the facts. See note 12 \textit{supra}.

\textsuperscript{15} 118 F. (2d) 310 (C.C.A. 2d, 1941), \textit{cert. granted}, 62 Sup. Ct. 119 (1941).
Regardless of the outcome of this case, the situation seems to be one in which the New York wiretapping rule can be applied. Investigating officers should not be allowed to use such devices at their discretion; nor is the requirement that they secure authorization from their superior officers, or from the Attorney General, a sufficient safeguard. Some prior judicial supervision should be imposed, some disclosure made of the facts justifying the use of either of these extraordinary listening devices. Of course the papers on which the judge acted need not be filed at the time the device is employed, but they should be available for later scrutiny should the conversations so overheard be used at a trial. Such a limitation would curb reckless use of these devices, although it must be admitted that similar restrictions on the use of search warrants have not done away with all abuses.

Searches and Seizures. This rather fully developed field of law has been extensively commented upon. The proposed rules would, therefore, do little more than codify the decisions. They would concern themselves with the situations under which searches might be made without any warrant, with the facts which must be stated and the formalities which must be observed to obtain a warrant, with the particularity with which the premises to be searched and objects to be seized must be described, and with the manner in which the warrant must be executed, and with the nature of the property which may be seized.

We have already, under the head of wiretapping, discussed the question of the scope of the Fourth Amendment with regard to the right of one person to object to the seizure of the property of another and the

16. See Cornelius, Search and Seizure (2d ed. 1930); Lasson, The History and Development of the Fourth Amendment (1937); Atkinson, Admissibility of Evidence Obtained through Unreasonable Searches and Seizures (1925) 25 Col. L. Rev. 11; Fraenkel, Concerning Searches and Seizures (1921) 34 Harv. L. Rev. 361; Fraenkel, Recent Developments in the Law of Search and Seizure (1929) 13 Minn. L. Rev. 1; Harno, Evidence Obtained by Illegal Search and Seizure (1925) 19 Ill. L. Rev. 303; Wood, The Scope of the Constitutional Immunity against Searches and Seizures (1927) 34 W. Va. L. Q. 1.


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The extent to which the rules might deal with that subject. Also the rules might abolish certain other limitations on the scope of the Fourth Amendment, which have been imposed by holdings of the Supreme Court. For instance, the Supreme Court has held that evidence is admissible, though seized without right by private persons, or by state officers. The rules might undo these rulings and require the rejection of such evidence. And the rules might embody the result reached by the Court of Appeals for the District of Columbia in *Nueslein v. District* which rejected an admission made to an officer during an illegal search.

**Admissions.** Generally speaking, admissions freely made are admissible in evidence against a defendant. And while it was formerly supposed that admissions required corroboration, the Supreme Court has recently ruled otherwise where the admissions were made before the commission of the crime under prosecution. Whether the rules should concern themselves with these subjects is doubtful. However, to the extent that admissions are obtained by the police or prosecutor they come directly within our subject. We have already considered admissions made consequent upon an illegal search. We must consider also admissions obtained as the result of the violation of various other rights, such as prolonged police questioning or the use of the third degree.

Two constitutional principles merge here—the right to be free from self-incrimination and the right to due process of law, both guaranteed by the Fifth Amendment. In consequence of these it is settled that an accused may not be compelled to make a statement and may, therefore, remain silent when accused, except, perhaps, when confronted by an accusing co-defendant. If, however, he does talk, what he says may

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28. The cases have been collected in Notes (1938) 115 A.L.R. 1510, (1932) 80 A.L.R. 1235. For a curious variant see Rocchia v. United States, 78 F. (2d) 966 (C. C. A. 9th, 1935).
29. The state of the law is in considerable doubt. The Supreme Court has said, by way of dictum, that it is proper to admit in evidence statements made by one prisoner in the presence of another, the latter having remained silent, "under such circumstances as would warrant the inference that he would naturally have contradicted them if he did not assent to their truth." *Sparf v. United States*, 156 U. S. 51, 55 (1895). But in *Brain v. United States*, 168 U. S. 532 (1897), the Court concluded that a statement made by the accused after arrest was not a voluntary one because induced by the fear that his failure to make any answer to an accusation would be held against him. In *Dickerson v. United States*, 65 F. (2d) 824 (App. D. C. 1933), *cert. denied*, 290 U. S.
be used against him unless he is induced to speak by fear or threats. The use of variants of the third degree, such as prolonged questioning, also bars admissions. The rules can well formulate the basic positions judicially established, settle the conflict with regard to statements by a co-defendant and make clear that there is a duty on the part of police and prosecutor alike to advise every accused person not only that he need make no statement but also that his silence cannot be held against him. Admissions should be barred not only when obtained illegally, but also when this warning has not been given.

**Bringing the Suspect into Court**

Since the only constitutional limitations are the restrictions on the issuance of warrants of arrest contained in the Fourth Amendment and the indictment provisions of the Fifth, the rule-making committee may exercise a greater freedom in this field than in that of securing evidence of crime.

*Arrest.* Various authorities have recognized that the present law of arrest is unsatisfactory, due principally to an inevitable conflict between police efficiency and ideals of freedom. Recent critical treatment of the problem has pointed out the wide divergence between the restraints of the law and the practical dictates of police efficiency. Specific suggestions for change include 'giving the police the right to do certain things without making an arrest, such as frisking a suspect for a gun,' allowing them to discharge arrested persons without arraignment, when innocence is manifest, and placing the financial burden of police lawlessness on the community.

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33. *Ibid.* The police do these things anyway, he indicates, though with the risk of litigation.

34. *Hall, The Law of Arrest in Relation to Contemporary Social Problems* (1936) 3 U. of CHI. L. Rev. 345. The author emphasizes the importance of a change in attitude toward those large categories of arrested persons such as drunks and vagrants,
It is now well settled that federal agents may arrest without warrant under a variety of circumstances—in certain respects having greater power than some state police officers. For while it is universally agreed that any officer may arrest whenever an offense is being committed or attempted in his presence, or when he has reasonable cause for believing that the arrested person committed the crime, there is some uncertainty whether an arrest is justified when in fact no crime had been committed, merely because the officer had reasonable cause to believe that it had.

In some of the states, as in New York, the law authorizes an arrest without warrant only if in fact a felony has been committed. Moreover, it has been held in New York that the right to arrest a person suspected of having committed a felony exists only if the officer knows that the felony was in fact committed, except, perhaps, when the arrest is made at night, when reasonable ground for belief is enough if it be later shown that the felony was actually committed. In England and other states an arrest may be made without a warrant if there were reasonable grounds to believe that the accused had committed a felony, even if it later appeared that no one had committed any felony at all.

A recent attempt to make the New York law conform failed.

There is no federal statute dealing with this phase of the subject and the cases are not sufficiently numerous or authoritative to justify a dogmatic statement of the applicable rules. But it has been said that an arrest is justified if the officer has reasonable cause for believing that a felony has been committed.

The right of private citizens to arrest without warrant seems to have received little consideration in the federal courts. In New York this which swell the statistics of illegal arrests. He believes that such cases should be treated outside the ordinary criminal law. He further stresses the necessity of immediately producing prisoners before a judge, noting that only thus can the use of the third degree be lessened, citing Rep. on Lawlessness in Law Enforcement, Nat. Comm. on Law Observance and Law Enforcement (1931).
right is less than that of the police officer, since the private citizen cannot arrest merely on reasonable ground for believing that the person to be arrested committed the crime. He acts at his peril if it turns out that the crime was not in fact committed by the person arrested.

It seems settled, however, that a state officer may arrest for a federal crime under the same circumstances as could a federal officer; at least it was so decided in Marsh v. United States, when the arrest was for a crime committed in the presence of the officer. Since some of these points have not been passed upon by the Supreme Court the formulation of precise rules on the right to arrest without warrant would be of great service.

An interesting sidelight on the subject of arrest is found in the case of United States v. Wingert. There Judge Dickinson refused to issue a bench warrant after indictment on the ground that the United States Attorney should have presented facts to the Court indicating probable cause. In an eloquent opinion Judge Dickinson pointed out the dangers which can result if, instead of affording the accused a preliminary hearing before the commissioner and thus throwing light on the basis for the accusation, the prosecutor uses secret proceedings in order to obtain an indictment. However, the Supreme Court, in Ex parte United States, unanimously rejected this view and issued a mandamus to compel the signing of the bench warrant on the ground that the grand jury determination of probable cause was conclusive.

Among the problems incident to arrest is the right of the authorities to photograph or fingerprint. In New York this right had been denied in the absence of statute. In United States v. Kelly the Circuit Court of Appeals for the Second Circuit reached a contrary conclusion on the ground that fingerprinting was an appropriate method of identification. The Court noted, however, that the Attorney General had issued


46. 29 F. (2d) 172 (C. C. A. 2d, 1928), cert. denied, 279 U. S. 849 (1929); accord, United States v. One Packard Truck, 55 F. (2d) 882 (C. C. A. 2d, 1932).

47. Many of the cases are in the field of search and seizure (see note 17 supra). See also note 36 supra.
48. 55 F. (2d) 960 (E. D. Pa., 1932).
49. 287 U. S. 241 (1932).
51. 55 F. (2d) 67 (C. C. A. 2d, 1932).
instructions that photographs, fingerprints and Bertillon measurements should not be made public before trial unless the prisoner became a fugitive and that in case of acquittal these data should be either destroyed or surrendered. Rules embodying these instructions would be useful.

We conclude that in some respects the law governing arrests should be brought into harmony with actual police practices. Specifically, the right to arrest without warrant should be freed from some of the restrictions which have been placed upon its use, and the rules should make clear the extent to which such arrests may be made by government agents, local police or private persons. The rules might also usefully specify the manner in which warrants should issue and be executed.

In the interest of efficient police work, the authorities should be allowed to fingerprint and photograph arrested persons, but in cases where the accused is finally acquitted these records should be destroyed.

**Prompt Arraignment: the Third Degree.** Mistreatment of prisoners by police eager to secure confessions is of unhappily frequent occurrence, and is one of the chief problems facing the codifiers. It is essential that the accused be brought into court without unreasonable delay. The longer a man is held incommunicado, the easier it is to force a confession from him, even without resort to the third degree. In the recent case of *Lisenba v. California*, although state law provided that the accused should be immediately arraigned, the arresting officers kept him in custody for several days, took him to the District Attorney's office and to a private residence for prolonged questioning; later, they again took him from jail for more questioning and, on this occasion, refused him the right to see his attorney (also a violation of state law). Such practices, the Supreme Court said, "may, in the end, defeat rather than further the ends of justice"; consequently they must be carefully scrutinized in view of the probability of a tyrannically obtained confession. But the majority of the Court concluded that due process had not been infringed because the confession of a confederate rather than the prolonged questioning of the accused induced the confession. Mr. Justice Black, with whom Mr. Justice Douglas agreed, dissented.

We have discussed this case at length because, although based on the acts of state police, it throws light on the nature of the problem involved in the arraignment of prisoners. Clearly the usual requirements of immediate arraignment and the right to consult counsel are an insufficient protection if statements obtained despite violation of these protections can be used to convict. It should not lie in the mouth of prosecuting officials who use such illegal methods in order to obtain confessions

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52. 62 Sup. Ct. 280 (1941).
53. CAL. PEN. CODE (Deering, 1937) § 849.
54. *Id.* at § 825.
to say that, in fact, the particular confession was motivated by some other cause. And, that the Supreme Court has sanctioned this result as a matter of constitutional law does not absolve a rule-making body from reconsidering the issue on broad grounds of policy.

The first question to be considered is whether the likelihood of such occurrences can be lessened by stricter procedural requirements; the second, whether public policy requires the exclusion of statements made during illegal detention. Some years ago the American Civil Liberties Union proposed stringent rules designed to lessen the use of the third degree,\(^5\) the essential purpose of these rules was to remove the custody of prisoners entirely from the control of police and prosecution and to permit their withdrawal from jail only upon court order; the proposals also ensured the right to counsel and to a copy of any statement taken by the police or the district attorney. There can be no doubt that if such provisions were effectively observed improper police practices would be reduced to a minimum. It is clear, however, that no rule of prison administration would ensure immediate arraignment of arrested persons. The proposed rules would have made impossible the second questioning of Lisenba, but not his first.

But these proposals were vigorously opposed by prosecuting officials on the ground that they unduly hampered police work. It was argued that the questioning of arrested persons before they have a chance to talk with lawyers is important, not so much because of direct confessions which may result, but because in this way statements are often obtained incriminating others. The point was made that, especially when gangs are involved, it is important for the police or prosecutor to be able to question arrested persons before the leaders even know of the arrest. Once the prisoner is taken to court and the gang's lawyer appears, fright will seal a mouth otherwise ready to talk. While these contentions have much force and indicate that there is no easy solution to the problem, it is clear that some regulation of present practice is desirable.

**Indictment or Information.** Not much scope exists for rules to determine the method by which accusation may be brought to judicial scrutiny. For the Fifth Amendment commands the use of the grand jury in all "capital, or otherwise infamous" crimes, and the Supreme Court has so defined these as to include all crimes punishable in a penitentiary,\(^6\) or at hard labor.\(^7\) This definition includes instances where the offense

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55. Such bills were introduced in both the New York Assembly (see *Assem. J.* 162d Sess. 1939, vol. I, p. 453 Int. 1336; *id.* 163d Sess. 1940, vol. I, p. 44 Int. 182, Int. 188) and Senate (see *Sen. J.* 162d Sess. 1939, vol. I, p. 291 Int. 920).

56. *Ex parte* Wilson, 114 U. S. 417 (1885); Mackin v. United States, 117 U. S. 348 (1886); Wong Wing v. United States, 163 U. S. 228 (1896).

itself might not be serious, nor the imprisonment for a long period. But there can be little doubt that the constitutional guaranty would apply to a crime traditionally considered serious, such as burglary, even though Congress might impose punishment in a workhouse without hard labor.

Nevertheless, there is a large field of crimes not involving malum per se which can be prosecuted by information, depending on the extent of the punishment. And in view of the constantly increasing number of crimes of this category this method of prosecution will grow in importance. The chief question to be considered here is whether any restrictions should be imposed on the institution of prosecutions by the various United States Attorneys. The Attorney General has, from time to time, required his approval to the institution of proceedings under various laws — even to grand jury proceedings. Such action generally has been motivated by a desire for uniformity in statutory interpretation, or, as in the case of sedition laws, has been an attempt to prevent possible interferences with free speech. In those fields it is doubtful whether the rules can be of any assistance.

Two problems have arisen in connection with grand jury subpoenas. The first is whether a subpoena should be vacated if it does not disclose either the identity of the person accused or the nature of the crime under investigation. The law seems to be that a prospective witness has no right to know these things in advance, apparently on the theory that his readiness to tell the truth might be affected if he could consult in advance with the suspected person. Whether or not this use of the "John Doe" subpoena lends itself to abuse is one of the things which must be considered in the formulation of any rules. Another problem arises from the fact that a grand jury subpoena is subject to scrutiny as to reasonableness under the Fourth Amendment. The courts in many instances have modified subpoenas by restricting their scope to

58. In United States v. Moreland, 258 U. S. 433 (1922), the offense was failure to support minor children. Justices Brandeis, Holmes and Taft dissented on the ground that the offense was not serious.

59. In Wong Wing v. United States, 163 U. S. 228 (1896), the imprisonment was for sixty days; in United States v. Moreland, 258 U. S. 433 (1922), it was for six months.

60. See N. Y. Times, December 22, 1941, p. 21, col. 3.


matters clearly relevant to the inquiry and have relieved the prospective witness from the burden of producing records covering an unreasonable number of years. It is doubtful whether anything more can be done in the rules than to paraphrase the judicial decisions on the subject, since each case must be considered on its own merits.

Removal Proceedings. The last step in the course from suspicion to accusation is the availability of the accused. No problem arises, of course, when he is found in the district where the alleged crime was committed, or generally, when, having fled, he is apprehended elsewhere. But, sometimes in this latter case, and almost always when a particular defendant has never been in the place where the trial is to take place, the attempt to remove is resisted.

There is no precise constitutional barrier to any scheme thought desirable. The Sixth Amendment requires only that the trial shall be held in the district where the crime was committed, and that such district shall have been previously ascertained by law. Congress is thus left free to determine the manner of removal and the extent to which it can be questioned. Existing law affords the accused the right to challenge the removal in the removal proceedings themselves. But since there is no appeal from a removal order it can be reviewed only through habeas corpus proceedings. It might, for the sake of simplicity, be desirable to change this rule so as to do away with any need for habeas corpus as a method of review. There is no good reason why there should be the trouble and delay incident to the habeas corpus hearing, nor why, as existing practice apparently permits, the arrested person should have two chances to introduce evidence.

Some problems arise in connection with the removal hearings. The Government generally relies on the indictment as its only evidence of probable cause that the prisoner has committed the crime, and on proof of his identity as the person accused — these being the only facts which may be put in issue. And on the subject of identity there is nothing which can be considered in rules. With regard to probable cause, however, the situation is different, because the Supreme Court has held that the indictment merely shifts to the prisoner the burden of showing that there is no probable cause, and when he has done so the Government

must offer proof beyond the indictment itself. This the Government is generally reluctant to do, partly because it dislikes having to disclose its evidence, partly because of an unwillingness to let its witnesses be cross-examined and often because of the expense of transporting the witnesses to the place where the objecting prisoner was arrested. In consequence, removal proceedings frequently fail and justice may be thwarted.

For this situation there are two principal alternatives: to make the indictment conclusive against the accused, or to provide some substitute for testimony by living witnesses on behalf of the Government. The first solution may be of doubtful constitutional validity, and would in any event be unwise. For there are many cases, particularly of conspiracy, in which the prisoner should be allowed to prove, if he can, that he had no part in the alleged crime. Otherwise persons might be taken to distant places for trial on some far fetched contention that they were responsible for a crime there committed. In cases involving groups unpopular at the place of trial the results of unchecked removal might be disastrous.

On the other hand the Government should have the right to compel removal by a showing of something less than common law proof. If the indictment itself cannot be accepted as countervailing to the accused’s testimony, why cannot the grand jury minutes play such a role? The judge trying the removal proceedings can then form some judgment of the substance of the Government’s case and determine whether probable cause exists despite the accused’s proof. That the trier of the facts would not see the witnesses who had testified before the grand jury is not important, since he can in no event determine issues of credibility. That these witnesses have not been subject to cross-examination is also not a substantial argument against the proposal, since the removal proceedings do not finally adjudicate anything. At least the use of grand jury minutes in such a situation would help the Government without serious inconvenience to it and without injustice to the accused. Unless a substantial showing of his participation in the crime was thus disclosed and his testimony to the contrary, therefore, put in issue, there would be


no removal. And if an issue of fact is thus created there should be no obstacle to removal.

CONCLUSION

The function of a rule-making body is threefold. First, such a body can formulate the state of the law insofar as constitutional provisions affect the problem. Second, it can formulate the state of the law in areas left free from constitutional restriction to the extent that existing legislation or judicial decision may have established a satisfactory regulation. Finally, the rule-making body may in many instances develop regulations which either change existing statute law or judicial interpretation or impose restrictions upon the activity of law enforcement agencies not now in force, where the rule-making body believes such further restrictions are in the public interest. This last function of its work will, of course, be the most difficult. For it will require a delicate balancing of the needs of the law-enforcing arm against the equally great need of the people that their liberties be respected. In trying to adjust this balance the rule-making body can well consider the words of Mr. Justice Day in Weeks v. United States\(^7\) where he said:

"The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."

70. 232 U. S. 383, 393 (1914). See also the dissenting opinions of Holmes and Brandeis, JJ., in Olmstead v. United States, 277 U. S. 438, 469, 471 (1928).