COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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TO: **Hon. Alicemarie H. Stotler, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Hon. W. Eugene Davis, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT **Report of Advisory Committee on Rules of Criminal Procedure**

DATE: **December 3, 1997**

I. INTRODUCTION.

At its meeting on October 13th and 14th, 1997, the Advisory Committee on the Rules of Criminal Procedure considered proposed or pending amendments to several Rules of Criminal Procedure. This report addresses those proposals. The minutes of that meeting are attached.

II. ACTION ITEM--The Size of Grand Juries

The Advisory Committee was asked to study a pending legislative proposal which would amend 18 U.S.C. § 3321 to reduce the size of grand juries to not less than nine, nor more than thirteen persons and would require at least seven jurors to concur as long as nine members were present. Currently not less than 16 nor more than 23 jurors compose a grand jury, with a requirement that 16 jurors be present. See Rule 6(a). Additionally, Rule 6(f) requires that at least 12 jurors concur before returning an indictment.

Following discussion of the issue, the Advisory Committee voted unanimously to oppose any reduction in the size of the grand jury. As the attached minutes reflect, the Committee was concerned in part with reducing citizen participation in an important aspect of criminal trials and the loss of a wider diversity of viewpoints and experiences if the size was reduced.

Recommendation: *The Advisory Committee recommends that the Judicial Conference oppose any attempts to reduce the size of grand juries.*

III. INFORMATION ITEMS

1. Amendments to Rules of Criminal Procedure Out for Public Comment

At its June 1997 meeting the Standing Committee approved a number of amendments for public comment; the comment period ends February 15, 1998. The rules affected are as follows:

a. Rule 6. Grand Jury (Presence of Interpreters; Return of Indictment)

b. Rule 7(c)(2). The Indictment and the Information (Technical amendment connected to adoption of Rule 32.2, *infra*)

c. Rule 11. Pleas (Acceptance of Pleas and Agreements, etc.).

d. Rule 24(c). Alternate Jurors (Retention During Deliberations).

e. Rule 30. Instructions (Submission of Requests for Instructions).

f. Rule 31(c). Verdict. (Technical amendment connected to adoption of Rule 32.2, *infra*).

g. Rule 32(d). Sentence and Judgment (Technical amendment connected to adoption of Rule 32.2, *infra*).

h. Rule 32.2. Criminal Forfeiture (New rule).

i. Rule 38. Stay of Execution (Technical amendment connected to adoption of Rule 32.2, *supra*).

j. Rule 54. Application and Exception (Technical amendment).

2. Proposed Amendments to the Rules of Criminal Procedure Being Considered by the Advisory Committee

At its October 1997 meeting the Advisory Committee considered proposed changes to: Rule 5(c) (Initial Appearance Before Magistrate, discussed *infra*); Rule 6 (Response to legislative proposal to reduce size of grand jury, discussed *supra*); Rule 11 (Notice to defendant of relevant sentencing information); Rule 12.2 (Ordering of mental examination); Rule 23 (Response to proposal to reduce size of jury); Rule 24 (Proposal to equalize number of peremptory challenges and proposal to provide for random selection); Rule 26 (Taking of testimony from remote location); Rule 32 (Ordering of mental examination of defendant); Rule 43 (Permit defendant to waive appearance at arraignment); and the Rules Governing Habeas Corpus Proceedings (Conflict in timing of responses to petitions).

A number of the foregoing rules will be on the agenda for the Committee's Spring meeting, at which point it will consider specific amending language. The Committee's discussion of the foregoing issues is reflected in the attached minutes from the meeting.

3. Action on Proposed Amendment to Rule 5(c) (Initial Appearance Before Magistrate).

Under 18 U.S.C. § 3060, a magistrate judge does not have the authority to grant a continuance in a preliminary examination if the defendant objects to such. In that case, a continuance may nonetheless be granted by a district judge. Rule 5(c) currently tracks the language of the statute. The Federal Magistrate Judges Association (FMJA) had proposed in October 1996 that the Advisory Committee consider proposing amendments to both Rule 5(c) and 18 U.S.C. § 3060. Given the past discussions about using the Rules Enabling Act to amend a rule of procedure which would then conflict with a clear statutory provision, the Advisory Committee recommended to the Standing Committee at its June 1997 meeting that the appropriate bodies within the Judicial Conference propose an amendment to the statute. Following discussion, the Standing Committee indicated that it would be more appropriate for the Advisory Committee to use the Rules Enabling Act, i.e., propose an amendment, if any, to Rule 5(c), publish the rule for comment, and provide a catalyst for legislative change.

The Advisory Committee discussed the issue at its October meeting and, as noted in the attached minutes, ultimately decided not to propose any amendments to Rule 5(c) at this point.

4. Discussion of Pending Legislation Affecting Victims' Rights

A subcommittee, chaired by Judge David Dowd, has, and will continue to monitor the pending Crime Victims' Assistance Act (S. 1081). The bill includes a number of proposed amendments to the Federal Rules of Criminal Procedure and also provides for a six-month delay in the effective date to provide the Judicial Conference with the opportunity to propose any alternatives.

Attachments

Minutes of Committee Meeting, Oct. 1996

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

December 9, 1997

MEMORANDUM TO STANDING RULES COMMITTEE

SUBJECT: *Grand Jury Legislation*

I am attaching a copy of H.R. 1536, which would reduce the size of a grand jury. It was introduced by Representative Bob Goodlatte on May 6, 1997, and was referred to the Committees on Court Administration and Case Management and Criminal Law for consideration. At their respective summer meetings, the committees took no position on H.R. 1536 and recommended that the bill be referred to the rules committees for consideration under the rulemaking process.

I am also attaching a memorandum describing the historical background regarding the advisory committee's consideration of an earlier similar proposal, including a preliminary report on the legal aspects.

John K. Rabiej

Attachments

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GPO's PDF version of this bill | References to this bill in the Congressional Record | Link to the Bill Summary & Status file. | Download this bill. (1,869 bytes).

Grand Jury Reduction Act (Introduced in the House)

HR 1536 IH

105th CONGRESS

1st Session

H. R. 1536

To amend title 18, United States Code, to reduce the size of grand juries.

IN THE HOUSE OF REPRESENTATIVES

May 6, 1997

Mr. GOODLATTE (for himself and Mr. GOODE) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 18, United States Code, to reduce the size of grand juries.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the `Grand Jury Reduction Act'.

SEC. 2. REDUCTION OF SIZE OF GRAND JURIES.

Section 3321 of title 18, United States Code, is amended to read as follows:

`Sec. 3321. Number of grand jurors; summoning additional jurors

`(a) Every grand jury impaneled before any district court shall consist of not less than 9 nor more than 13 persons. If less than 9 of the persons summoned attend, they shall be placed on the grand jury and the court shall order that an additional number of persons be summoned to complete the grand jury in a manner ordered by the court in accordance with procedures set forth in section 1866 of title 28. Whenever a challenge to a grand juror is allowed, and there not in attendance others jurors sufficient to complete the grand jury, the court shall make a like order.

`(b) An indictment may be found only if at least 9 jurors are present and 7 of those present concur.'.

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

May 16, 1997
Via Federal Express Mail

MEMORANDUM TO JUDGE D. LOWELL JENSEN AND PROFESSOR DAVID A. SCHLUETER

SUBJECT: *Background on Grand Jury Materials*

For your information, I have attached materials that we located in our records on an earlier proposal considered by the Advisory Committee on Criminal Rules to reduce the number of grand jurors.

In 1972, the chair of the House Judiciary Committee requested the judiciary to study the grand jury process. The Chief Justice assigned the project to the Advisory Committee on Criminal Rules. The committee prepared a draft report with wide-ranging recommendations on the grand jury process, including one to reduce its size. The committee expected to forward the report to the Judicial Conference for approval in 1976, before sending it to the Hill. In late 1975, however, the House Judiciary Committee was considering several pending bills on grand jury. And it requested a copy of the preliminary report before the report was submitted to the Conference. The preliminary report on the grand jury was sent to the Hill, but the report was never submitted to the Conference. (In the interim, several new bills were introduced that raised new issues. A new subcommittee was planned to be formed, but it appears that the subcommittee was not renewed at that time.)

In sum, a proposal to amend the statute governing the grand jury process to reduce the number of grand jurors was considered and approved by the Advisory Committee on Criminal Rules. But the Standing Committee and the Judicial Conference were not requested to adopt the position nor was the proposal vetted through the rulemaking process.

Items G and Q are memoranda from the Reporter, Professor Wayne R. LaFave, on the proposal to reduce the number of grand jurors. It is a detailed memorandum of law that addresses and answers a number of challenges to the proposal. If we decide to poll the committee on this proposal, this memorandum would be helpful to them and to the drafting of a Committee Note. The Committee on Court Administration and Case Management meets on June 15-18 outside of Washington. I will forward to you a copy of the final agenda item prepared for that committee, which should be available next week.

John K. Rabiej

Attachments

cc: Honorable Alicemarie H. Stotler (with attach.)

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
SUPREME COURT BUILDING
WASHINGTON, D. C. 20544

December 8, 1975

TO THE ADVISORY COMMITTEE ON CRIMINAL RULES

Enclosed is a copy of the Grand Jury Report which has been submitted to the House Judiciary Committee.

Sincerely,

William E. Foley
Secretary

cc: Honorable Alfonso J. Zirpoli
Honorable Alexander Harvey II
Honorable Roszel C. Thomsen
Professor Frank J. Remington

(10/29/75 draft)

REPORT
(PRELIMINARY DRAFT)
OF THE
ADVISORY COMMITTEE
ON CRIMINAL RULES
CONCERNING
THE
FEDERAL GRAND JURY

November, 1975

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES CONCERNING THE FEDERAL GRAND JURY

Table of Contents

This is a preliminary draft of a Report by the Advisory Committee on Criminal Rules concerning the operation of the federal grand jury system. The Report has not yet been approved by the Judicial Conference of the United States, to which it will be presented at the next meeting of the Conference in the Spring of 1976. Attached hereto is an addendum which presents in summary form the additional views of the Committee on the Administration of the Criminal Law of the Judicial Conference.

Recommendations are made in this Report for certain changes by way of additions to or amendment of statutes and rules of court which it is believed would make the grand jury system more fair and efficient in its operation. Although the Committee has given primary emphasis to those changes which could be accomplished by rule or statute consistent with the existing provisions of the Fifth Amendment, Part One of this Report deals with H.J. Res. 46, 94th Cong., 1st Sess., which proposes an amendment to the Constitution.

The Committee presents six affirmative recommendations in this Report. They are: (1) that 18 U.S.C. § 3321 and Fed. R. Crim. P. 6 be revised to provide that federal grand juries be reduced in size so as to consist of nine to fifteen members and that concurrence by two-thirds of the members be required for an indictment; (2) that 18 U.S.C. § 3321 be amended to make it clear that a grand jury may be summoned from the entire district or from any statutory or nonstatutory division or divisions thereof and that a grand jury so impanelled be empowered

to consider offenses alleged to have been committed at any place in the district; (3) that Fed. R. Crim. P. 6 be revised to make the recordation of grand jury proceedings mandatory rather than permissible; (4) that Fed. R. Crim. P. 7 be revised to provide expressly that a motion to dismiss an indictment may not be based on the ground that it is not supported by sufficient or competent evidence; (5) that a statute be enacted making the unauthorized disclosure of grand jury proceedings a criminal offense, and that an appropriate accommodating amendment be made to Fed. R. Crim. P. 6; and (6) that 18 U.S.C. § 3500 be amended to provide for disclosure in advance of trial of the grand jury testimony of witnesses. These six proposals are discussed herein in Parts Two through Seven, respectively, of this Report.

The Committee has also given careful consideration to several other proposals which have been made, including but not limited to those appearing in H.R. 1277, H.R. 2986, H.R. 6006, and H.R. 6207, 94th Cong., 1st Sess. The Committee recommends that these other proposals not be adopted, and specifically does not favor enactment of any of the aforementioned four bills. Although the reasons for rejecting many of the proposals which have been made are detailed in Part Eight of this Report, it may be noted here that opposition to the four bills is primarily based upon the following general considerations: 1) that the proposals with respect to the granting of various rights to grand jury witnesses and the altering of existing procedures

of the grand jury should be preserved. Except in some few special cases where a special statutory method of compelling testimony is provided, the grand jury provides the only means by which the prosecutor may require the attendance of witnesses and compel them to testify under oath. An abolition of the investigatory function of the grand jury would leave the government without any power to summon and examine witnesses under oath in many important areas unless, of course, some alternative investigatory procedure were devised. The Committee is therefore in agreement with so much of Section 2 of the proposed amendment as embodies the principle that the investigatory function of the grand jury not be disturbed.

PART TWO: SIZE OF THE GRAND JURY

It is recommended that federal grand juries be reduced in size so as to consist of nine to fifteen members and that concurrence by two-thirds of the members be required for an indictment. This would require revision of 18 U.S.C. § 3321 as follows:

Every grand jury impaneled before any district court shall consist of not less than nine ~~sixteen~~ nor more than fifteen ~~twenty-three~~ persons. If less than nine ~~sixteen~~ of the persons summoned attend, they shall be placed on the grand jury, and the court shall order the marshal to summon, either immediately or for a day fixed, from the body of the

district, and not from the bystanders, a sufficient number of persons to complete the grand jury. Whenever a challenge to a grand juror is allowed, and there are not in attendance other jurors sufficient to complete the grand jury, the court shall make a like order to the marshal to summon a sufficient number of persons for that purpose.

In addition, rule 6 would be revised in the following fashion:

(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 9 ~~16~~ nor more than 15 ~~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.

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(2) Motion to Dismiss. A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualifications of an individual juror, if not previously determined upon challenge. It shall be made in the manner prescribed in 28 U.S.C. § 1867(c) and shall be granted under the conditions prescribed in that statute. 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 the requisite number of ~~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 present at, and the number 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.

***

(f) FINDING AND RETURN OF INDICTMENT. An indictment may be found only if at least 9 jurors are present and two-thirds of those present concur. ~~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 is in custody or has been released pending action of the grand jury ~~given bail~~ and the requisite number of ~~12~~ jurors do not concur in finding an indictment, the foreman shall so report to the court in writing forthwith.

The early common law grand jury consisted of twelve persons, all of whom had to concur in the indictment. Thompson & Merriam, Juries §§ 464, 583 (1882); United States v. Williams, 28 F. Cas. 666 (No. 16, 716) (C.C.D. Minn. 1871). Later, however, the size of the grand jury was increased, the purpose being "to prevent, on the one hand, the course of justice from being defeated if the accused should have one or more friends on the jury; and on the other hand, the better to protect persons against the influence of unfriendly jurors upon the panel." United States v. Williams, supra. The requirement that twelve concur in the finding of an indictment continued without change, and thus an upper limit of twenty-three was placed on the grand jury so that at least a majority vote would be required for indictment. Thompson & Merriam, supra, at § 583; Fitts v. Superior Court, 6 Cal.2d 230, 57 P.2d 510 (1936). The common law maximum of 23 and requirement of 12 for indictment were made applicable to federal grand juries by statute, see 13 Stat. 500, discussed in United States v. Williams, supra, and were continued with the adoption of rule 6.

The provision in present rule 6 that the grand jury should consist of at least sixteen, also derived from the statute, most likely originated primarily for the benefit of the government rather than the defendant. It ensured that the prosecutor could obtain an indictment upon the concurrence of not more than three-quarters (i.e., 12 of 16) of the grand jury. Thus, while it is sometimes said that sixteen are

required for a quorum, United States v. Belvin, 46 Fed. 381 (C.C.E.D.Va. 1891), it appears that a defendant may not challenge an indictment concurred in by twelve on the ground that less than sixteen were present. See In re Wilson, 140 U.S. 575 (1891), rejecting defendant's post-conviction objection that he had been indicted by a grand jury of 15, contrary to a territorial statute setting the size of the grand jury at 17 to 23, because "if the two had been present, and had voted against the indictment, still such opposing votes would not have prevented its finding by the concurrence of the twelve who did in fact vote in its favor." Rule 6(a)(2) expressly provides that an indictment shall not be dismissed because there are less than sixteen legally qualified jurors if twelve or more of those legally qualified voted for indictment. This provision and the Wilson decision are consistent with the prevailing view that, in the absence of a statute making the presence of a certain number of grand jurors mandatory, an indictment may be returned by less than a full grand jury so long as enough remain to constitute the number necessary to concur. See Edwards, The Grand Jury 46 (1906); People v. Dale, 79 Cal.App.2d 370, 179 P.2d 870 (1947); State v. Belvel, 89 Iowa 405, 56 N.W. 545 (1893); State v. Pailet, 139 La. 697, 71 So. 951 (1916); State v. Connors, 233 Mo. 348, 135 S.W. 444 (1911).

There does not appear to be any constitutional obstacle to the reduction of the size of federal grand juries or of the

number of jurors who must concur in an indictment. There are a few early state decisions, interpreting state constitutional provisions comparable to the grand jury clause of the Fifth Amendment, holding that neither the size of the grand jury nor the number required to concur in an indictment may be reduced below twelve, State v. Hartley, 22 Nev. 342, 40 P. 372 (1895); State v. Barker, 107 N.C. 913, 12 S.E. 115 (1890). It is fair to conclude, however, that the number twelve is no more a part of the constitutional right to grand jury indictment than it is of the right to a petit jury in criminal and civil cases. See Williams v. Florida, 399 U.S. 78, 90 S. Ct. 1893, 26 L.Ed.2d 446 (1970) (criminal cases); Colgrove v. Battin, 413 U.S. 149, 93 S. Ct. 2448, 37 L.Ed.2d 522 (1973) (civil cases).

The grand jury "has the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions." Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972). It is "regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused ... to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." Wood v. Georgia, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569

(1962). Given the fact that the petit jury is likewise "a safeguard against arbitrary law enforcement," Williams v. Florida, supra, the considerations which are relevant in determining the size of that jury seem equally relevant with respect to the grand jury. It is important that the number "be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross section of the community." Williams v. Florida, supra. If that test is met with a six-person petit jury, as held in Williams, then it would seem to follow that an indictment concurred in by six or more grand jurors, particularly when that number constitutes at least two-thirds of the grand jury, does not violate the Fifth Amendment.

The proposal to reduce the size of federal grand juries from between 23 and 16 to between 15 and 9 is based upon several considerations. One is that the reduction in size will improve the quality of the deliberative process. With a smaller number of grand jurors, responsibility will not be diffused, and the size will be conducive to more active participation by all of the jurors. See Note, 5 U.Mich.J.L. Reform 87, 99-106 (1971). Secondly, the reduction will decrease the number of citizens who will have to absent themselves from their employment and other productive endeavors for substantial periods of time in order to perform the necessary but

demanding responsibilities of a federal grand juror. In addition, the reduction in the size of federal grand juries will result in an appreciable saving of money which would otherwise be spent on the attendance, mileage and substinence of grand jurors. See 1972 Annual Report of the Director of the Administrative Office of the United States Courts 166 (1973), noting that the cost of grand jurors for fiscal year 1972 was $3,085,800, a 5.7% increase over the previous year. At least in some districts, the requirements of the Speedy Trial Act of 1974, 18 U.S.C. § 3161(b), will in the future result in the calling of grand juries at more frequent intervals than formerly.

The proposed change continues the concept of a variable membership size for federal grand juries. This approach is fairly common on the state level, see, e.g., Fla. Stat. Ann. § 905.01 (15 to 18); Ill. Rev. Stat. ch. 38, § 112-2 (16 to 23); N.Y. Crim. Pro. Law § 190.05 (16 to 23) although some states set a specific size for the grand jury, see, e.g., Cal. Pen. Code § 888.2 (23 or 19); Colo. Const. art. II, § 23(12); Ore. Const. art. VII, §5(7). The variable size approach has the advantage that if a jury of the maximum size is initially selected, then if some jurors are later excused from the panel or are absent during the consideration of certain cases because of illness or other reason, there is no need for them to be replaced. It avoids the type of mechanical error held to invalidate an indictment in State v. Vincent, 91 Md. 718, 47 A. 1036 (1900),

where an indictment found by a jury of 22 persons, where state law required 23, was subject to attack even though more than 12 had voted for indictment.

Nine has been selected as the lower limit of the variable membership. Taking account of the considerations expressed in Williams v. Florida, supra (that the number be such as to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility of obtaining a representative cross section of the community), it is an appropriate number. Given the requirement discussed below that two-thirds of the jurors concur in the indictment, it ensures that no indictment may be returned without the concurrence of at least six jurors. Fifteen has been selected as the upper limit, as that number provides an adequate "cushion" of 6 jurors more than the minimum required and thus ensures against a grand jury being unable to indict because of the illness or other justified absence of some of its members.

One incidental consequence of the variable membership approach as heretofore utilized in the federal courts and in the states listed above is that the percentage of jurors needed to indict will vary withthe size of the grand jury. For example, under the present federal scheme, where 12 are required to indict and the grand jury may number anywhere from 16 to 23, the percentage required for indictment may vary from 75% to 52%. This consequence appears to be the result of nothing more

than historical accident, and is less rational than the proposed approach whereby the percentage is fixed. The two-thirds requirement, which is about midway between the present possibilities, ensures that there will be at least six votes for indictment. Cf. Williams v. Florida and Colgrove v. Battin, supra, and compare Colo. Const. art. II, § 23 (12-man grand jury, 9 must concur in indictment); Ind. Code §§ 35-1-15-1, 35-1-16-1 (6-man, 5 must concur); La. Code Crim. P. arts. 413, 444 (12-man, 9 must concur); Mont. Const. art. II, §20 (11-man, 8 must concur); Ore. Const. art. VII, § 5 (7-man, 5 must concur); Texas Const. art. 5, § 13 (12-man, 9 must concur); Va. Code §§ 19.1-150, 19.1-157 (5 to 7-man, 4 must concur).

The proposed change in rule 6 (f) would require that at least nine grand jurors be present when an indictment is found and that two-thirds of those present concur in the indictment. This means, for example, that an indictment would be open to challenge if it were concurred in by six jurors but only six, seven, or eight jurors were present. This is contrary to the position taken in In re Wilson, supra, that an indictment concurred in by the requisite number cannot be challenged on the ground that the grand jury had been reduced below its minimum size. The Wilson rule may have been appropriate when considered with the requirement that 12 concur in the indictment,

but with the proposed reduction in the size of the grand jury it is believed desirable that no less than nine be present when an indictment is voted. This better ensures group deliberation, free from outside influence, by a group representative of the community. The proposed change in rule 6(c), requiring that a record be kept of the number of jurors present at and concurring in the finding of every indictment, is to provide a means whereby it can be determined that the requisite number were present and that the number concurring in the indictment were no less than two-thirds of those present.

It must be emphasized that the proposed change in rule 6(f) merely requires the presence of at least nine and a two-thirds vote at the time an indictment is found. No change has been made in the well-established rule that an indictment is not necessarily subject to challenge because some of those present at or voting for the finding of an indictment were absent at some earlier time. See, e.g., United States ex rel. McCann v. Thompson, 144 F.2d 604 (2d Cir. 1944); United States v. Colasurdo, 453 F.2d 585 (2d Cir. 1971); United States v. Armour and Co., 214 F.Supp. 123 (S.D.Cal. 1963). As noted in Thompson: "Since all the evidence adduced before a grand jury--certainly when the accused does not appear--is aimed at proving guilt, the absence of some jurors during some part of the hearings will ordinarily merely weaken the prosecution's case. If what the absentees actually hear is enough to

satisfy them, there would seem to be no reason why they should not vote."

The proposed change to rule 6(b)(2) is necessary in light of the fact that the number required to concur in the indictment under rule 6(f) may vary, depending upon the number of grand jurors present. It does not change the present policy, which is that if some of the jurors are not legally qualified, the indictment shall not be dismissed if, deducting those jurors, the required number still voted for indictment. Because of the rejection of the Wilson rule, discussed above, it might well be argued that a corresponding change should be made in rule 6(b)(2), so that it must also be shown that at least nine legally qualified jurors were present when the indictment was found. That approach has been considered but rejected. It is one thing to apply such a strict rule with respect to the rather simple requirement that nine jurors be present, but quite another to apply the same rule with respect to the likely inadvertent presence on the grand jury of one or more persons not legally qualified. While it is true that the legal qualifications are fewer in number than they once were, see 18 U.S.C. § 1865 and compare Castle v. United States, 238 F.2d 131 (8th Cir. 1956), it would nonetheless be unduly severe to quash an indictment because, say, one of the nine persons present was thereafter determined to have had a federal charge pending against him. Similarly, to the extent that rule 6(b)(2) is utilized in cases where the defendant claims that one of the

jurors was biased against him, see, e.g., United States v. Anzelmo, 319 F.Supp. 1106 (E.D.La. 1970), which is also unlikely to occur by government design, it should again be sufficient that there are the requisite number of votes for indictment after elimination of the prejudiced juror.

The change in rule 6(f) at line 34 reflects the fact that under the Bail Reform Act of 1966 some persons will be released without requiring bail. See 18 U.S.C. § 3146, § 3148. "The purpose of the last sentence of Rule 6(f) can only be carried out if it is construed as being applicable to such persons, and a 'no bill' promptly reported in such cases." 1 Wright, Federal Practice and Procedure - Criminal § 110 (1969).

PART THREE: SUMMONING THE GRAND JURY

It is recommended that it be expressly provided by statute that a grand jury may be summoned from the entire district or from any division or divisions thereof and that such a grand jury may indict for any offense committed in the district. This could best be accomplished by amendment of 18 U.S.C. § 3321, previously set out, by adding the following sentence to the end of the section:

1 A grand jury may be summoned from the entire district,
2 or from any statutory or nonstatutory division or divisions
3 thereof, and a grand jury so impanelled shall be empowered
4 to consider offenses alleged to have been committee at any
5 place in the district.

ADDENDUM:

REPORT OF THE ~~COMMITTEE~~ ON THE ADMINISTRATION OF THE CRIMINAL LAW

[Note: An earlier draft of the Report of the Advisory Committee on Criminal Rules, not including what are now Parts One, Three, and Seven of the Report and referring to H.R. 1277 and H.R. 2986 but not H.R. 6006 and H.R. 6207, was considered by the Committee on the Administration of the Criminal Law of the Judicial Conference. The Report of the latter Committee, as contained in a letter from Judge Alfonso J. Zirpoli to Judge J. Edward Lumbard, is set out below.]

1. Size of the Grand Jury.

We approve the recommendation of your Committee that Title 18 U.S.C. section 3321 and Rule 6 of the Federal Rules of Criminal Procedure be revised to provide that the grand jury be reduced in size to not less than nine and not more than fifteen and that concurrence by two-thirds of the members thereof be required for an indictment. The mechanics of such statutory revision and change in Rule 6 should be so timed that each becomes effective on the same date.