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THE CONGRESSIONAL INVITATION TO AVOID THE PRELIMINARY HEARING: AN ANALYSIS OF SECTION 303 OF THE FEDERAL MAGISTRATES ACT OF 1968†

Patricia W. Weinberg* and Robert L. Weinberg**

I. THE FEDERAL MAGISTRATES ACT OF 1968

At the bill-signing ceremony for the new Federal Magistrates Act¹ on October 17, 1968, President Johnson declared:

The Act that I will sign today achieves a long-overdue reform in the Federal judicial system. It replaces the United States Commissioners with the office of the United States Magistrates.

But more than a name change is involved in this Act. . . . [I]t will bring new standards of professionalism and a much higher quality of justice to an important first level of our judiciary.

Later in his remarks he added, "The Act also improves the law relating to preliminary hearings of accused persons."² We take issue only with the latter claim. For, ironically, this "reform" legislation, which gives magistrates important new duties and insures that they are better qualified to handle them,³ also threatens to curtail the performance of one of their most important former duties in safeguarding the accused: the holding of preliminary hearings under rule 5(c) of the Federal Rules of Criminal Procedure.⁴

The provision that assertedly "improves the law relating to preliminary hearings"⁵ appears in section 303(a) of the Act, as an

† Some of the research for this Article was undertaken in connection with the current study of the preliminary hearing in four American jurisdictions (Chicago, Los Angeles, Philadelphia, and Washington, D.C.) and in England by the Institute of Criminal Law and Procedure, Georgetown University Law Center. The research assistance to the Institute of law students, in particular Richard Wood and Lenore Schreiber, has contributed to the materials for this Article. The authors' views are their own, however, and do not necessarily represent those of the Institute.

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1. Pub. L. No. 90-578, 82 Stat. 1107 (codified in 18, 28 U.S.C.).

2. Remarks of the President upon signing S. 945, Federal Magistrates Act, Oct. 17, 1968 (Office of the White House Press Secretary).

3. See note 106 *infra*.

4. See note 8 *infra*.

5. Remarks of the President, *supra* note 2. The terms "preliminary examination" and "preliminary hearing" are used interchangeably in this Article.

amendment to section 3060 of title 18 of the United States Code. The amendment specifies that unless the preliminary hearing is waived by the defendant or postponed with his consent it "shall be held within a reasonable time following initial appearance" of the accused before the magistrate, but no later than the tenth day after the initial appearance if the defendant is in custody or the twentieth day if the defendant has been released.⁶ Prior to this amendment, section 3060 was merely a cross-reference to rule 5 of the Federal Rules of Criminal Procedure.⁷ Rule 5 provides⁸

6. Pub. L. No. 90-578, § 303(a), 82 Stat. 1117 (1968):

Section 3060, title 18, United States Code, is amended to read as follows:

"§ 3060. Preliminary examination

"(a) Except as otherwise provided by this section, a preliminary examination shall be held within the time set by the judge or magistrate pursuant to subsection (b) of this section, to determine whether there is probable cause to believe that an offense has been committed and that the arrested person has committed it.

"(b) The date for the preliminary examination shall be fixed by the judge or magistrate at the initial appearance of the arrested person. Except as provided by subsection (c) of this section, or unless the arrested person waives the preliminary examination, such examination shall be held within a reasonable time following initial appearance, but in any event not later than—

"(1) the tenth day following the date of the initial appearance of the arrested person before such officer if the arrested person is held in custody without any provision for release, or is held in custody for failure to meet the conditions of release imposed, or is released from custody only during specified hours of the day; or

"(2) the twentieth day following the date of the initial appearance if the arrested person is released from custody under any condition other than a condition described in paragraph (1) of this subsection.

"(c) With the consent of the arrested person, the date fixed by the judge or magistrate for the preliminary examination may be a date later than that prescribed by subsection (b), or may be continued one or more times to a date subsequent to the date initially fixed therefor. In the absence of such consent of the accused, the date fixed for the preliminary hearing may be a date later than that prescribed by subsection (b), or may be continued to a date subsequent to the date initially fixed therefor, only upon the order of a judge of the appropriate United States district court after a finding that extraordinary circumstances exist, and that the delay of the preliminary hearing is indispensable to the interests of justice.

"(d) Except as provided by subsection (e) of this section, an arrested person who has not been accorded the preliminary examination required by subsection (a) within the period of time fixed by the judge or magistrate in compliance with subsections (b) and (c), shall be discharged from custody or from the requirement of bail or any other condition of release, without prejudice, however, to the institution of further criminal proceedings against him upon the charge upon which he was arrested.

"(e) No preliminary examination in compliance with subsection (a) of this section shall be required to be accorded an arrested person, nor shall such arrested person be discharged from custody or from the requirement of bail or any other condition of release pursuant to subsection (d), if at any time subsequent to the initial appearance of such person before a judge or magistrate and prior to the date fixed for the preliminary examination pursuant to subsections (b) and (c) an indictment is returned or, in appropriate cases, an information is filed against such person in a court of the United States.

"(f) Proceedings before United States magistrates under this section shall be taken down by a court reporter or recorded by suitable sound recording equipment. A copy of the record of such proceeding shall be made available at the expense of the United States to a person who makes affidavit that he is unable to pay or give security therefor, and the expense of such copy shall be paid by the Director of the Administrative Office of the United States Courts."

7. In its entirety, section 3060 had read: "§ 3060. Preliminary Examination—

that a defendant arrested prior to indictment should be brought before a committing magistrate, there informed of his rights, and "within a reasonable time" afforded a preliminary hearing to determine whether there was probable cause to detain him pending grand jury consideration⁹ of his case.

If section 303 had simply prescribed the ten- and twenty-day limits for nonconsensual continuances of the hearing date, it would have added needed specificity to the "reasonable time" requirement of rule 5(c). But section 303 goes on to provide that "[n]o preliminary examination . . . shall be required to be accorded an arrested person . . . if at any time subsequent to the initial appearance of such person . . . and prior to the date fixed for the preliminary examination . . . an indictment is returned"¹⁰ Instead of "improv[ing] the law relating to preliminary hearings of accused persons," this provision offers the well-organized prosecutor's office an invitation to avoid a preliminary hearing altogether. Senator

(Rule) SEE FEDERAL RULES OF CRIMINAL PROCEDURE. Proceedings before commissioner, appearance, advice as to right to counsel, hearing, Rule 5." Act of June 25, 1948, ch. 645, § 1, 62 Stat. 819.

8. Rule 5 reads:

(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 and of any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain 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.

For a discussion of the effect of the Federal Magistrates Act of 1968 on rule 5, see pt. III. C. *infra*.

9. If the defendant is charged with a misdemeanor, or if he waives grand jury indictment, grand jury consideration is not required and the prosecutor may instead file an information. FED. R. CRIM. P. 7(a).

10. 18 U.S.C.A. § 3060(e) (Supp. Feb. 1969). This section is quoted in note 6 *supra*.

Tydings, the sponsor and architect of the Act, recognized this possibility, and predicted that "[t]he ultimate result in our busy urban districts may be the virtual elimination of preliminary hearings, but only if the present grand jury delays are eliminated first."¹¹

Under prior law, it is true, many federal prosecutors routinely avoided preliminary hearings by securing continuances of the hearing date until after an indictment was obtained.¹² But this ploy required a complaisant magistrate or an inert defendant. Moreover, the propriety of using continuances to circumvent the accused's right to a preliminary hearing had come under increasing and sometimes successful attack.¹³ Section 303, if literally construed, can legitimize the prosecutorial practice of mooting the defendant's right to a preliminary hearing under rule 5(c) by obtaining a relatively quick indictment.¹⁴ This predictable use or abuse of the Act should and can be prevented, we submit, either by a judicial construction of section 303 that preserves the defendant's right to a prompt preliminary hearing,¹⁵ or by provision for alternative forms of discovery¹⁶ that would reduce the prosecutor's motivation for avoiding the hearing.

11. Remarks on the floor of the Senate, Feb. 8, 1967, reprinted in *Hearings on S. 3,475 & S. 945 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. (1966), 90th Cong., 1st Sess. (1967) at 241 [hereinafter *Hearings on S. 3,475*]. Compare the opinions on this point in two staff memoranda prepared to accompany draft legislation. Staff Memorandum, April 28, 1966, in *Hearings on S. 3,475*, at 9, 15: "[I]t is anticipated that preliminary hearings will rarely be held." Staff Memorandum, June 7, 1966, *Hearings on S. 3,475*, at 29, 36:

It is anticipated that this procedure will, at least initially, increase the frequency of preliminary hearings in districts in which the grand jury backlog is such that no action can be expected within a short time after arrest and presentment. It will also provide something of an incentive for prompt grand jury action, in that a prosecutor who wishes to avoid a preliminary hearing can do so only by getting his case to the grand jury quickly.

12. See S. REP. NO. 371, 90th Cong., 1st Sess. 33 (1967) [hereinafter S. REP. NO. 371]; Remarks of Senator Tydings on the floor of the Senate, Feb. 8, 1967, in *Hearings on S. 3,475*, at 237, 241; *Hearings on the United States Commissioner System Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess., pt. 1, at 14 (1965) (testimony of Prof. Charles A. Lindquist of Temple University) [hereinafter *Hearings*, pt. 1]; *Hearings on the United States Commissioner System Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess., pt. 3, at 220-22, 254-55 (1966) (testimony of Irving Younger of New York University and Judge Talbot Smith of the Eastern Dist. of Michigan) [hereinafter *Hearings*, pt. 3].

13. See text accompanying note 71 *infra*.

14. See note 12 *supra*. The practice had been criticized in hearings on the legislation. *Hearings*, pt. 1, at 14 (testimony of Prof. Charles A. Lindquist); *Hearings*, pt. 3, at 220-22 (testimony of Prof. Irving Younger). As to indictment mooting the hearing, see text accompanying notes 69-74 *infra*.

15. See text accompanying notes 131-39 *infra*.

16. See text accompanying notes 154-66 *infra*.

II. FUNCTIONS OF THE PRELIMINARY HEARING UNDER PRIOR LAW

A. *Historical Perspective*

1. *Early English and American Uses*

Contemporary debate on the preliminary hearing has largely focused upon whether the hearing's sole purpose is to determine the existence of probable cause to hold the accused, or whether the hearing has the additional purpose of affording the defendant an opportunity for discovery.¹⁷ Today either function is assumed to be primarily for the defendant's benefit. The weight of judicial authority recognizes only the former purpose; as the United States Court of Appeals for the Second Circuit stated in 1967, "[i]t is quite clear from the logic as well as the history of the procedure that discovery is *not* one of its purposes."¹⁸ The draftmen of the Federal Magistrates Act clearly shared this assumption: "Your committee believes that a judicial determination of the question of probable cause for the accused's restraint is the historic purpose of a preliminary examination, and that in light of certain current practices it is necessary to spell out that purpose"¹⁹

But in its origin, in sixteenth century English law, the preliminary hearing was designed primarily to serve the purpose of discovery—and to do so for the benefit of the prosecution. The first preliminary hearing statute,²⁰ which was enacted in 1554, provided that two justices of the peace were to examine prisoners before they were admitted to bail, to hear the testimony of those who charged them, and to record the information thus disclosed. This significant development in criminal procedure came about "apparently by accident, for the motive of the enactment was, it seems, to prevent collusion between justices and criminals" in releasing defendants on bail.²¹ A statute enacted in the following year ex-

17. See text accompanying notes 47-68 *infra*.

18. *Sciortino v. Zampano*, 385 F.2d 132, 134 (2d Cir. 1967), *cert. denied*, 390 U.S. 906 (1968). The court noted that "[t]here is extensive authority in the cases for the proposition that the return of an indictment, which establishes probable cause, eliminates the need for a preliminary examination." 385 F.2d at 133. It declined to order a post-indictment preliminary hearing.

19. S. REP. NO. 371, at 33. However, a committee staff memorandum noted the other historical purposes of the preliminary hearing. *Hearings on S. 3,475*, at 268, 271.

20. 1 & 2 Phil. & M., c. 13 (1554).

21. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 432 (5th ed. 1956); 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 219, 236-38 (1883). See also M. DALTON, THE COUNTRY JUSTICE 53 (1727 ed.):

[Under the prior practice, a single justice] did oftentimes by sinister Means set at

tended the examination procedure to cases in which the prisoner was not bailed but committed,²² and soon "it became apparent that an important novelty had been introduced, albeit obliquely, into criminal procedure."²³ Under the statute, "all arrested persons were to be brought before the magistrate and to be examined by him. He would then try to discover what evidence he could against the accused and see to it that that evidence was not lost."²⁴ The preliminary examination thus came to serve a vital discovery function for the prosecution at a time when there was neither a police force nor a public prosecutor.²⁵

The magistrate's investigatory duties later began to decline, about the same time as the first professional police force was established.²⁶ The requirement that the accused be examined at preliminary hearing was finally abolished in England in 1848.²⁷ By contrast

large great Offenders, such as were notailable, and yet, to hide their Affection therein, did signify the Cause of their Apprehension to be but only for Suspicion of Felony, whereby the said Offenders have escaped unpunished; for Reformation thereof, by the Statute 1 & 2 P. & M. it was enacted, That if it be for Manslaughter, or Felony, or Suspicion of Manslaughter, or Felony, (*beingailable by Law*;) then the same Justices must be present together at the Time of the said Bailment; and that they must certify (in Writing subscribed with their own Hands) the said Bailment at the next General Gaol-delivery, to be holden within the County where the Person shall be arrested or suspected, upon Pain to be fined by the Justices of Gaol-delivery.

22. 2 & 3 Phil. & M., c. 10 (1555).

23. T. PLUCKNETT, *supra* note 21, at 432. The statutes are reprinted in A. KIRALFY, *A SOURCE BOOK OF ENGLISH LAW* 5-7 (1957).

24. E. PUTTKAMMER, *ADMINISTRATION OF CRIMINAL LAW* 91 (1953). For a historical and analytical treatment of practices under the early legislation, 1 & 2 Phil. & M., c. 13 (1554), 2 & 3 Phil. & M., c. 10 (1555), *see* 4 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 528-30 (2d ed. 1937); 1 J. STEPHEN, *supra* note 21, at 219-28. *See also* M. DALTON, *supra* note 21, at 105-08, 539-48.

25. *See* E. PUTTKAMMER, *supra* note 24, at 88:

The statute [of Philip and Mary] was the reflection of the fact that at that time (and indeed for close to another three hundred years) there was no organized governmental agency faced with the task of prosecuting criminals. There was no prosecuting attorney in England at that time, and, from the standpoint of the preliminary examination even more significant, there was no police force. There was literally no participation on the part of government in the criminal proceedings at this stage. This necessarily operated very largely to the benefit of undeserving persons, because it might be possible to do away with incriminating evidence, or the gathering of evidence might not begin until it was too late.

See also Devlin, *The Police in a Changing Society*, 57 J. CRIM. L.C. & P.S. 123, 125 (1966).

26. In England, this was in 1829. T. PLUCKNETT, *supra* note 21, at 432. According to Holdsworth,

as late as 1823 it was stated to the grand jury that, when a magistrate was conducting this preliminary examination, he was acting inquisitorially and not judicially; that such proceedings might and ought to be conducted in secret; and that information so ascertained might be communicated to the prosecutor but not to the party accused.

1 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 296 (7th ed. 1956).

27. Sir John Jervis' Act, 11 & 12 Vict., c. 42 (1848). Shortly thereafter by the Act of 30 & 31 Vict., c. 35 (1867), the defendant was allowed to call witnesses at the prelimi-

to the important role that discovery played in the early preliminary examinations, the screening function was more limited than at present. The rule as stated by Hale was: "If a person be brought before a Justice, if it appears no Felony be committed, he may discharge him; but if a Felony be committed, though it appears not that the party accused is guilty, yet he cannot discharge him, but must commit or bail him."²⁸

The basic English preliminary examination statutes were in effect in this country both before and after the Revolution;²⁹ as in England, the examination served the purpose of discovery for the prosecution.³⁰ But some states rejected or limited the English preliminary examination statutes because of their incompatibility with constitutional provisions securing the privilege against self-incrimination.³¹ As Justice Rutledge has pointed out:

nary hearing. For a discussion of the legislation, see 1 J. STEPHEN, *supra* note 21, at 220-29. It seems likely that there was a shift in emphasis of the preliminary hearing away from requiring the accused to make a statement even before the adoption of the statute. See ALI CODE OF CRIMINAL PROCEDURE § 39, Commentary, at 266 (Official Draft 1930); P. DEVLIN, *THE CRIMINAL PROSECUTION IN ENGLAND* 6-8 (1958); T. PLUCKNETT, *supra* note 21, at 432; Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 MICH. L. REV. 1224, 1233-35 (1932).

28. M. HALE, *PLEAS OF THE CROWN* 98 (1682 ed.).

29. Kauper, *supra* note 27, at 1235-36. During the colonial period, the statutory as well as the common law of England was generally in effect unless it conflicted with an enactment of a colonial assembly. See Note, *Law in Colonial New York: The Legal System in 1691*, 80 HARV. L. REV. 1757, 1769 (1967). The statutes of Philip and Mary are cited as authority in numerous early legal treatises. See, e.g., BURN'S ABRIDGMENT, OR THE AMERICAN JUSTICE 141 (1792); CONDUCTOR GENERALIS, OR THE OFFICE, DUTY, AND AUTHORITY OF THE JUSTICES OF THE PEACE 82 (1722); J. LATROBE, *THE JUSTICE'S PRACTICE UNDER THE LAWS OF MARYLAND* 317 (2d ed. 1835); G. WEBB, *THE OFFICE AND AUTHORITY OF A JUSTICE OF PEACE* 31, 140 (1736).

30. See J. GOEBEL & T. NAUGHTON, *LAW ENFORCEMENT IN COLONIAL NEW YORK* 630-33 (1944).

31. The privilege against self-incrimination had received early acceptance in this country. See generally Rogge, Book Review, 67 MICH. L. REV. 862 (1969). It has been said that it "came to be fairly well established in the New England colonies before 1650 and in Virginia shortly thereafter." Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763, 781 (1935). By 1789 the privilege was included in the constitutions or bills of rights of seven states. *Id.* at 764-65. State constitutional provisions, including the privilege against self-incrimination, were generally cited in the early justice of the peace manuals. See J. COLVIN, *MAGISTRATE'S GUIDE AND CITIZEN'S COUNSELLOR* 238 (1805) (citing the Maryland provision that "no man ought to be compelled to give evidence against himself"); H. POTTER, *THE OFFICE AND DUTY OF A JUSTICE OF THE PEACE* 350 (1816) [quoting N. C. CONST. art. VII (1776)]. Massachusetts adopted its own committal statute as early as 1783. D. DAVIS, *A PRACTICAL TREATISE UPON THE AUTHORITY AND DUTY OF JUSTICES OF THE PEACE IN CRIMINAL PROSECUTIONS* 26 (1824). The author states that the provisions of the statutes of Philip and Mary had not been adopted by the state. *Id.* at 90-91. Even though a defendant might be called upon to plead under the statute "[w]hen the party is brought before the magistrate, he ought to be cautioned, that he is not bound either to accuse himself, or confess his guilt; and that any confession or admission of that nature may be produced in evidence against him on his trial." *Id.* at 107.

Historically it was the preliminary inquisition which gave rise to the privilege. It was won through centuries of struggle against abuses of magisterial as well as more formal judicial inquisition. The modern hearing is the lineal descendant of the ancient preliminary examination. But its character has changed with the evolution of the privilege and other constitutional guaranties.³²

The shift away from requiring the accused to testify at preliminary hearing was accompanied by increasing opportunities for the defense to gain positive advantages at the hearing. Gradually the accused obtained the right to be present at the hearing and to be accompanied by counsel,³³ to cross-examine witnesses against him,³⁴

In South Carolina, the statutes of Philip and Mary remained in effect until 1839, when the legislature passed its own committal statute, indirectly repealing the English predecessor. See *In re Bates*, 2 F. Cas. 1015, 1017 (No. 1,099a) (D.S.C. 1858); B. PRESSLEY, *THE LAW OF MAGISTRATES AND CONSTABLES IN THE STATE OF SOUTH CAROLINA* 208 (1848). The new statute provided that the defendant need no longer be examined at the preliminary hearing—a regrettable deviation from former practice, according to a contemporary commentator:

Though by the Act of 1839, it is no longer obligatory on the magistrate to examine the prisoner, yet it were better that this ancient and established course be pursued as the hearing of what the prisoner may say for and against himself, will probably furnish useful information in the investigation of the case.

Id. See also H. HITCHCOCK, *THE ALABAMA JUSTICE OF THE PEACE* 98 (1822), emphasizing that the English statutes of Philip and Mary are “not in force in this country, [and] the trial of a criminal in this state must be governed by the rules of the common law, and our own act of Assembly; neither of which will justify his own examination in order to convict him.” The magistrate was authorized “to take the *voluntary* information of the accused.” *Id.* at 205 (emphasis added). The privilege against self-incrimination was contained in the first Alabama Constitution, art. 1, § 10 (1819).

Id. at 473.

32. *Wood v. United States*, 128 F.2d 265, 271 (D.C. Cir. 1942) (footnote omitted). The court reversed the conviction because the accused’s plea of guilty at the preliminary hearing had been admitted into evidence at trial, and noted that the right to examine the defendant at preliminary hearing does not entail

authority to compel him to answer, with the sanction of contempt, or to do so in any manner which would violate constitutional right The power of examination, therefore, goes no further than is constitutionally permissible in a judicial proceeding. Nor should the hearing be made a trap for luring the unwary into confession or admission which is fatal or prejudicial. So to use it would pervert its function and make of the court, not an arbiter, but an arm of the prosecution. This could bring back the very evil the privilege was created to destroy.

128 F.2d at 271.

33. See J. BENEDICT, *BENEDICT’S TREATISE: CONTAINING A SUMMARY OF THE JURISDICTION POWERS AND DUTIES OF JUSTICES OF THE PEACE IN THE STATE OF NEW YORK* 278-79 (1846); T. WATERMAN, *THE JUSTICE’S MANUAL; OR, A SUMMARY OF THE POWERS AND DUTIES OF JUSTICES OF THE PEACE IN THE STATE OF NEW YORK* 206 (2d ed. 1825). But see *In re Bates*, 2 F. Cas. 1015, 1017 (No. 1,099a) (D.S.C. 1858) (“While it was professed to confront the accused and the witnesses, and allow the benefits of cross-examination, in practice the right of counsel for the accused to be present as a matter of right was denied.”).

There may have been mixed motives for allowing the defendant to be present. See J. GOEBEL & T. NAUGHTON, *supra* note 30, at 33-34: the right to confrontation at the preliminary examination “probably developed during the early eighteenth century, chiefly because it was a convenient way to wrest a confession from a prisoner.”

34. H. HITCHCOCK, *THE ALABAMA JUSTICE OF THE PEACE* 205 (1822). But the right to

and to call witnesses in his own behalf.³⁵ In comparison to the earlier American practice,³⁶ the screening standard became higher: the accused was entitled to discharge unless it had been shown that there was probable cause that he had committed the offense.³⁷ By 1824 the Solicitor General of Massachusetts was able to write that the preliminary examination "has been considered rather as a privilege in favour of the party accused, afforded by law for the benefit of an innocent man, who may by this opportunity have it in his power to

cross-examination did not exist in colonial New York. J. GOEBEL & T. NAUGHTON, *supra* note 30, at 635.

35. J. BENEDICT, *supra* note 33, at 279; D. DAVIS, A PRACTICAL TREATISE UPON THE AUTHORITY AND DUTY OF JUSTICES OF THE PEACE IN CRIMINAL PROSECUTIONS 112 (1824); J. LATROBE, *supra* note 29, at 317; T. WATERMAN, *supra* note 33, at 205; G. WEBB, *supra* note 29, at 112. J. GOEBEL & T. NAUGHTON, *supra* note 30, at 633, without citing authority, state that "[t]he justice's manuals usually contained an admonition that evidence which went against the Crown should be taken as well as that which was against the defendant."

36. See BURN'S ABRIDGMENT, *supra* note 29, at 156:

If a felony is committed, and one is brought before a justice upon suspicion thereof, and the justice finds upon examination that the prisoner is not guilty; yet the justice shall not discharge him, but he must either be bailed or committed: For it is not fit that a man once arrested and charged with felony, or suspicion thereof, should be delivered upon any man's discretion, without further trial.

See also *id.* at 64-65, 98; H. HITCHCOCK, *supra* note 34, at 204; G. WEBB, *supra* note 29, at 140. The language in each of the three treatises cited is almost identical.

37. See J. BENEDICT, BENEDICT'S TREATISE: CONTAINING A SUMMARY OF THE JURISDICTION, POWERS AND DUTIES OF JUSTICES OF THE PEACE IN THE STATE OF NEW YORK 471 (3d ed. 1852):

If, upon the examination of the whole matter, it appears to the magistrate either that no offence has been committed by any person, or that there is no probable cause for charging the prisoner therewith, he must discharge him.

It appears formerly to have been held, and upon high authority, that if there were an express charge of felony, on oath, against the prisoner, the magistrate had no discretion to discharge, but must bail or commit him. But this position has been controverted by all recent authorities, and cannot be considered as the law at the present day. For it has been well observed, that according to this doctrine, the liberty and character of every man in the country would be placed at the mercy, not of the magistrate, (for he is assumed to have no discretion,) but at the mercy of any corrupt and infamous individual, who might think proper to make a positive oath that a felony had been committed by the person whom he accused—a doctrine too monstrous to be stated as law.

(The 1846 edition of this work, *supra* note 33, at 280, is in accord with the first paragraph of the above quotation but lacks the commentary contained in the second paragraph.) Accord, T. WATERMAN, *supra* note 33, at 207; cf. D. DAVIS, *supra* note 35, at 112; H. POTTER, THE OFFICE AND DUTY OF A JUSTICE OF THE PEACE 60 (1816) ("The justice should discharge persons brought before him charged with any crime, if upon inquiry it manifestly appears either that no crime was committed, or that the suspicion entertained of the prisoner was wholly groundless: otherwise he must be committed to prison or give bail."). See also J. LATROBE, *supra* note 29, at 317:

If there be an express charge of felony, on oath, against the prisoner, though his guilt appear doubtful, the justice cannot wholly discharge him, but must bail or commit him And, in modern practices, though exculpatory evidence is received at the instance of the prisoner, and certified with the other depositions, unless it appear in the clearest manner that the charge is malicious, as well as groundless, it is not usual for the magistrate to discharge him, even when he believes him to be altogether innocent.

clear himself from suspicion."³⁸ The same source also recognized the possibility of using testimony taken at the preliminary hearing for impeachment at trial³⁹—a principal object of contemporary defense counsel who use the preliminary hearing for discovery.⁴⁰

2. Rule 5(c) Prior to the Magistrates Act

From 1789 until the adoption of Federal Rules of Criminal Procedure in 1946, the preliminary hearing in federal practice followed, in large measure, the practice of the state in which the federal court was sitting.⁴¹ The federal provision adopted as rule 5(c), which was thought to reflect prevailing state practice,⁴² reads:

38. D. DAVIS, *supra* note 35, at 92. The same language, though different grammar, is to be found in J. BENEDICT, *supra* note 33, at 469, where it is added: "And it being for the benefit of the accused, he has a right to insist upon an examination taking place, before he can be compelled to enter into a recognizance."

39. D. DAVIS, *supra* note 35, at 94:

In Massachusetts, it is not the usual practice to take the testimony of the complainant and witnesses in writing. It is sometimes done in capital cases, and in other cases in which a particular interest is taken or existed; but such written testimony is not made use of on the trial unless by the consent of the prisoner; though it undoubtedly may be, to contradict or impeach the testimony of a witness when material varies, or is repugnant to what he swore to before the magistrate.

J. GOEBEL & T. NAUGHTON, *supra* note 30, at 636, cite "one important case [in which] it had been ruled that examinations could be read at the defendant's request to impeach the credibility of a witness." The preliminary hearing's change from a discovery tool for the prosecution to a discovery tool for the defense is explained clearly and accurately, though with little documentation, in E. PUTTKAMMER, *supra* note 24, at 88-95.

40. See E. BARRETT PRETTYMAN FELLOWS, 1965-1966, THE PRELIMINARY HEARING IN THE DISTRICT OF COLUMBIA 7-8 (1967) (footnote omitted):

There is currently a judicial dispute as to whether discovery is another recognized purpose of a preliminary hearing. From the perspective of the defense counsel, however, there is no doubt that the hearing is a critical tool in trial preparation. If used properly, the crucial facts of the government's case, including names of potential witnesses, statements made by the defendant, and physical evidence in the government's possession, can be discovered. Moreover, since the hearing is transcribed or recorded, the testimony is preserved for potential trial use in refreshing recollection or impeachment. For these reasons, preliminary hearings SHOULD NEVER BE WAIVED.

41. The Federal Judiciary Act of 1789, 1 Stat. 91 (emphasis added) provided:

That for any crime or offence against the United States, the offender may, by any justice or judge of the United States, or by any justice of the peace, or other magistrate of any of the United States where he may be found *agreeably to the usual mode of process against offenders in such state* . . . be arrested, and imprisoned or bailed as the case may be, for trial

By this directive, preliminary proceedings in federal criminal cases were to be governed by the law of the state in which the court was sitting. See *In re Bates*, 2 F. Cas. 1015, 1017 (No. 1,099a) (D.S.C. 1858):

In the United States there is no law by which an established mode of criminal procedure is provided, and an uniform system of practice pursued. In the criminal as in the civil administration of justice, legislation, as far as it has gone, has professed to assimilate in each state the practice of the courts of the United States with that of the highest courts of law in that state.

See also *United States v. Horton*, 26 F. Cas. 375 (No. 15,393) (C.C. Mo. 1873), and the discussion and authorities in L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES 228-30 (1966). Orfield concludes that "the great bulk of the cases held that state law was applicable to almost every aspect of the preliminary examination in the federal

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

Rule 5(c) is silent as to the nature and strength of the evidence needed to establish probable cause. And, although the rules elsewhere provide that the defendant may waive indictment,⁴³ they fail to indicate whether a defendant who is within the ambit of rule 5(c)⁴⁴ can be deprived of the hearing by return of an indictment before the hearing is held.

The practical result under rule 5(c), as the draftsmen of the new Magistrates Act found, was that "[f]ew commissioners have any clear idea of what the contours and purposes of the preliminary hearing are. Much of this confusion is pardonable, since the law with respect to the preliminary hearing is in dire need of clarification."⁴⁵ In adopting the Federal Magistrates Act, Congress did at least clarify

courts prior to the adoption of Rule 5," although he cites a few cases to the contrary. *Id.* at 231 nn. 1, 2, 6.

Later federal statutes, e.g., Act to Supplement the Federal Judiciary Act of 1789, 5 Stat. 516 (1842), Appropriations Act, 29 Stat. 184 (1896), provided for the appointment of federal committing magistrates, but the obligation to follow state procedure remained. It was not until 1940 that legislation was approved authorizing the Supreme Court to regulate criminal procedure in the federal courts. 54 Stat. 688, now 18 U.S.C. § 3771 (1964). The rules were promulgated by the Supreme Court at the end of 1944 and took effect on March 21, 1946. Holtzoff, *A Criminal Case in the Federal Courts*, in 1966 FEDERAL RULES OF CRIMINAL PROCEDURE 3 (West ed.). Rule 5 has been said to be "largely a codification of pre-existing practice, except that it eliminates pleas before committing magistrates, which were in fact an anomaly." *Id.* at 5. For a discussion of early drafts of rule 5, see L. ORFIELD, *supra*, at 203-15. The best compilation of state law governing the preliminary hearing prior to the adoption of rule 5 is contained in ALLI, CODE OF CRIMINAL PROCEDURE §§ 39-60, Commentary, at 266-334 (Official Draft 1930).

42. FED. R. CRIM. P. 5(a), Advisory Committee Note 2. For a discussion of the effect of the Federal Magistrates Act of 1968 on rule 5, see pt. III. C. *infra*.

43. FED. R. CRIM. P. 7(b).

44. Rule 5(c) applies only to a defendant who has been arrested or summoned prior to the return of an indictment. See *United States v. Shields*, 291 F.2d 798, 799 (6th Cir.), *cert. denied*, 368 U.S. 933 (1961). The Federal Rules of Criminal Procedure do not set forth the circumstances under which an accused may be arrested without warrant; that is left to statute and case law. But rule 5 expressly applies to a defendant arrested with or without warrant.

45. S. REP. No. 371, at 10; H. REP. No. 1,629, 90th Cong., 2d Sess. 13 (1968) [hereinafter H. REP. No. 1,629].

the law by specifying the purpose of the preliminary hearing: the legislative history of amended section 3060 makes clear that the only purpose of the preliminary hearing is to determine probable cause, and that discovery is no longer, if it ever was, a purpose of the hearing.⁴⁶

B. *Theoretical Screening and Discovery Functions of the Preliminary Hearing*

In contemporary judicial thinking, it is generally accepted that the task of screening out weak or unsupported charges and discharging the defendant if the committing magistrate finds no probable cause to believe that he is guilty is a proper function of the preliminary hearing.⁴⁷ The only doubts on this point have been whether the preliminary hearing is effective in carrying out this function,⁴⁸ and what significance the decision at preliminary hearing should have in federal and other jurisdictions in which the prosecutor is allowed to ignore the magistrate's ruling and to seek an original indictment on the same charge.⁴⁹

46. S. REP. NO. 371, at 34-35.

47. See *United States v. Amabile*, 395 F.2d 47, 53-54 (7th Cir. 1968); *Sciortino v. Zampano*, 385 F.2d 132 (2d Cir. 1967), *cert. denied*, 390 U.S. 906 (1968); *United States v. Chase*, 372 F.2d 453, 467 (4th Cir. 1967); *Boone v. United States*, 280 F.2d 911 (6th Cir. 1960); L. ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 67-68 (1947); Note, *The Preliminary Hearing—An Interest Analysis*, 51 IOWA L. REV. 164, 165, 167-68 (1965); Note, *Preliminary Examination—Evidence and Due Process*, 15 KAN. L. REV. 374, 375 (1967).

Determination of probable cause was the purpose of the preliminary hearing most frequently cited by United States Commissioners responding to a questionnaire sent to them by the Subcommittee on Improvements in Judicial Machinery. See *Hearings on S. 3,475*, at 487. The Subcommittee sent a detailed questionnaire to each of the more than 730 commissioners and received in reply 407 substantially completed responses. *Hearings on S. 3,475*, at 453. The staff drew on this material to prepare a unique picture of the way in which commissioners view their role and functions. The report is printed as Appendix I, Report by Subcomm. Staff on U.S. Commissioner Responses to Subcomm. Questionnaire, *Hearings on S. 3,475*, at 453-97 [hereinafter Questionnaire].

48. Serious criticism has been leveled at magistrates' ability and qualifications to conduct the preliminary hearing and other judicial duties. See L. ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 75 (1947); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *TASK FORCE REPORT: THE COURTS* 34-36 (1967). Two commissioners raised the issue with the Subcommittee on Improvements in Judicial Machinery in response to a question as to whether the preliminary hearing is well designed to achieve its goals:

"Preliminary hearings, left to Commissioners, are very summary. The worth depends on individuals. This is the reason more thought should be given to appointment."

"If the office of Commissioner is competently discharged, I think it adequately serves its purpose. However, I personally know of U.S. Commissioners who were appointed because of their personal connections with a Federal Judge, and who have no other qualifications."

Questionnaire 490-91.

49. Questionnaire 491, stated that "[s]ome commissioners were critical of the

Rule 5(c), like its state counterparts, makes no express reference to affording the defendant discovery. But some degree of discovery is an inevitable result of an adversary hearing in which probable cause is established through the testimony of witnesses. The desire of prosecutors to avoid the discovery function of the preliminary hearing, rather than their desire to avoid the screening function, has given rise to the widespread practice of continuing the preliminary hearing date until the return of an indictment renders a hearing moot.⁵⁰ By the same token, it is defense counsels' desire to use the hearing as a means of obtaining discovery—a means not available under any other rule⁵¹—that has led them to challenge this practice and other restrictions on the opportunity to use preliminary hearings as a discovery device.⁵² These challenges have yielded a body of recent case law on the subject of whether discovery is a legitimate function of a rule 5(c) preliminary hearing.

Against the backdrop of these cases, and particularly the decisions in the District of Columbia, the draftsmen of the Federal Magistrates Act fashioned section 303.⁵³ In so doing they chose to

fact that the government may seek an indictment from the grand jury regardless of whether the case had been heard by the commissioner, and regardless of his decision on probable cause if it was heard" The staff report quotes from two commissioners who

mentioned cases in which they had found no probable cause after which indictments had been obtained but without successful prosecution.

"One year I dismissed six cases after which the Grand Jury indicted and, on trial in U.S. Court, all thereof were acquitted."

"... I have discharged defendants, and the U.S. Attorney subsequently indicts them; in several cases, the Judge turned them loose again."

Id.

50. The possibility of saving time for prosecutors, law enforcement officials, and other witnesses by avoiding the preliminary hearing is an additional justification for the practice.

In general, United States Attorneys have had free rein to avoid the preliminary hearing. Answers by two United States Commissioners to a Subcommittee question as to why preliminary hearings were not held were particularly disturbing: "When appointed I was instructed by U.S. District Attorney to set hearings far enough in advance to allow for grand jury indictment." "It is the policy of the U.S. Attorney not to have preliminary hearings." Questionnaire 483 (emphasis added); cf. note 12 *supra*.

51. None of the Federal Rules of Criminal Procedure provides for the cross-examination under oath of potential government witnesses before trial in order to obtain discovery of their testimony. Under rule 15(a), the court may, after indictment, allow the defendant to take the deposition of "a prospective witness [who] may be unable to attend or prevented from attending a trial or hearing" if his testimony is material and a deposition is necessary "to prevent a failure of justice." But this provision was not intended as a discovery device and has not been used as such. See 8 J. MOORE, *FEDERAL PRACTICE* ¶ 15.02, at 15-4 (R. Cipes, 2d ed. 1968). Rule 16 covers only the discovery and inspection of written material and tangible objects. For a discussion of the inadequacy of federal discovery procedures, see generally Comment, *Preliminary Hearing in the District of Columbia—An Emerging Discovery Device*, 56 GEO. L.J. 191, 203-05 (1967).

52. See note 40 *supra*.

53. In a memorandum on the preliminary hearing prepared for use of the Sub-

follow the weight of authority and reject the discovery function of the preliminary hearing.⁵⁴ Before criticizing this choice, it will be helpful to review the judicial precedent on the subject. Like the Committee, we will take special note of the case law that has developed in the District of Columbia, since it has differed markedly from practice in other parts of the federal judicial system.

C. *Case Law on the Functions of the Preliminary Hearing*

Although all of the participants in a preliminary hearing are well aware that discovery is a significant outcome of the proceedings, most courts have refused to recognize discovery as a valid purpose of the hearing. Instead, the courts have generally declared that screening cases for grand jury action is the sole valid purpose; the reported decisions indicate that only rarely have courts thwarted the prosecutor's inclination to moot the hearing by seeking a continuance pending indictment. But the Court of Appeals for the District of Columbia Circuit took a major step in curbing this practice in 1961⁵⁵ when an appellant alleged that postponement of his hearing pending indictment was "representative of a general philosophy or pattern."⁵⁶ The court emphatically declared that "persons accused of crime are entitled to prompt preliminary hearings pursuant to Rule 5."⁵⁷

committee on Improvements in Judicial Machinery, its staff paid particular attention to the law in the District of Columbia. See Staff Memorandum, *Hearings on S. 3,475*, at 265. See also Staff Memorandum, *id.* at 273, 274: "In the District of Columbia, the Court of Appeals for the first time is beginning to lay down standards for the proper conduct of a preliminary hearing"

54. *Hearings on S. 3,475*, at 2-3 (remarks of Senator Tydings):

The subcommittee's previous hearings on the commissioner system have disclosed that a great deal of confusion exists about the procedures and purpose of the preliminary hearing. Indeed, any study of the common law background of the preliminary hearing, and of the cases which have been handed down since this Nation's formation will indicate that there is a great deal of cloudiness and confusion about the range and purpose of preliminary hearings. The bill accepts the traditional notion that the hearing is solely a device for the determination of probable cause

The preliminary hearing provision of the bill operates on the assumption that the problem of pretrial discovery should be treated separately and apart from the preliminary hearing.

55. *Drew v. Beard*, 290 F.2d 741.

56. 290 F.2d at 741.

57. 290 F.2d at 742. The committing magistrate had postponed the hearing on the ground that the defendant was on bond, a ground disapproved by the court of appeals: "The fact that an accused is at liberty on bond does not in itself constitute a reason for denying him a prompt preliminary hearing, or postponing the hearing to a future date." 290 F.2d at 742. The language is dictum; the appeal was dismissed as moot because the preliminary hearing had been scheduled for the same day as the appeal was decided. However, the dictum had an important practical impact in reducing the practice of bypassing preliminary hearings in the District of Columbia. See also Wilson

Three years later, in *Blue v. United States*,⁵⁸ the same court analyzed the purposes of the hearing and found discovery to be one of them:

It has generally been thought that the purpose of a preliminary hearing is to afford the accused (1) an opportunity to establish that there is no probable cause for his continued detention and thereby to regain his liberty and, possibly, escape prosecution, and (2) a chance to learn in advance of trial the foundations of the charge and the evidence that will comprise the government's case against him.⁵⁹

Recognition of discovery as an independently valid purpose of the preliminary hearing proved to be a remarkably controversial statement—and one from which the court has recently retreated. After several decisions following *Blue's* recognition of the discovery function of the preliminary hearing,⁶⁰ in *Ross v. Sirica*⁶¹ the court had to decide whether to review en banc a panel decision ordering the reopening of a preliminary hearing so that additional witnesses might be subpoenaed. The petition for en banc rehearing was denied over the vigorous dissent of three judges, who felt that the panel decision necessarily depended upon an erroneous belief that discovery was a valid purpose of the preliminary hearing.⁶² But the opinion which, because of the balance on the court, proved to be decisive was that of the two “swing” judges who voted to deny rehearing en banc on the ground that the witnesses should have

v. Anderson, 335 F.2d 687 (D.C. Cir. 1964), in which the preliminary hearing was continued until the proceedings were dismissed as moot following indictment. Judge Bazelon (dissenting from an order of the court denying leave to appeal in forma pauperis from the denial of a writ of habeas corpus) stated that “the question how to vindicate this critical right [to confront witnesses in a preliminary hearing and to refute probable cause] is not frivolous and requires power over the processes of criminal justice.” 335 F.2d at 691.

58. 342 F.2d 894 (D.C. Cir. 1964), cert. denied, 380 U.S. 944 (1965).

59. 342 F.2d at 901 (footnote, citing no case authority, omitted).

60. E.g., *Dancy v. United States*, 361 F.2d 75 (D.C. Cir. 1966); *Holmes v. United States*, 370 F.2d 209 (D.C. Cir. 1966). But see *Crump v. Anderson*, 352 F.2d 649 (D.C. Cir. 1965). For a comprehensive treatment of recent District of Columbia case law on the subject, see Comment, *supra* note 51, at 194-202. See also *The United States Court of Appeals for the District of Columbia Circuit: 1964-65 Term*, 54 Geo. L.J. 185, 203-09 (1965).

61. 380 F.2d 557 (D.C. Cir. 1967).

62. Judge Danaher pointed out that “there is now and . . . for the last few years there has been substantial disagreement among the judges of this court on the matter of ‘discovery’ in preliminary hearings.” 380 F.2d at 566. In a separate opinion, Judge Burger, with whom Judge Tamm joined, said that “[i]t should be clear . . . that a majority of the Court does not agree with the three judges of the sitting division in their effort to re-write the procedure authorized by Congress for a preliminary hearing so as to convert it into a discovery mechanism.” 380 F.2d at 569. A fourth judge, without intimating a position on the merits, would have granted rehearing to clarify uncertainties as to the proper function of the preliminary hearing. 380 F.2d at 569.

been subpoenaed for the purpose of resolving the issue of probable cause. In reaching their conclusion they restated the relationship of discovery to the preliminary hearing:

The focus of the solicitude embodied in the procedural device of the preliminary hearing is the liberty of the accused. Should it be taken away from him because there is probable cause to believe that he has committed a crime for which the grand jury will indict? To the extent that the prosecution is put to its proof of such probable cause, the accused in effect gets discovery of that much of the Government's case as is comprised of the evidence it adduces to establish probable cause. But that is an inevitable consequence of the hearing, and not its primary purpose.⁶³

This limitation upon *Blue*'s recognition of discovery as an independently valid purpose of the hearing is particularly significant since it was written by the author of the *Blue* opinion.⁶⁴

Decisions in other circuits have not accepted discovery as a purpose of the preliminary hearing. For them, the sole rationale of the preliminary hearing is to inquire whether there is probable cause to hold the defendant pending action by the grand jury.⁶⁵ On this premise, the federal courts generally have not hesitated to rule that the defendant's right to the hearing is mooted when an indictment is returned prior to the date set for a preliminary hearing: since the only purpose of the hearing is to decide whether the defendant should be held for the grand jury, there is no longer any purpose to be served by a hearing after the grand jury has acted.⁶⁶ Some courts have also pointed out that the provisions of rule 5 do not apply to a defendant who is arrested under rule 9 following an original indictment,⁶⁷ and that there is no rule under which such a defendant may be given a preliminary hearing.⁶⁸ Therefore, the courts reason, once the grand jury has acted, a defendant who was arrested either by warrant under rule 4 or without warrant should be in the same

63. 380 F.2d at 563 (statement of Judges McGowan and Leventhal on their reasons for voting to deny rehearing en banc).

64. Judge McGowan, as the author of *Blue*, was at liberty to comment: "It may well be that there is language in the *Blue* opinion which obscures this true relationship of discovery to probable cause. But, however cloudy or misconceived that language may be, the relationship, as it is given to us to understand it, is as described above." 380 F.2d at 563.

65. See cases cited in note 47 *supra*.

66. See cases cited in note 47 *supra*. See also *United States v. Cowan*, 396 F.2d 83 (2d Cir. 1968).

67. *Swingle v. United States*, 389 F.2d 220, 223 (10th Cir.), *cert. denied*, 392 U.S. 928 (1968); *Crump v. Anderson*, 352 F.2d 649, 656 (D.C. Cir. 1965).

68. A challenge to this disparity on equal protection grounds failed to obtain certiorari. *Petition for Certiorari* at 2, *Swingle v. United States*, 389 F.2d 220 (10th Cir.), *cert. denied*, 392 U.S. 928 (1968).

position with respect to the hearing as a defendant who was arrested under rule 9.

It is no coincidence that the few courts which hold that a preliminary hearing is not automatically mooted by indictment are those which have recognized the value of the preliminary hearing in affording discovery to the defense. But for some reason the decisions holding that indictment does not moot the hearing have not been premised on a need to afford discovery. In *Blue*, which shattered precedent by holding that an indictment would not invariably moot the preliminary hearing,⁶⁹ the District of Columbia Circuit considered the possible effect of a post-indictment finding of no probable cause:

In a preliminary hearing held or reopened after indictment, the Commissioner would continue under the necessity of making his own independent determination of probable cause. If he were persuaded that no such cause existed, that finding would result in his release of the defendant. It would not affect the indictment, although the Commissioner's action would presumably cause the prosecutor to review the indictment again with care. The defendant could be made to respond to the indictment by summons, or a resumption of custody could be sought by application for a bench warrant. In the latter case, such a singular circumstance as a finding of no probable cause by the Commissioner would presumably be a factor for consideration by the court.⁷⁰

This explanation, though technically impeccable, reveals the practical anomaly of requiring the commissioner to hold a probable cause hearing after the ultimate decision on probable cause has already been reached by a grand jury. A preliminary hearing after indictment realistically serves a useful function only in terms of discovery. Nevertheless, the "swing" judges in *Ross v. Sirica*, who

69. The precedent-breaking language stated, *inter alia*:

We do not believe . . . that the mere existence of an indictment renders academic any defects in the Commissioner's proceedings or necessarily insulates those defects from judicial correction.

. . . Where a defendant is denied out of hand the opportunity to consider utilizing that value, we do not think that that denial is to be swept under the rug of a grand jury indictment. Neither do we think that the availability of a remedy should depend upon the outcome of a race between counsel seeking habeas corpus or mandamus and the grand jury acting upon the charge. We, therefore, conclude that relief in such a situation is not to be foreclosed solely by reason of an intervening indictment.

342 F.2d at 899-900. In the case before it, however, the court declined to reverse the conviction on the grounds that the issue had not been timely raised and that the defendant had not been prejudiced: "[W]e cannot find that the Commissioner's failure to accord appellant a meaningful opportunity to elect a preliminary hearing, and thereby to acquaint himself in greater detail with the case against him, so handicapped him in his first trial as to require a second." 342 F.2d at 901.

70. 342 F.2d at 900 n.7.

sought to minimize the discovery function of the preliminary hearing, indicated their unwillingness to retreat from the position that indictment does not automatically moot the hearing. They castigated the practice, found to exist in another jurisdiction, by which

preliminary hearings are avoided through continuances granted routinely until mooted by an indictment. If such a practice were attempted in the District, we would find no insuperable barrier in meeting the problem through the sanction of requiring a hearing after indictment. Similarly, we see no jurisdictional barrier to a like sanction for coping with the withholding of critical witnesses whose testimony is the key to the issue of the reasonableness of continued detention.⁷¹

The Supreme Court has been asked to resolve this conflict between the District of Columbia⁷² and the other circuits,⁷³ but thus far it has declined.⁷⁴

III. CRITICISM OF THE NEW LEGISLATION

Against this background of conflicting judicial opinion regarding the purposes of the preliminary hearing and its relationship to grand

71. 380 F.2d at 563-64 (statement of Judges McGowan and Leventhal on their reasons for voting to deny rehearing en banc) (footnote omitted).

72. *Ross v. Sirica*, 380 F.2d 557 (D.C. Cir. 1967); *Dancy v. United States*, 361 F.2d 75 (D.C. Cir. 1966); *Blue v. United States*, 342 F.2d 894 (D.C. Cir. 1964), *cert. denied*, 380 U.S. 944 (1965).

73. See cases cited in note 47 *supra*. For commentary on mootness and rule 5(c), see Note, *The Preliminary Examination in the Federal System: A Proposal for a Rule Change*, 116 U. PA. L. REV. 1416, 1420-26 (1968). In *United States ex rel. Wheeler v. Flood*, 269 F. Supp. 194, 197 (E.D.N.Y. 1967), Judge Weinstein noted that "[m]ost courts have felt compelled to deny relief [when the government has delayed the hearing pending indictment] on the ground that the issue of delay was mooted by indictment." In this case, in which the defendants had not yet been indicted, he ordered their release from custody unless a preliminary hearing was held later the same day. Moreover, he noted, "[a]t the insistence of the defendant, the preliminary hearing of a defendant brought before a Commissioner prior to indictment should take place before, or simultaneously with, presentment to the Grand Jury unless, of course, the Grand Jury is operating independently of the United States Attorney—a circumstance most rare." 269 F. Supp. at 198.

74. Petition for Certiorari at 2, *Sciortino v. Zampano*, 385 F.2d 132 (2d Cir. 1967), *cert. denied*, 390 U.S. 906 (1968). In *Jaben v. United States*, 381 U.S. 214, 220 (1965), the Supreme Court had said in dictum:

[W]e think that the Government must proceed through the further steps of the complaint procedure by affording the defendant a preliminary hearing as required by Rule 5, unless before the preliminary hearing is held, the grand jury supersedes the complaint procedure by returning an indictment.

In the *Sirica* case, the Court of Appeals for the District of Columbia Circuit concluded:

Jaben does not undermine the holding in *Blue* that an accused who demands the preliminary hearing as is his right is entitled to such a hearing and that, if the point is properly and timely pressed, a denial of that hearing cannot be excused by pointing to an intervening grand jury indictment.

Ross v. Sirica, 380 F.2d 557, 560-61 (D.C. Cir. 1967) (footnote, noting that the issue had not been properly raised in the *Jaben* case, omitted).

jury action, the Senate Subcommittee on Improvements in Judicial Machinery undertook a detailed study of the United States Commissioner system. Chaired by Senator Tydings, this subcommittee held extensive hearings over a three-year period, first on the existing law and practices and later on preliminary drafts of the Federal Magistrates Act.⁷⁵ The Act was the subject of more thorough, scholarly consideration than most legislation receives.⁷⁶

But the adequacy of the congressional appraisal of section 303 in the broader context of federal pretrial criminal procedure is open to question. Our criticism of the congressional decision concerning the preliminary hearing, as embodied in section 303,⁷⁷ is twofold: first, it reflects inadequate appreciation of the hearing's potential ability to screen out weak cases, and second, it undermines use of the hearing for discovery while failing to provide any substitute.

A. *The Congressional Approach to the Screening Function of the Hearing*

Section 303 of the Federal Magistrates Act, which provides that a preliminary hearing "shall not be required" after indictment, rests upon a fallacious assumption that a grand jury's consideration of whether or not to return an indictment is equivalent to a preliminary hearing as a screening device. The Senate report on the bill contains the unexceptionable statement that "[n]o citizen should

75. *Hearings*, pt. 1; *Hearings on the United States Commissioner System Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess., pt. 2 (1965) [hereinafter *Hearings*, pt. 2]; *Hearings*, pt. 3; *Hearings on S. 3,475*.

By contrast, the two days of hearings in the House appear to have been conducted almost pro forma. See *Hearings on S. 945, H.R. 5,502, H.R. 8,277, H.R. 8,520, H.R. 8,932, H.R. 9,970, and H.R. 10,841 Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 90th Cong., 2d Sess., ser. 17 (1968) [hereinafter *House Hearings on S. 945*]. The most extensive testimony was that of Senator Tydings, *id.* at 68-96, and William T. Finley, Jr., former Chief Counsel to the Senate Subcommittee on Improvements in Judicial Machinery, *id.* at 119-42. The House amended the legislation passed by the Senate but "most of the changes are designed either to clarify the act, to resolve possible inconsistencies between the act and other statutes, or to make grammatical improvements." H.R. REP. NO. 1,629, at 10. A comparison of House and Senate (S. REP. NO. 371) committee reports shows that the House Report is based in large part on that of the Senate.

76. The legislative history, note 75 *supra*, shows an earnest attempt to fulfill Senator Tydings' opening promise:

This is a hearing which we hope will mark the beginning of an extensive and exhaustive examination of the U.S. commissioner system. We intend to find out all there is to know about the current operation of the commissioner system, and to seek the best available advice from the bench, the bar and the commissioners themselves, of course, the persons who know most about this subject, in order to determine what reforms are needed in this long-neglected "front line" area of Federal justice.

Hearings, pt. 1, at 1.

77. See note 6 *supra*.

have his liberty restrained, even to the limited extent of being required to post bail or meet other conditions of release, unless some *independent judicial determination* has been made that the restraint is justified."⁷⁸ But the report proceeds on the erroneous premise that "the magistrate, some judicial officer, [and] the grand jury" are all capable, and equally so, of making an "independent judicial determination" that "restraint is justified."⁷⁹

The grand jury is not a proper body to reach an "independent judicial determination" of probable cause. Its determination is unlikely to be "judicial" because it is composed of laymen,⁸⁰ whose sole guidance on legal questions will normally come from the prosecutor. Its determination is also unlikely to be "independent" in most cases because, in practice, the prosecutor's influence is usually controlling. In his classic 1932 study of preliminary criminal proceedings in Oregon, Wayne Morse observed that "studies of the grand jury show rather conclusively that it is not inclined to be an independent body but rather that it tends to stamp with approval, and often uncritically, the wishes of the prosecuting attorney."⁸¹ More recent studies support this conclusion;⁸² as the Second Circuit has stated, "[b]asically the grand jury is a law enforcement agency."⁸³

78. S. REP. NO. 371, at 34 (emphasis added).

79. *Id.* See also Staff Memorandum, *Hearings on S. 3,475*, at 9, 14, quoted in note 99 *infra*.

80. See *Costello v. United States*, 350 U.S. 359, 362 (1956): "[I]n this country as in England of old the grand jury has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor."

81. Morse & Beattie, *Survey of the Administration of Criminal Justice in Oregon*, 11 ORE. L. REV. 108-09 (Supp.) (1932); Morse, *Survey of the Grand Jury System*, 10 ORE. L. REV. 101, 295 (1931); accord, Moley, *Grand Jury*, in 7 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 148, 149 (1937) (volume 7 appears in volume 4 of the 1937 reissued ed.).

82. E.g., Meshbesh, *Right to Counsel Before Grand Jury*, 41 F.R.D. 189 (1967); cf. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1171 (1960).

Recently a grand jury at the end of its five-month term issued a report suggesting that the grand jury be abolished. The grand jury posed the following rhetorical questions: "Isn't the grand jury simply rubber-stamping what a trial judge has previously decided? . . . Are not we but furthering the time element between arrest and trial? . . . True (the grand jury) is a fine means of practice for the State's Attorney's office and its witnesses. But is that enough to justify a grand jury?" *Washington Post*, Feb. 6, 1969, at E6.

83. *United States v. Cleary*, 265 F.2d 459, 461 (2d Cir.), *cert. denied*, 360 U.S. 936 (1959). The court there said:

Under the Assize of Clarendon in 1166 and for several centuries thereafter the sole function of the accusatory jury in the area of criminal law was to assist the Crown in law enforcement . . . And today, with its power to subpoena witnesses and question them in secret, the grand jury continues to be an important investigative instrument of the prosecutor.

265 F.2d at 461 (citations omitted). See also *In re Grand Jury Proceedings*, 4 F. Supp. 283, 284 (E.D. Pa. 1933): "The inquisitorial power of the grand jury is the most valuable function which it possesses to-day and, far more than any supposed protection which it gives to the accused, justifies its survival as an institution."

In practice, the federal criminal justice system has relied primarily on the discretion of prosecutors, and not on preliminary hearings⁸⁴ or independent grand jury decisions, to screen out weak cases. The prosecutor does not ordinarily want to take weak cases to trial and will ask leave of court⁸⁵ to drop charges when, on reflection, evidence does not appear to warrant prosecution of a person already charged. But prosecutorial "reflection" may take an unreasonably long time. A committing magistrate, formerly an Assistant United States Attorney, noted that the value of the preliminary hearing lies less in the screening given by the hearing itself than in the effect which its pendency has on the prosecutor:

It forces him . . . to immediately screen his case. In other words, he doesn't let [the defendant] sit in jail for three months and then talk to the officer and dump it. It forces him to paper as we say. . . . [A] lot of [cases] are thrown out that wouldn't be thrown out if the prosecutor wasn't, out of his busy schedule, forced to look at the facts, forced to determine whether there's a case⁸⁶

Moreover, the prosecutor has to take account of factors other than the possibility of winning a particular case. He must also make policy decisions such as whether he will take a hard line on certain types of crime, and it is unrealistic to expect that he can perform this task and still maintain a detached, objective view of the exact strength of each individual case. Indeed, that is not his function.⁸⁷

84. In the District of Columbia, most of the screening is undertaken by the prosecutor prior to the time scheduled for the preliminary hearing. In consequence, very few cases actually result in discharge at the preliminary hearing. See statistics collected in PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA, REPORT 233-35, figure 4, at 275 (1966). The Commission refers to the "pivotal role of the prosecutor in no papering or dismissing substantial numbers of cases . . ." *Id.* at 235. In Chicago, on the other hand, the reverse is true. There the prosecutor dismisses very few cases but a substantial proportion are dismissed at the preliminary hearing. McIntyre, *A Study of Judicial Dominance of the Charging Process*, 59 J. CRIM. L.C. & P.S. 463, 464 (1968). The author states that "[o]nly about 20 percent of the cases receiving a hearing are bound over to the Grand Jury for further prosecution." *Id.* at 463.

85. FED. R. CRIM. P. 48(a). See PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA, REPORT 239 (1966) (footnote omitted):

After initiating prosecution, the United States Attorney may still exercise his discretion to terminate the case. Unlike his decision not to prosecute, however, these decisions are supervised by the court, since the prosecutor must file a motion to dismiss or request leave to enter a nolle prosequi. As a practical matter, few of these requests are denied.

In fiscal 1965, cases involving 15 percent of the felony defendants were terminated prior to trial Most of these dismissals occur on motion of the U.S. Attorney and are an exercise of his prosecutive discretion.

86. Copy of interview on file at Institute of Criminal Law and Procedure, Georgetown University Law Center, Washington, D.C. When references are made in the text to interviews commenting on the preliminary hearing in the District of Columbia, and to practices relating to the hearing, supporting data is on file at the Institute of Criminal Law, Georgetown University Law Center, under whose auspices the interviews were conducted.

87. The difference between a judicial and prosecutorial assessment of the appro-

There are thus two drawbacks of depending on the prosecutor to screen out cases. First, unless he has to be prepared to make a prompt showing of probable cause he will naturally tend to postpone review. In addition, he does, and should, have a prosecutorial viewpoint. Both of these shortcomings are better remedied by preliminary hearing than by grand jury screening.

The fact that the preliminary hearing is both public and adversary makes its screening more independent than the grand jury's.⁸⁸ It is also more difficult to conceal evidentiary weaknesses at a preliminary hearing. Because the grand jury is composed of laymen, it is incompetent to make legal decisions about whether a prima facie case against the defendant exists. Indeed, since the Supreme Court held in *Costello v. United States*⁸⁹ that a valid indictment may be

priateness of felony prosecution may be seen in connection with charges arising out of the April 1968 riots in Washington, D.C., following the death of Dr. Martin Luther King, Jr. According to a newspaper account, a veteran district judge, reviewing several hundred indictments in those cases, was of the opinion that the evidence in most of them was too weak for the cases to be tried as felonies. *Washington Evening Star*, Oct. 10, 1968, at B1. The article reported that the judge said "that his review of more than 270 indictments charging 499 defendants may indicate about 25 'hard core' felonies. [The judge] said there is a number of cases the government cannot prove, and that many others could be reduced to misdemeanors . . ." Yet those cases had been screened by the prosecutor, the preliminary hearing, and the grand jury. For an account of preliminary hearings in the riot cases see *Washington Post*, April 28, 1968, at D1. The *Post* reported that at that time about 250 persons had been held for the grand jury after preliminary hearing, that only four defendants had waived the hearing, and that 25 defendants had had charges against them dismissed at preliminary hearing. In addition, the *Post* reported, "charges have been reduced or dropped in about another 250 cases." *Id.* Presumably action in these latter cases was an exercise of prosecutorial discretion; see note 84 *supra*.

88. As Dean A. Kenneth Pye of Duke Law School pointed out in testimony before the Subcommittee, the preliminary hearing is an adversary proceeding. This is why a defendant is given the right to cross-examine, to call witnesses and to testify in his own behalf. He does not have these rights before a grand jury. Indeed, it is a crime for him to communicate with the grand jury without authority. Probable cause has already been determined ex parte by either an officer arresting without a warrant or by a commissioner or judge in issuing a warrant. One reason for the commissioner's hearing is to test the assertion of probable cause by the best truth-seeking device which we have been able to develop—cross-examination by counsel.

Hearings, pt. 3, at 270. Professor Samuel Dash of Georgetown University made a similar point:

The bill treats the probable cause screening function of the grand jury on the same qualitative level as the probable cause determination by a judicial officer at a preliminary hearing. It leaves it to the prosecutor to decide which procedure will be made available to an arrested person. Yet can it be seriously argued that probable cause determined by laymen in secret under the guidance of the prosecutor and in the absence of the defendant and his counsel is anywhere near as protective of individual rights as the determination of probable cause by a judicial officer at a public preliminary hearing in the presence of the defendant and his counsel with the right of the defendant to cross-examine and present evidence in his own behalf?

Hearings on S. 3475, at 139. See also *id.* at 160 (testimony of Lawrence Speiser on behalf of the American Civil Liberties Union).

89. 350 U.S. 359 (1956).

returned solely on the basis of hearsay testimony, there is no pretense that federal grand juries screen out cases in which no competent evidence exists.⁹⁰ An indictment based on illegally obtained evidence is slightly more vulnerable to a motion to dismiss,⁹¹ but whenever the court grants such a motion, screening by the grand jury has obviously failed. Moreover, the defendant may already have spent substantial time in jail prior to the ruling on the motion.

At the present time, there is little authority to support legal objection to a federal committing magistrate's basing probable cause on hearsay or tainted evidence;⁹² the Federal Rules of Crim-

90. In the Second Circuit, the courts have severely criticized the practice of relying on hearsay evidence before the grand jury when better evidence is available, and have implied that the continuation of such a practice might result in quashing the indictment. *See United States v. Arcuri*, 405 F.2d 691 (2d Cir. 1969).

91. *See Laughlin v. United States*, 385 F.2d 287, 291 (D.C. Cir. 1967); *United States v. Tane*, 329 F.2d 848 (2d Cir. 1964); *cf. Coppedge v. United States*, 311 F.2d 128 (D.C. Cir. 1962), *cert. denied*, 373 U.S. 946 (1963). *But cf. United States v. Blue*, 384 U.S. 251, 255 n.3 (1966). There surely are stronger reasons for quashing an indictment based on illegally obtained evidence than for quashing an indictment based on hearsay. Note, *Criminal Procedure—Grand Jury—Validity of Indictment Based Solely on Hearsay Questioned When Direct Testimony is Readily Available*, 43 N.Y.U. L. REV. 578, 581 (1968): "Unlike the coerced confession or the illegal wiretap which will never have probative value at trial, hearsay, by its very nature, may be translated into competent evidence by the time of trial if the originator or primary source of the hearsay testifies in court."

92. The Court of Appeals for the District of Columbia has implied that, at least in certain types of cases, the committing magistrate should not be satisfied with the establishment of probable cause by hearsay evidence when first-hand testimony is available. *See Washington v. Clemmer*, 339 F.2d 715, 728 (D.C. Cir. 1964) (footnote omitted):

[W]e do not decide whether a Government case composed solely of hearsay can or cannot satisfy the requirement of "competent evidence" in a preliminary hearing. We decide only that under the circumstances shown here the decision and reasons of the Commissioner, on the [defendant's] request for the subpoena [the complaining witness in a rape case], were clearly erroneous.

Ross v. Sirica, 380 F.2d 557, 565 (D.C. Cir. 1967) (statements of Judges McGowan and Leventhal, on their reasons for voting to deny rehearing en banc) (footnote omitted):

A judicial officer engaged in a judicial determination of probable cause can hardly rest easy solely with the hearsay account of the policeman of what these eye-witnesses told him if the eye-witnesses can be available, so that he can listen to their versions and observe their demeanor and provide an opportunity to defense counsel to explore their account on cross-examination.

See also Wilson v. Anderson, 335 F.2d 687, 690 n.6 (D.C. Cir. 1964) (Judge Bazelon, dissenting):

Since Rule 5 guarantees the right of cross-examination at preliminary hearings, the question arises whether the rules concerning hearsay testimony are relevant. *See WIGMORE, EVIDENCE* §§ 1362, 1367 (3d ed. 1940). If so, it may be improper for the material witnesses to "testify" at the hearing only through the hearsay testimony of the arresting police officer . . .

The Staff of the Subcommittee on Improvements in Judiciary Machinery noted: "Apparently there has been virtually no case law discussion of the admissibility of hearsay evidence in preliminary hearings, and the question is open." Staff Memorandum, *Hearings on S. 3,475*, at 273, 274. The memorandum points out that in the District of Columbia, the "Court of Appeals for the first time is beginning to lay down standards for the proper conduct of a preliminary hearing . . . [the issue of the use of hearsay at the hearing] was expressly left open in *Washington v. Clemmer* . . ." *Id.* (citation omitted).

inal Procedure do not even deal with the question of what evidence can be admitted at preliminary hearings. The *Manual For United States Commissioners* states that "[p]robable cause is *competent evidence* [sic] which induces a reasonable ground for the inference that the charges may be well founded."⁹³ But committing magistrates simply do not follow this precept on any large scale.⁹⁴ In the District of Columbia, for example, not only is hearsay evidence admitted at preliminary hearings, but probable cause is often founded on hearsay alone.⁹⁵ But the preliminary hearing's deficiency on this point is potentially remediable,⁹⁶ whereas the grand jury's is not.

In concluding that it is unnecessary for a committing magistrate to determine probable cause when the grand jury acts with relative promptness, the draftsmen of the Federal Magistrates Act did not seriously consider the potential usefulness of the preliminary hearing as a screening device. This is clear from the manner in which the Senate Committee report attempts to rebut the "number of witnesses [who] suggested that preliminary examinations should be held in all cases, despite intervening indictments, and that the preliminary examination should to some degree take the place of grand jury proceedings."⁹⁷ Instead of addressing itself to the screening rationale underlying this argument, the report erroneously assumes that the sole reason for making the preliminary hearing mandatory would be to provide the defendant with discovery. The immediately succeeding language of the report is confined to a lengthy justification for the Committee's conclusion that "the problem of discovery should be treated separately from that of the preliminary hearing."⁹⁸ The Committee's Report contains no discussion of the screening value of the preliminary hearing.⁹⁹

93. MANUAL FOR UNITED STATES COMMISSIONERS 10 (1948) (emphasis added).

94. See Address of Chief Justice Warren to Annual Meeting of the American Law Institute, May 20, 1964, in 35 F.R.D. 181, 189 (1964).

95. See note 86 *supra*.

96. See pt. IV. B. *infra*.

97. S. REP. NO. 371, at 34.

98. *Id.* For a discussion of this position, see text accompanying notes 117-28 *infra*.

99. It is also clear from his testimony before a House subcommittee of the Committee on the Judiciary that Senator Tydings assumed that those witnesses who had emphasized the importance of the preliminary hearing did so only for the discovery advantages it offered. *House Hearings on S. 945*, at 74.

The Staff Memorandum prepared to accompany the draft legislation similarly assumes that the preliminary hearing serves no screening function which cannot be performed better by the grand jury:

Viewed solely as a means of determining probable cause, the preliminary hearing is rendered obsolete by the modern practice—at least in urban areas—of a grand jury sitting continuously, returning indictments soon after an accused is taken into custody or even before he is arrested. It surely seems unnecessary and wasteful to have the question of probable cause determined twice, particularly when the first

The Subcommittee heard testimony criticizing the practice of United States Attorneys who moot the defendant's right to a preliminary hearing by racing to the grand jury for an indictment.¹⁰⁰ But some concern was directed not so much to the grand jury indictment mooting the hearing, as to the possibility of excessive delay in obtaining the indictment.¹⁰¹ The draftsmen were responsive only to the latter criticism. Their purpose was not to insure that all defendants receive a preliminary hearing; instead, it was to insure that they not be held "too long" without *either* a preliminary hearing or a grand jury indictment.¹⁰² It was this accomplishment of section 303 which President Johnson noted during the bill-signing ceremony.

The influence of Senator Tydings may well have been decisive against ensuring the defendant the right to a preliminary hearing. His personal experience seemed to belie the widely accepted view that the grand jury is an inadequate means of protecting the defendant. In response to a subcommittee witness who was "of the opinion that the grand jury proceedings provide no real safeguard for a person's constitutional and civil rights," Senator Tydings stated: "As one who was charged with a violation of the Corrupt Practices Act and not indicted, I cannot quite agree with you. The grand jury is, probably, a safeguard for the individual, too. I have been on both sides of the fence. That is for the record."¹⁰³ It is unfortunate that Senator Tydings sought to generalize from such an atypical incident. When a similar colloquy arose later in the hearings and the Senator again referred to his experience as proof "that the grand juries in this country protect the innocent as well as return

determination at the preliminary hearing is not sufficient to confer jurisdiction upon the district court to proceed to the trial of the case.

Staff Memorandum, *Hearings on S. 3,475*, at 9, 14. Like the Senator, the memorandum proceeds to explain that discovery can best be provided elsewhere. *Id.* at 15.

100. *Hearings*, pt. 1, at 14, 37 (testimony of Prof. Charles A. Lindquist of Temple University and F. Archie Meatyard, Jr., U.S. Commissioner, Bethesda, Maryland); *Hearings*, pt. 3, at 220-22 (testimony of Prof. Irving Younger of New York University).

101. *See Hearings*, pt. 3, at 242-43 (testimony of Judge Rozel C. Thomsen of the District of Maryland); *Hearings on S. 3,475*, at 99-100 (testimony of Prof. Lloyd L. Weinreb of Harvard University).

102. A staff memorandum concluded that the "novel procedure," provided for in 18 U.S.C.A. § 3060(b) (Supp. Feb. 1969). This section is quoted in note 6 *supra*, and seems to serve the primary purpose of a preliminary hearing; namely, to allow an arrested person a prompt determination by an appropriate authority of whether his detention is justified. This seems to be the only conceivable purpose of a preliminary hearing that is not or cannot be served by other procedures in the law.

Staff Memorandum, *Hearings on S. 3,475*, at 9, 15.

103. *Hearings*, pt. 1, at 14. The witness, Charles A. Lindquist, was drawing a comparison between grand jury and preliminary hearing, criticizing the ability of the prosecutor to obtain an indictment and thereby moot the hearing, and advocating that "the preliminary hearing [be] made to serve a more useful purpose." *Id.*

charges against the guilty," the witness, Lawrence Speiser of the American Civil Liberties Union, responded: "I might suggest that the grand jury considering the case of a former U.S. attorney or U.S. attorney might be slightly different than when it considers the majority of matters which come before it."¹⁰⁴ It is possible that Senator Tydings' former practice as a United States Attorney was another factor underlying the congressional assumption that the preliminary hearing is unnecessary when the grand jury has acted. In the hearings he made it clear that during his tenure as a prosecutor the preliminary hearing was regularly mooted by indictment, even if the defendant had indicated that he wished to have a hearing.¹⁰⁵

It is ironic that statutory contraction of the committing magistrates' preliminary hearing function comes at a time when the magistrates themselves will be better qualified to perform it, and when substantial new judicial duties are being entrusted to them.¹⁰⁶

104. *Hearings on S. 3,475*, at 160.

105. *Hearings*, pt. 1, at 37:

Senator TYDINGS. Do you feel that in any revision or study that is related to the commissioners that there should definitely be a provision made for preliminary hearings giving a defendant the absolute right of a preliminary hearing?

Mr. MEATYARD. Giving the defendant the right of a preliminary hearing? Yes, I do.

Senator TYDINGS. For instance, do you feel that Tom Kenney's policy as U.S. attorney, which is directly opposite to his predecessor's policy—namely—mine, would be a better policy, that is to say, where a defendant has indicated that he wishes to have a preliminary hearing, he should be permitted to have a preliminary hearing prior to any U.S. attorney being able to take the case to the grand jury?

Mr. MEATYARD. I think so, yes. That points up the need that you are going to have to select capable personnel to conduct preliminary hearings.

The witness, F. Archie Meatyard, Jr., had served as United States commissioner at Bethesda, Maryland, for approximately nineteen years. *Id.* at 15.

106. The laudable purpose of the Federal Magistrates Act was "to abolish the office of U.S. commissioner and reform the first echelon of the Federal judiciary into an effective component of a modern scheme of justice by establishing a system of U.S. magistrates." S. REP. NO. 371, at 8; H.R. REP. NO. 1,629, at 11. The new magistrates are required to be attorneys "unless it is impossible to find a qualified attorney to fill a particular position" and the "anachronistic fee system of compensation" is replaced by "a system of salaries set on a sliding scale according to anticipated workload." *Id.*

The question of whether magistrates have been adequately upgraded, or whether their judicial functions would more properly be exercised by an article III judge, is beyond the scope of this Article. The dissenting views on this point by Mr. Cahill to the Report of the House Committee on the Judiciary, which approved the bill, raise some serious questions. Representative William T. Cahill argues:

Our Constitution does not refer to, nor provide authority for, a Federal magistrate system. To the contrary, article III specifically provides that Federal judicial power must be vested in "the Supreme Court and such other inferior courts, as the Congress may from time to time establish." Moreover, article II requires that judges of the Supreme Court and "All other officers of the United States whose appointments shall be established by law" must be appointed by the President by and with the advice and consent of the Senate. Federal judges are also provided lifetime tenure, and protection against diminution of their salaries.

• • • •

Contrary to these constitutional provisions, magistrates would be appointed by

In the past, the magistrates' lack of judicial qualifications undoubtedly contributed to the assumption that the preliminary hearing and the grand jury proceeding serve much the same purpose; if both procedures may be conducted by laymen and dominated by the prosecutor, there appears little reason to choose between them. Almost one third of the more than 700 current United States Commissioners are not lawyers,¹⁰⁷ and previously only minimal efforts had been made to provide them with "on the job training"—even if such instruction were feasible in such a complex and rapidly changing field. Formal legal assistance was largely limited to that provided in the *Manual for United States Commissioners*, a wholly inadequate pamphlet distributed by the Administrative Office of the United States Courts and not revised since 1948.¹⁰⁸ The opening paragraph of the *Manual*, after assuring commissioners that they should feel free to confer with the district court judge when necessary, goes on to say:

In any case where the commissioner desires the assistance and advice of the United States attorney or his assistants at any stage of a pro-

Federal district court judges for a tenure of only 8 years. Yet these officers of court would be empowered to adjudicate an unlimited and undefined range of Federal . . . civil, and criminal matters.

H.R. REP. NO. 1,629, at 44. In addition to the constitutional questions, Representative Cahill points to the disadvantages of allowing district court judges to appoint officials whose salaries range up to \$22,500. *Id.* at 46. This point had also been raised during the hearings. See *Hearings*, pt. 3, at 282 (testimony of Dean A. Kenneth Pye of Duke Law School); *Hearings on S. 3,475*, at 132-33 (statement of Prof. Samuel Dash of Georgetown University).

Section 302 of the Act expands the magistrates' trial jurisdiction to misdemeanors punishable by imprisonment for not more than one year or a fine of not more than \$1,000 or both, subject to the defendant's election to be tried by a magistrate and his right to appeal to the district court. S. REP. NO. 371, at 8-9; H.R. REP. NO. 1,629, at 11-12. The district courts are empowered to promulgate rules assigning the magistrates "such additional duties as are not inconsistent with the Constitution and laws of the United States." Section 101 of the Act, amending 28 U.S.C. § 636(b) (1964). The subsection continues:

The additional duties authorized by rule may include, but are not restricted to—

(1) service as a special master in an appropriate civil action, pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts;

(2) assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions; and

(3) preliminary review of applications for posttrial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing.

28 U.S.C.A. § 636(b) (Supp. Feb. 1969).

107. S. REP. NO. 371, at 10; H. REP. NO. 1,629, at 13.

108. See Testimony of Warren Olney, III, Director, Administrative Office of the United States Courts, *Hearings*, pt. 2, at 156-57. See also *Hearings*, pt. 1, at 25 (testimony of Fritz W. Windhorst, U.S. Commissioner, New Orleans, La.) Seventy-seven per cent of the commissioners who responded to the Subcommittee's questionnaire indicated that they thought the *Manual* was in need of revision. Questionnaire 471.

ceeding, or in conducting a preliminary examination, he should make a request of the United States attorney therefor At times the advice of the United States law enforcement agencies may also be helpful.¹⁰⁹

Excessive reliance on prosecutors and law enforcement agencies was apparent from the responses of some commissioners to a questionnaire sent to them by the Senate Subcommittee on Improvements in Judicial Machinery;¹¹⁰ in fact, some nonlawyer commissioners cited the ability to turn to the prosecutor for advice as a reason why legal training was unnecessary for committing magistrates.¹¹¹

A further reason why legal training for magistrates may have seemed unnecessary under the previous commissioner system was the fact that the defendant usually had no lawyer to raise legal questions. Many federal defendants are indigent,¹¹² but neither Congress¹¹³ nor the Supreme Court provided for appointment of counsel prior to the defendant's arraignment upon the indictment¹¹⁴ until 1964, when

109. MANUAL FOR UNITED STATES COMMISSIONERS 1 (1948) (emphasis added). The final admonition that "the commissioner should always bear in mind that his judicial decisions should be his own, based on the law and the facts in the light of his own best judgment," can hardly undo the damage to that independent judicial spirit which the *Manual* formally endorses, but has in fact undercut.

110. See note 50 *supra*; note 111 *infra*. When the commissioners were asked by the Subcommittee how they were informed of recent decisions affecting their duties, some of their responses

again seemed to indicate reliance on the prosecutors [sic] and law enforcement agents:

"Not informed, but U.S. Attorney very helpful in giving any advice asked—I really depend on U.S. Atty. & F.B.I. to avoid technical mistakes."

"Actually the U.S. Attorney helps as much as anyone."

"Informed by federal judge, F.B.I. agents—U.S. Clerks of Court and U.S. Deputy Marshals—and by mail."

"Only by the grapevine or hearsay."

"Usually receive directions from U.S. Attorney, or clerk or [sic] anything important."

Questionnaire 471.

111. Questionnaire 463.

112. See ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE, REPORT 20 (1963): "[I]t is the Committee's best judgment that in the country as a whole something over one-third of federal defendants are financially unable to supply themselves with competent counsel and that in many federal districts one-half or more of such defendants find themselves in this position."

113. See note 115 *infra* and accompanying text. In 1960, however, Congress had provided for representation of indigents in the District of Columbia. District of Columbia Legal Aid Act, D.C. CODE §§ 2-2201-10 (1967). The Act specifically provided for representation by Legal Aid attorneys "in preliminary hearings in felony cases." D.C. CODE § 2-2202 (1967). It was probably not purely coincidence that the landmark decision of *Blue v. United States*, 342 F.2d 894 (D.C. Cir. 1964), *cert. denied*, 380 U.S. 944 (1965), followed by three years the establishment of the Legal Aid Agency in 1961. *Blue* relied on "what we conceive to be the letter, as it is certainly the spirit, of the 1960 statute" in requiring the United States commissioner to inform the defendant of his right to the assignment of counsel. 342 F.2d at 898.

114. See note 115 *infra*. The Attorney General's committee found that "[i]n most federal districts appointed counsel first enters the case when the accused is brought before the court on arraignment and is required to plead to the indictment." Ar-

the Criminal Justice Act provided for appointment of counsel at the preliminary-hearing stage.¹¹⁵ Providing counsel tends to increase the frequency of preliminary hearings, since unrepresented defendants often waived preliminary hearings or failed to object when the prosecutor requested a postponement in order to moot the hearing by indictment. The staff of the Senate Subcommittee on Improvements in Judicial Machinery reported:

A number of commissioners expressed concern as to whether defendants without counsel understand the nature and purpose of the preliminary hearing. They indicated that his [sic] failure to understand results in frequent waiver by uncounselled defendants:

"It is difficult to explain the significance of the preliminary hearing to many."

"Even after thorough explanation some defendants don't seem to understand what a preliminary examination is."¹¹⁶

TORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE, REPORT 27 (1963).

115. Criminal Justice Act of 1964, 18 U.S.C. § 3006A (1964). The House Report stated:

[G]uaranteeing counsel at every stage of the proceedings, commencing with the initial appearance before the commissioner, is designed to afford representation to each defendant throughout his involvement in the judicial process. It insures that the advice of counsel will be available at the critical early stages when recollections are fresh and the opportunity to uncover evidence is greatest.

H.R. REP. NO. 864, 88th Cong., 1st Sess. 7 (1963). In 1966, the Supreme Court reflected the change by amending rule 44 of the Federal Rules of Criminal Procedure to guarantee the defendant's right to the assignment of counsel "at every stage of the proceedings from his initial appearance before the commissioner." FED. R. CRIM. P. 44 Prior to its amendment in 1966, the rule had provided: "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." The Court also amended rule 5(b) to require that the magistrate inform defendants of this right. *See* FED. R. CRIM. P. 5(b), Advisory Committee Note to 1966 amendment: "The second change obligates the commissioner to inform the defendant of his right to request the assignment of counsel if he is unable to retain counsel." Prior to the 1966 amendment to Rule 5(b), the commissioner was required to inform the defendant only "of his right to retain counsel."

116. Questionnaire 479. Surprisingly, fifty-five per cent of the commissioners who responded to the questionnaire thought that the frequency of waiver was not significantly affected by whether the accused was represented by counsel. *Id.* The need for counsel at preliminary hearing is forcefully asserted in 1 L. SILVERSTEIN, *DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS* 76 (1965):

Apart from the possibility of a constitutional requirement, it seems clear that counsel should be present at the preliminary hearing, since the defendant without counsel at that stage is at a tactical disadvantage, as pointed out in several of the state reports. First, he does not know whether to ask for the hearing or to waive it. If the hearing is held, he does not know how to cross-examine the state's witnesses, or whether to testify himself. He does not know whether to ask that a record be made of the hearing. He does not know the requisite legal elements of the offense with which he is charged, nor of lesser related offenses, so he is unable to discuss intelligently with the prosecutor possible reduction or dismissal of the charges. Moreover, it is possible, especially if the committing magistrate is untrained in the law, that the defendant will be bound over for the grand jury on insufficient evidence or that political considerations will affect his decision.

The Criminal Justice Act of 1964 and the Federal Magistrates Act of 1968, taken together, offer for the first time in the federal jurisdiction the promise that preliminary hearings will generally have both counsel and a tribunal qualified to perform the hearings' important screening function. Unless this potential is frustrated by section 303 of the Magistrates Act, the preliminary hearing should at last be able to fulfill its potential as a screening mechanism through which felony cases should pass before going on to the grand jury and to trial.

B. *Congressional Approach to the Discovery
Function of the Hearing*

By providing that a preliminary hearing is unnecessary if an indictment is returned within the time limits specified in section 303, the draftsmen of the Magistrates Act made clear their view that discovery was no longer, if it ever had been, an independently valid purpose of the hearing.¹¹⁷ The subcommittee was not, apparently, unimpressed with the testimony it heard stressing the need for discovery in criminal cases.¹¹⁸ But it was not convinced that discovery should take place at the preliminary hearing.

In general, the hearing affords the defendant an opportunity to learn the basis of the charges against him, by testimony given under oath and subject to cross-examination, shortly after the commission of the crime with which he is charged.¹¹⁹ The draftsmen were not unaware of these advantages, but in justifying section 303 they emphasized the lack of uniformity in defendants' ability to obtain a preliminary hearing. The Senate committee report correctly noted that

the degree of discovery obtained in a preliminary hearing will vary depending on how much evidence the presiding judicial officer thinks is necessary to establish probable cause in a particular case. This may be quite a bit, or it may be very little, but in either event

117. See note 99 *supra*.

118. S. REP. NO. 371, at 34.

119. See note 40 *supra*. See also *Symposium—Discovery in Federal Criminal Cases*, 33 F.R.D. 47, 70 (1964) (remarks of Professor Frank J. Remington):

[D]iscovery in a State like Wisconsin, which has little formal discovery, may in fact be much more complicated than it may appear. Although the preliminary examination was in its inception and certainly in its theory designed to afford a protection against being subjected to a trial when there does not exist probable cause to hold a person for trial, there is no question whatsoever that in practice it is used largely, if not entirely, as a discovery device. As a consequence, at least where the defendant is adequately represented, he is able to learn a great deal about the prosecution's case by demanding a preliminary examination.

it need not be all the evidence within the possession of the Government that should be subject to discovery.¹²⁰

Moreover, as Senator Tydings pointed out, defendants first arrested after indictment rather than pursuant to rule 4 are ineligible for a preliminary hearing and so cannot use it as a discovery device.¹²¹ This is a negative equal protection rationale which would deny discovery opportunities to some defendants because the law fails to grant them to others.

A second principal reason for the committee's conclusion that the preliminary hearing does not afford "an ideal opportunity for discovery"¹²² was its belief that the hearing "should be held within a short time after the accused is first arrested. Discovery, on the other hand, can most usefully take place at a later stage, much closer to trial, when the evidence is more nearly complete and defense counsel is better prepared."¹²³ No doubt discovery closer to trial, after attorneys for both sides have had an opportunity to become familiar with the case, would serve a useful purpose. But the defendant also has a vital interest in obtaining discovery promptly. Because human memory is fallible, evidence which is obtained immediately after the event is more likely to be reliable than evidence which is given later;¹²⁴ defense lawyers are well aware of the tactical advantage in-

120. S. REP. NO. 371, at 34. See *United States v. Bates*, 287 F. Supp. 657, 661 (E.D. Tenn. 1968):

Having concluded that the purpose in seeking to call the witness was to obtain discovery and not to shed light upon the issue of probable cause, the Commissioner was acting within his inherent authority to confine the preliminary hearing to the matters in issue in declining to require that ATU [Alcohol Tax Unit] Agent Sample submit to examination by the defendant.

None of the witnesses who testified before the Subcommittee and no one interviewed in the District of Columbia project (see note 86 *supra*) favored adoption of the English practice at preliminary hearing. Prior to Parliament's enactment of the Criminal Justice Act of 1967, the English preliminary hearing was a full-scale discovery proceeding at which all witnesses whom the government planned to use at trial had to be called. Williams, *Introductory Survey of the Preliminary Examination in England*, in *Hearings on S. 3,475*, at 307. The disadvantage lay in the "enormous waste of time by magistrates in having to take down the depositions of prosecution witnesses (by the hand of their clerk)." The Criminal Justice Act of 1967 sought to overcome this problem by providing that the defendant might waive the hearing, and in return for waiver, obtain written depositions of all the witnesses. *Id.*

121. *Hearings on S. 3,475*, at 29: "[U]nder current doctrines it will always be possible to bypass the preliminary hearing—and therefore discovery—by proceeding rapidly to indictment after arrest, or by arresting the defendant only after an indictment has been returned."

122. S. REP. NO. 371, at 34.

123. *Id.* at 34-35; cf. Staff Memorandum, *Hearings on S. 3,475*, at 29, 35.

124. See G. WILLIAMS, *THE PROOF OF GUILT* 104-05 (3d ed. 1963) (footnotes omitted):

[I]t really needs no psychologist to show that, although instances occur of delayed reproduction, memory generally fades with the passage of time, and that, when a witness is required more than once to recall an event, his act of recall on a subsequent occasion may be merely an imperfect memory of what he said on an earlier. If this is true, it is an interesting commentary on the legal rule whereby

herent in preserving witnesses' testimony before it becomes "polished" or influenced by subsequent experiences.¹²⁵ Nor does the value of preserving early recollection always lie with the defendant. Testimony favorable to the prosecution may also be "frozen" at the preliminary hearing while witnesses or victims are feeling particularly hostile to the defendant—before affection, remorse, sympathy, or fear may have diluted the quality of their testimony. Moreover, by encouraging the prosecutor to test his case only in the secrecy and security of the grand jury setting, the new legislation reduces the government's chance of learning how well its witnesses will perform in public and under cross-examination.

The draftsmen's position would have been more tenable if their criticism of the adequacy of the preliminary hearing as a discovery device had been accompanied by a substitute proposal for discovery. In an early formulation of the bill, they provided such a substitute by a legislative directive to adopt discovery measures through the rulemaking process. A published staff memorandum, commenting on a preliminary unpublished draft of the Act, states that

the bill contains a guiding statement enjoining the rulemakers to take into account not only the benefits to the judicial process of liberal pretrial discovery, but also national security interests and the wellbeing of witnesses in cases where an unfettered discovery procedure might jeopardize either. The rules can therefore provide for appropriate exception to the general right of discovery when the Government can show good cause for making such an exception.¹²⁶

Unfortunately, the discovery provision had been dropped by the time that the first printed draft of the legislation appeared.¹²⁷ In its stead, the Committee appended a concluding exhortation to its

the witness's statement, given in court perhaps months after the event, is the real evidence, while his original proof of evidence, given perhaps within hours of the event, and his deposition at the preliminary hearing, given a few days or weeks after the event, are referred to only for the purpose of contradicting him and not as independent evidence.

Chapter 5, *Mistaken Evidence*, which includes this quotation, is a sobering appraisal of the extent to which reliance should be placed on eyewitness testimony.

125. See note 86 *supra*. A typical observation of a defense lawyer is, "I think it's important to get [testimony] on the record before it's gotten too polished, as it does by the time it's gone through grand jury and to the stage of trial." Or, "you have a situation [at preliminary hearing] where these people are committed to a position before they have had a chance to talk to many friends or neighbors or other witnesses, before they have been influenced, and perhaps improperly."

126. Staff Memorandum, April 28, 1966, *Hearings on S. 3,475*, at 9, 16.

127. The first printed draft of S. 3,475 is reproduced in *Hearings on S. 3,475*, at 17-25. A second staff memorandum, prepared to accompany S. 3,475 and dated June 7, 1966, is almost identical with its predecessor cited in note 126 *supra*. See Staff Memorandum, *Hearings on S. 3,475*, at 29. Significantly, however, the language quoted in the text accompanying note 126 is omitted.

discussion of why discovery was not a valid purpose of the preliminary hearing: "[T]he committee does urge the Judicial Conference and the Supreme Court to give careful consideration to further liberalization of the existing discovery procedures provided in criminal rule 16."¹²⁸

C. Problems of Construction

As a matter of draftsmanship, it is unfortunate that section 303 is written as an amendment to section 3060 of title 18 rather than as an amendment to rule 5(c) of the Federal Rules of Criminal Procedure. While former section 3060 consisted solely of a cross-reference to the provisions of rule 5(a)-(c),¹²⁹ section 3060, as amended by section 303 of the Federal Magistrates Act, eliminates any cross-reference to rule 5. Presumably this omission was not intended to repeal subsections (a) and (b) of rule 5; despite the deletion of the Code section's cross-reference to them, nothing in the legislative history supports their implied repeal. But subsection (c) of rule 5 presents a more difficult question of implied repeal. For the new section 3060, entitled "Preliminary examination," is sufficiently comprehensive so that it arguably replaces the shorter rule 5(c).

The new section 3060(f) speaks in terms of "[p]roceedings before United States magistrates under this section,"¹³⁰ not "under Rule 5(c)." The preceding subsection, 3060(c), provides that "[n]o *preliminary examination in compliance with subsection (a) of this section* shall be required" when a timely indictment intervenes. This presumably does not contemplate the possibility that a preliminary examination in compliance with rule 5(c) could still be required. Thus, the provision in rule 5(c) authorizing a preliminary examination is apparently superseded by subsection (a) of section 3060, and section 3060(a) is meant to be the sole source of the right to a preliminary examination. But if rule 5(c) is repealed to the extent that it no longer provides the basis for holding a preliminary hearing, do the incidents of the hearing prescribed by rule 5(c)—including the defendant's right to cross-examine and to introduce evidence—survive the implicit repeal of the basic provision authorizing a hearing? Or are these and other incidents of the hearing to be prescribed by courts and magistrates as part of a process of

128. S. REP. NO. 371, at 35.

129. A number of sections of title 18 follow this same form. See 18 U.S.C. §§ 3001-741 (1964).

130. The new section provides: "Proceedings before the United States magistrates *under this section* shall be taken down by a court reporter" 18 U.S.C.A. § 3060 (Supp. Feb. 1969) (emphasis is added). This section is reprinted in note 6 *supra*.

formulating rules of procedure and evidence needed to carry out the mandate of section 3060(a): "preliminary examination shall be held . . . to determine whether there is probable cause" The latter construction seems more consistent with the rest of new section 3060; it would also leave greater scope for judicial implementation of improvements in preliminary hearing procedures.

IV. PROPOSALS FOR CHANGE

Some of the potential drawbacks of the Federal Magistrates Act can be mitigated or overcome through judicial action in formulating case law or rules of procedure. We shall here consider what steps, short of legislative amendment, may be taken to rectify apparent deficiencies in the Act and to take advantage of the opportunities it affords.

A. *Prompt Hearing*

We have thus far assumed that the prosecutor will be allowed to avoid the preliminary hearing if he is able to obtain an indictment within the time limits specified in the Act. This is a plausible assumption in view of the previous widespread practice in which United States Commissioners, without any express legislative authorization, willingly granted continuances of preliminary hearings so that prosecutors would have enough time to moot the hearing.¹³¹ But better-qualified magistrates will be appointed under the Act, and such solicitude for prosecutorial convenience may be at an end. Other jurisdictions are free to accept the example of the District of Columbia Circuit¹³² and refuse to tolerate this practice, for the Act does *not* in terms give the United States Attorney a free hand to moot the hearing so long as he does so promptly.¹³³ Section 3060(b) provides for a hearing "within a reasonable time," "but in any event not later than" ten or twenty days after the defendant's initial appearance. "These are outer limits only," the Senate committee report states, "and a court or magistrate may well decide that a reasonable time

131. See S. REP. NO. 371, at 33; *Hearings*, pt. 1, at 14, 37 (testimony of Prof. Charles A. Lindquist of Temple University and F. Archie Meatyard, Jr., U.S. Commissioner, Bethesda, Maryland); *Hearings*, pt. 3, at 220-22 (testimony of Prof. Irving Younger of New York University), 254-55 (statement of Judge Talbot Smith of the Eastern District of Michigan).

132. See text accompanying notes 69-71 *supra*.

133. See 18 U.S.C.A. § 3060(b) (Supp. Feb. 1969) (quoted in note 6 *supra*). The contrary implication in an early staff memorandum is not borne out by the legislation, as other legislative history indicates. See note 134 *infra* and accompanying text. Staff Memorandum, *Hearings on S. 3475*, at 9, 15: "The bill . . . provides for a preliminary hearing only in those cases in which the grand jury has not acted within a reasonable time after arrest and presentment."

is well within these limits under the circumstances of a particular case.”¹³⁴ Such a “particular case” should be interpreted by the courts to include any case in which the defendant demands an immediate hearing, unless the government can show the same “extraordinary circumstances” which would authorize a delay beyond the ten- or twenty-day limit under section 3060(c). This interpretation would not be inconsistent with the purpose of the Act;¹³⁵ the evil that section 303 purportedly sought to overcome was the practice of detaining a defendant indefinitely with no probable cause determination by either magistrate or grand jury.¹³⁶

Unless the “reasonable time” requirement in section 3060(b) is construed to mean less time than it takes to procure an indictment, the United States Attorneys’ offices will be able to revert to the practice of racing to the grand jury in order to moot the defendant’s right to a hearing. As noted above, judges on the Court of Appeals for the District of Columbia Circuit have said that they would see no objection to requiring a hearing after indictment;¹³⁷ but this was prior to passage of the Magistrates Act, and the Act specifically states that “[n]o preliminary examination . . . shall be required . . . if . . . an indictment is returned.”¹³⁸ This language will undoubtedly make it more difficult for courts to control prosecutors’ attempts to circumvent the preliminary hearing, but one option is still available to the federal judiciary: under the Act, the courts retain the power to require that a preliminary hearing be held on demand, without waiting for the time limits given in the Act to expire. Affording the

134. S. REP. NO. 371, at 34. *See also Hearings on S. 3,475*, at 241 (remarks of Senator Tydings) (emphasis added): “Let me emphasize that these are only outer limits, and that the bill reaffirms the requirement that the preliminary hearing be held within a reasonable time. *In most cases a reasonable time may be well within the outer limits.*”

135. *Cf.* the exchange between Senator Tydings and Professor Lloyd L. Weinreb of Harvard University, *Hearings on S. 3,475*, at 99-100. In his prepared statement, Professor Weinreb had said:

Even as prescribing the outside limits of a “reasonable time,” the periods specified are too long. There are no circumstances in which a person should be detained unwillingly for as much as ten days before it is competently determined even whether he should be held for trial. . . . In no circumstances, should the preliminary examination be delayed because the Government is building its case; if the Government lacks probable cause to detain, it should not arrest. Contrary to a suggestion implicit in the Subcommittee’s staff memorandum, in no circumstance should timing of the examination be fixed so that an indictment can intervene and avoid the hearing.

Id. at 105.

136. The legislative history contains no criticism of jurisdictions in which preliminary hearings are routinely held, but only of those jurisdictions where hearings are routinely postponed pending return of an indictment. *See, e.g.*, S. REP. NO. 371, at 33; *Hearings on S. 3,475*, at 28 (remarks of Senator Tydings).

137. *Ross v. Sirica*, 380 F.2d 557, 564 (D.C. Cir. 1967) (Judges McGowan and Leventhal, voting to deny rehearing en banc); *see text accompanying note 71 supra*.

138. 18 U.S.C.A. § 3060(e) (Supp. Feb. 1969) (quoted in note 6 *supra*).

defendant a prompt preliminary hearing would assure continuation of the screening and discovery advantages now available at preliminary hearing. Moreover, holding the hearing promptly after arrest would reduce the incidence of "arrests for investigation."¹³⁹

B. Rules of Evidence

After learning of the disparity in commissioners' practices concerning the admissibility of hearsay, Senator Tydings stated that "there should be some statutory guidelines as to evidence which is admissible in hearings for probable cause."¹⁴⁰ But no such guidelines were included in the Act, and it seems likely that the point, which was raised early in the hearings in 1965, had been forgotten when the legislation was finally drafted.

At present, federal preliminary hearings are not generally held pursuant to the usual rules of evidence.¹⁴¹ Some years ago Chief Justice Warren noted this fact and commented that a proposal before the Judicial Conference to make the usual rules applicable to preliminary hearings provided the defendant waived indictment "would be in accord with the more enlightened procedures developed in some of the states of the Union."¹⁴²

139. As Dean A. Kenneth Pye stated in testimony before the Subcommittee:

The requirement that the defendant be brought before the commissioner without unnecessary delay and the right of the defendant to have a hearing to determine whether there is probable cause combine to discourage law enforcement officers from arresting on suspicion and then investigating the case at their leisure to determine whether there is probable cause.

Hearings, pt. 3, at 270. This advantage of the preliminary hearing was recognized over a hundred years ago in New York, where concern was expressed over the "arrest of a person upon testimony which would be insufficient to hold him, and his detention until evidence can be hunted up, upon which the magistrate might be warranted in committing him." NEW YORK STATE, FOURTH REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADINGS, CODE OF CRIMINAL PROCEDURE XXV (1849). The solution proposed was that the preliminary hearing be held as soon as possible, preferably at one sitting. If adjournments were necessary, the hearing was to be continued for only two days at a time, and not more than six days in all, "unless by consent or on motion of the defendant." *Id.* at xxvi. Cf. J. GOEBEL & T. NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 343 (1944):

Sometimes, too, the grand jury, unable to find a bill, would nevertheless have the defendant kept in custody in the hope of developing at a later time sufficient evidence on which to charge the accused. Thus Robert Wilson appeared in the Supreme Court on March 19, 1727/28, and "the Grand Jury not having sufficient witness brought before them to find a bill of indictment but in as much as they can see strong cause of suspicion of felony agt him, they pray that the Ct o'd him to be kept confined 'till the next Term."

140. *Hearings*, pt. 1, at 38.

141. See notes 92-95 *supra* and accompanying text.

142. Address of Chief Justice Warren to Annual Meeting of the American Law Institute, May 20, 1964, in 35 F.R.D. 181, 189 (1964). The Chief Justice added: "These proposals will indeed require a great deal of study, but there can be no doubt that to the extent their objectives can be realized, the process of criminal proceedings will be fairer than it is now or has been in the past."

So long as one third of the committing magistrates were not lawyers and most defendants were not represented by counsel at preliminary hearing such a development was not feasible.¹⁴³ With the appointment of better-qualified magistrates, the courts or the rulemaking bodies will be able to require that the hearing be conducted according to the usual rules of evidence.¹⁴⁴ There is, however, no valid reason for conditioning the application of evidentiary rules upon the defendant's waiver of his constitutional right to indictment. Such a condition is also open to serious constitutional doubt.¹⁴⁵

There is a tendency to assume that the principal reason for objecting to hearsay evidence at the preliminary hearing is a desire to obtain discovery; if hearsay cannot be used to establish probable cause, then the prosecution will be forced to resort to more revealing direct testimony, and thus to provide the defense with an opportunity for cross-examination. It is true that eyewitness testimony given at the hearing is a valuable kind of discovery; but eyewitness testimony also is obviously more reliable than hearsay for the purpose of determining probable cause.¹⁴⁶ In our view, it is time

143. The Subcommittee on Improvements in Judicial Machinery inquired of all United States Commissioners as to the kinds of evidence they admit at the preliminary hearing. Surprisingly, forty-six per cent of the Commissioners who responded stated that they admit only evidence that would be admissible in court. Questionnaire at 493. This statement must be received with some skepticism, especially since, as the Staff Memorandum noted, "by far the largest group of *non-lawyer* commissioners who responded said that they admit only evidence admissible in court." *Id.* (emphasis added).

144. On March 31, 1969, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States released Proposed Rules of Evidence for the United States District Courts and Magistrates (Preliminary Draft). Rule 11-01 makes the proposed rules applicable at preliminary hearing before United States Magistrates. The Advisory Committee's Note explicitly states that the rules are intended to apply to preliminary hearings:

Nor does the rule exempt preliminary examinations in criminal cases. Authority as to the applicability of the rules of evidence to preliminary examinations has been meager and conflicting. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L. J. 1149, 1168, n. 53 (1960); Comment, *Preliminary Hearings on Indictable Offenses in Philadelphia*, 106 U. Pa. L. Rev. 589, 592-593 (1958). Lack of legal training on the part of presiding officers has no doubt tended to make application of the rules a practical impossibility. However, the enhanced standing of magistrates under the Federal Magistrates Act, P.L. 90-578, removes this obstacle and is calculated to increase the dignity of preliminary examinations. Moreover, compliance with the rules of evidence is calculated to render effective the right of the accused to cross-examine witnesses and to introduce evidence in his own behalf, under Rule 5(c) of the Federal Rules of Criminal Procedure. The fundamental difference from grand jury proceedings is apparent.

Id. at 254.

145. Cf. *United States v. Jackson*, 390 U.S. 570, 581-85 (1968) (maximum penalty of life imprisonment instead of death sentence may not constitutionally be conditioned upon waiver of right to trial by petit jury); *Scott v. United States*, No. 20,954, at 10 (D.C. Cir. Feb. 13, 1969).

146. See *Ross v. Sirica*, 380 F.2d 557, 565 (D.C. Cir. 1967) (Statement of Judges

to adopt the reform discussed by Chief Justice Warren and to require that preliminary hearings be conducted "under the usual rules of evidence," except to the extent that these rules are waived by consent of the parties.

In the interest of time, counsel on occasion would presumably be willing to have some elements of the alleged offense, such as chemical analysis of substances thought to contain narcotics, established by hearsay. Moreover, when an immediate hearing is sought, necessary evidence may not yet be available. A number of commissioners told the Senate Subcommittee on Improvements in Judicial Machinery that the need for more time to make further investigations and to obtain additional evidence is among the reasons which the government asserts for seeking a continuance in the preliminary hearing.¹⁴⁷ To alleviate this problem, the government could be allowed to make a proffer of evidence which, for adequate reasons, was not available at the time of the hearing—for example, because it consisted of documentary proof being sent from elsewhere. If the proffered evidence plus the available evidence does not establish probable cause, the defendant should be discharged. Otherwise, the defendant might agree either to have the proffer treated as evidence or to obtain an adjournment of the hearing until the witness could be produced. This procedure would both protect the defendant from an illegal arrest for investigation and insure that the government would not have to release a defendant when probable cause against him cannot be established immediately because essential evidence has not yet been received.

Application of the hearsay rule and the other usual rules of evidence to the preliminary hearing is relatively simple. But the question of excluding evidence on constitutional grounds raises more complex problems. On the one hand, it makes little sense for a qualified magistrate to conduct an adversary, judicial hearing and then to hold the defendant when the only evidence against him has *obviously* been obtained by unconstitutional means. On the other hand, rule 41(e) provides that motions for the suppression of evidence obtained by unlawful search and seizure¹⁴⁸ are to be made

McGowan and Leventhal on their reasons for voting to deny rehearing en banc); *cf. Hearings*, pt. 1, at 36 (testimony of F. Archie Meatyard, Jr., U.S. Commissioner, Bethesda, Maryland).

147. Questionnaire at 485; *c. Hearings on S. 3,475*, at 105 (statement of Prof. Lloyd L. Weinreb of Harvard).

148. Some courts have applied the same procedure to suppression of confessions. See 3 C. WRIGHT, *FEDERAL PRACTICE AND PROCEDURE* § 673, at 108 (1969):

A number of courts have felt that if a motion to suppress is available before trial when evidence has allegedly been obtained in violation of the Fourth Amend-

in district court; and, since suppression may turn upon complex constitutional issues, there are grounds for not allowing committing magistrates to make a final ruling.¹⁴⁹ Unless hearings are mooted, resolution of this dilemma will become increasingly urgent as better qualified defense counsel and magistrates are involved in the hearings. A solution would be to permit the committing magistrate to determine constitutional evidentiary issues only for purposes of ruling upon the admissibility of evidence offered before him on the issue of probable cause, leaving the defendant to his rule 41(e) remedy if he is held to answer.¹⁵⁰ But the government should be allowed to petition the district court to set aside a discharge order based upon exclusion of evidence alleged to be unlawfully obtained.

C. *Result of Magistrate's Finding of No Probable Cause*

The Magistrates Act does not change the existing law under which the prosecutor may present a case to the grand jury even though the committing magistrate has found no probable cause at the preliminary hearing.¹⁵¹ In order to make preliminary hearing a meaningful screening device, a rule should be adopted providing that the prosecutor, as an officer of the court, may not present evidence to a grand jury in a case in which the magistrate has found no probable cause at the hearing. An exception to this rule should be provided

ment, there should be a similar procedure available when it is claimed that evidence has been obtained in violation of the Fifth Amendment. Accordingly they have held that a motion will lie when it is claimed that a confession was illegally obtained.

See also 18 U.S.C.A. § 3501 (Supp. Feb. 1969).

149. The problem was clearly posed to the Subcommittee on Improvements in Judicial Machinery by one committing magistrate:

I am faced with the attempt of the voluntary defender to prove by cross-examination at the preliminary hearing that the warrant was issued without probable cause (by showing that the agent did not actually know what the complaint alleged), or, more important, that the arrest was illegal and without probable cause. Up until now, I have allowed defense counsel to cross-examine on these matters, but one of the enforcement agencies has seen fit to complain to the Court, and I have been advised by the Court that I have no right to rule on these questions since they must be decided by the Judges of the District Court under Rule 41.

This, in my opinion, results in a great injustice, especially where it is clear from the evidence before me that the warrant was illegally issued and/or that the defendant was illegally arrested, and hence all the evidence following the arrest is inadmissible, especially where admissions or confessions were obtained without affording the defendant an opportunity to consult counsel.

Why should a defendant have to seek bail, be indicted, and probably be committed and wait months for a motion to be filed in Court after the indictment, or at trial, in cases like this?

Questionnaire 492.

150. Implementation of this proposal might require a revision of rule 41(e); see 3 C. WRIGHT, *supra* note 148, at 105: "[U]nder the rule [41(e)] the motion must be made before the court while before adoption of the rule it could be made to a United States commissioner." See also *Giordenello v. United States*, 357 U.S. 480 (1958).

151. Some commissioners responding to the questionnaire expressed dissatisfaction with the practice. Questionnaire 491.

for instances in which the prosecutor obtains leave of court to seek an indictment upon a showing that the magistrate erred.¹⁵² Once the government has chosen to follow the path of pre-indictment arrest and preliminary hearing, the prosecutor should not be permitted to make a mockery of that proceeding by seeking an indictment from the grand jury in disregard of the magistrate's ruling.¹⁵³

D. *Depositions for Discovery*

The foregoing proposals would all retain or increase the amount of discovery now effectively available at the preliminary hearing. But even if all of them were adopted, discovery at preliminary hearings would, as the legislators pointed out,¹⁵⁴ be haphazard. On the other hand, if discovery at the preliminary hearing is reduced, either because hearings are consistently mooted or because magistrates terminate the proceedings as soon as probable cause is established, then a uniquely valuable discovery tool will have been lost. In either event, it is time that testimonial discovery in criminal cases was extended on a more rational basis. Liberalization of the rules governing the availability of grand jury minutes, Jencks Act¹⁵⁵ state-

152. The federal grand jury would retain the power to indict on its own initiative, but absent prosecutorial urging, such action is rare. See generally *Hauberg v. Cox*, 342 F.2d 167 (5th Cir.), cert. denied 381 U.S. 935 (1965). Cf. *Hearings on S. 3475*, at 140 (testimony of Professor Samuel Dash of Georgetown University). The witness advocated the adoption of the Pennsylvania practice of assuring the right to a preliminary hearing prior to the presentation of the case to the grand jury. See also *Symposium—Discovery in Federal Criminal Cases*, 33 F.R.D. 47, 69 (1964) (remarks of Professor Frank J. Remington of the University of Wisconsin):

[I]n Wisconsin there is a right to a preliminary examination which cannot be denied the defendant by resort to the grand jury. As a consequence, any defendant who requests a preliminary examination can get one. It is typically true that the prosecution is required to put in much, if not all, of its case in order to insure a finding of probable cause to hold a defendant for trial If the defendant has waived a preliminary examination, appears for arraignment and requests assigned counsel, a statute in Wisconsin provides that he has a right to have the case remanded for a preliminary examination.

153. In light of skepticism concerning the adequacy of the grand jury's screening of probable cause, it may also be time to review the extent to which the prosecutor should have discretion to seek an original indictment without the prior issuance of a complaint, upon which a rule 5(c) hearing would be held to determine probable cause. In the District of Columbia, defendants are sometimes arrested on one charge, as to which probable cause is found at preliminary hearing, and subsequently indicted on others, the events in which may have occurred earlier. See *Godfrey v. United States*, 353 F.2d 456, 457 (D.C. Cir. 1965); *Hearings*, pt. 3, at 279 (remarks of Dean A. Kenneth Pye of Duke Law School); note 86 *supra*. Rather than allow the prosecutor to exercise unfettered discretion as to whether to proceed by rule 5 or rule 9, it would be preferable to delineate the kinds of cases as to which an original indictment is particularly appropriate (for example, income tax, antitrust and regulatory crimes, when the defendant will often know the evidentiary basis for the indictment because it comes largely from his own records). Alternatively, the prosecutor might be required to obtain special leave of the district court, explaining the need for obtaining an original indictment in an individual case.

154. See notes 127-29 *supra* and accompanying text.

155. For a discussion of the Jencks Act, 18 U.S.C. § 3500 (1964), and its application

ments, and other written material will not provide an effective substitute for preliminary hearing discovery. All of them lack the advantage of direct confrontation and of having witnesses under oath and subject to cross-examination.¹⁵⁶ In our view, only the adoption of deposition procedures, analogous to those that have long been available in federal civil proceedings,¹⁵⁷ would afford adequate and consistent discovery in criminal cases.

The proposal for allowing depositions in criminal cases is by no means new,¹⁵⁸ but it seems to be gaining somewhat broader acceptance at present. At least limited support was recently provided by a Task Force of the President's Commission on Law Enforcement and Administration of Justice:

It is undesirable to confine the use of depositions only to the preservation of testimony of witnesses who may be unavailable at trial. Depositions may be used to find facts as well as to preserve testimony. A deposition could resolve a factual dispute during the negotiating stage, and it could provide the basis for a stipulation of witnesses' testimony at trial. In cases where it is not necessary to conduct a full preliminary hearing before a judge, depositions may be submitted to the court for determination of probable cause.¹⁵⁹

Although only a handful of states have provisions permitting the use of depositions in criminal cases,¹⁶⁰ their use is becoming less uncommon.¹⁶¹

The Senate Subcommittee on Improvements in Judicial Machinery was in a unique position to explore the potentialities of the deposition and other discovery mechanisms with the numerous expert witnesses who testified before it,¹⁶² but it failed to take advan-

to a specific discovery problem, see Recent Development, *Criminal Procedure—Evidence—Composite Drawing Not Producible Under Jencks Act*, 66 MICH. L. REV. 772 (1968).

156. See note 40 *supra* and text accompanying note 52 *supra*.

157. For recent developments in civil discovery and deposition rules, see *Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States Courts Relating to Deposition and Discovery*, 43 F.R.D. 215 (1967).

158. See Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1150, 1192-98 (1960).

159. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 43 (1967).

160. *Id.*

161. For discussion of recent developments, see Ratnoff, *The New Criminal Deposition Statute in Ohio—Help or Hindrance to Justice?*, 19 CASE W. RES. L. REV. 279 (1968); Langrock, *Vermont's Experiment in Criminal Discovery*, 53 A.B.A.J. 732 (1967); Note, *Florida's Proposed Rules of Criminal Discovery—A New Chapter in Criminal Procedure*, 19 U. FLA. L. REV. 68 (1966); Thode, *Arraignment, Pretrial Hearing and Discovery*, Oct. 13, 1966 (mimeographed address to Institute on Texas and Federal Criminal Procedure, University of Texas School of Law).

162. Lawrence Speiser, Director of the Washington office of the American Civil Liberties Union stressed the value of discovery in criminal, as in civil, cases. *Hearings*, pt. 3, at 215.

tage of this opportunity. There are many features requiring careful consideration. For example, to what extent could discovery be made reciprocal, within constitutional bounds?¹⁶³ Would it be adequate to allow depositions to be taken before any person qualified to administer oaths, or is there sufficient difference from civil cases to require that criminal discovery take place before a judicial officer with some authority to protect witnesses? It may well be that judicial control of depositions is needed, since there is a real possibility that a witness called to testify at the deposition might incriminate himself. Rather than entrust this responsibility to one of the two counsel present, neither of whose interests may coincide with the witness', it might be preferable to require the presence of a judicial officer possessing the authority to appoint counsel for a witness who needs it. Similarly, there may be stronger reasons to object to the form or content of questions in depositions in criminal cases than in civil. Once again, having a judicial officer available to make a ruling on the spot would serve a useful purpose. In fact, the newly created federal magistrates might themselves be given such a task. Section 101 of the Federal Magistrates Act provides that the district court

may establish rules pursuant to which . . . any full-time United States magistrate, or . . . any part-time magistrate specially designated by the court, may be assigned . . . additional duties The additional duties authorized by rule may include, but are not restricted to—

. . . .
(2) assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions¹⁶⁴

In short, the Federal Magistrates Act can serve to further rather than to retard criminal discovery. The Supreme Court, through its rule-making authority, or the district courts through theirs,¹⁶⁵ should act to fill the potential void in discovery arising out of the Act's preliminary hearing provisions, and advantage should be taken of the express availability of the federal magistrates whom the Act provides to conduct pretrial discovery proceedings.

163. The problem already exists under FED. R. CRIM. P. 16(c). See *Discovery in Criminal Cases*, 44 F.R.D. 481, 482 (1968) (panel discussion before Judicial Conference of the Second Circuit, Sept. 8, 1967). See also Symposium, *Discovery in Federal Criminal Cases*, 33 F.R.D. 47, 63-64 (1963) (remarks of Justice Brennan).

Reciprocity in discovery has been widely urged. See, e.g., Washington Post, May 11, 1967, at B1 (proposal by a Maryland state's attorney to Prince George's County Bar Association); Washington Post, Sept. 21, 1966, at B6 (remarks of Judge Leventhal to District of Columbia Bar Association's junior section); *Discovery in Criminal Cases*, 44 F.R.D. 498-99 (1968) (statement by U.S. Attorney for Connecticut).

164. 28 U.S.C.A. § 636(b) (Supp. Feb. 1969).

165. See FED. R. CRIM. P. 57(a), which authorizes district courts to make rules for the conduct of criminal proceedings so long as they are not inconsistent with the statutes or rules promulgated by the Supreme Court.