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TITLE 2: CRIMINAL DIVISION

The functions of the Criminal Division, more particularly set out in Title I under "Criminal Division", include supervision of the enforcement of all Federal criminal statutes except those specifically assigned to the Antitrust, Civil Rights, Internal Security, and Tax Divisions.

The Division also exercises supervision over international extradition proceedings; all civil and criminal litigation arising under the immigration and nationality laws, with a few exceptions; and all litigation under the Federal Food, Drug, and Cosmetic Act. It handles civil penalty and forfeiture actions, including petitions for remission or mitigation of penalties and forfeitures, offers in compromise and related proceedings under various statutes as well as offers in compromise in pending criminal cases under the internal revenue laws relating to liquor, narcotics, and marihuana. It also coordinates enforcement activities directed against organized crime and racketeering, enforces the registration requirements of the Gambling Devices Act and maintains registration thereunder.

This part of the Manual deals with recurring problems of criminal procedure which frequently arise and sets forth Departmental policy in connection with the enforcement of the statutes on which any considerable effort is expended by U.S. Attorneys and the Division. An extended discussion of such matters is neither intended nor necessary since U.S. Attorneys are urged to communicate with the Criminal Division for assistance and advice as often as necessary.

INVESTIGATIONS

The Federal Bureau of Investigation investigates all violations of Federal laws with the exception of those assigned to other Federal agencies, such as the statutes pertaining to counterfeiting, postal violations, customs offenses, and internal revenue matters. The Bureau also investigates all instances of escape by Federal prisoners from custody prior to conviction.

Information as to which agency has investigative jurisdiction in particular cases can be obtained from FBI field offices. It is important that the respective jurisdictions of investigative agencies be respected and if a jurisdictional dispute arises the facts should be reported to the Deputy Attorney General.

Attorneys should refrain from conducting investigations which are the primary responsibility of the various agencies. It is proper, however, to offer suggestions as to the direction, scope, and emphasis of the investigative activity and as to the priority and importance of a case in relation to other pending matters, but no attempt should be made to supervise investigations or investigative personnel in the ordinary sense.

Attorneys desiring the transfer of Federal prisoners from one Federal penal institution to another to aid in an investigation should address requests for such transfers to the Chief of the Section of the Criminal Division concerned with the prisoner's violation or the office of the Deputy Assistant Attorney General of the Criminal Division.

REFERRAL PROCEDURES

Cases Directly Referred to U.S. Attorneys

The following categories of cases under the supervisory jurisdiction of the Criminal Division are initially referred direct to the U.S. Attorneys by the agency in which the case originates:

Accident Reports Act.
Agricultural lending agencies.
Agricultural Marketing Agreements Act of 1937 (7 U.S.C. 601, et seq.)
Agricultural Marketing Act of 1946 (7 U.S.C. 1621, et seq.).
All cases of theft, conversion, embezzlement, or fraud arising in the administration of the agricultural credit programs (Farmers Home Administration and Rural Electrification Administration) and the Commodity Stabilization Service (Commodity Credit Corporation).
Animal quarantine laws (21 U.S.C. 101–130).
Antigambling statutes (18 U.S.C. 1084, 1952, and 1953).
Barter and stockpile programs (7 U.S.C. 714b(h)).
Child Nutrition Act (42 U.S.C. 1771).
Commodity Credit Corporation export programs (7 U.S.C. 1427).
Commodity distribution programs.
Commodity Exchange Act violations.
Dangerous Cargo Act (46 U.S.C. 170).
Dependents Assistance Act of 1950.

Eligibility of cooperatives to participate in price support programs (7 U.S.C. 1421).
Elkins Act.
Explosives and dangerous articles Act, transportation of (18 U.S.C. 831).
Fair Labor Standards Act.
False claims under Federal crop insurance program.
False Claims Under the Sugar Act.
False reports as to destruction of or attempts to destroy aircraft, motor vehicles, and facilities.
Federal Aviation Act.
Federal election laws (except matters involving racial discrimination).
Federal Seed Act.
Food, Drug, and Cosmetics Act.
Hours of Service Act.
Insecticide Act.
Internal Revenue and related liquor laws.
Interstate Commerce Act.
Locomotive Inspection Act.
Marketing quota penalty cases under the Agricultural Adjustment Act of 1938, as amended (7 U.S.C. 1311–1376).
Meat Inspection Act (21 U.S.C. 71, et. seq.)
Migratory bird and other fish and wildlife violations.
Misuse of aids to navigation (14 U.S.C. 84).
Misuse of seaman's documents (18 U.S.C. 2197).
Motorboat Act of 1940 (46 U.S.C. 526, et seq.).
Motor Carrier Act (criminal proceedings for enforcement of part II of Interstate Commerce Act, 49 U.S.C. 322).
Narcotics laws.
National school lunch program (42 U.S.C. 1751)
National Stolen Property Act.
Naval stores price-support program (16 U.S.C. 590h).
Postal law violations.
Programs under Public Law 480 (7 U.S.C. 1691).
Railroad matters (ICC)—Miscellaneous.
Railroad Retirement Act.
Railroad Unemployment Insurance Act.
Safety Appliance Acts.
Securities control and air traffic (49 U.S.C. 704).
Selective Service Act, as amended; Universal Military Training and Service Act, as amended.

Signal Inspection Act.
Social Security Act.
Special school milk program (42 U.S.C. 1772).
Tanker Act (46 U.S.C. 391a).
Tobacco price support, auction warehouse cases.
Twenty-eight Hour Law cases (cruelty to stock).
Violation of Federal criminal statutes by Department of Agriculture personnel.
Violations of the Investment Advisers Act of 1940, as amended (15 U.S.C. 80b–1, et seq.).
Violations of the Securities Act of 1933, as amended (15 U.S.C. 77a, et seq.).
Violations of the Securities Exchange Act of 1934, as amended (15 U.S.C. 78a, et seq.).
War risk insurance and other cases originating in the Veterans' Administration.
Wheat processors certificate cases (7 U.S.C. 1379i).
White Slave Traffic Act (18 U.S.C. 2421, et seq.).
Workmen's compensation and related compensation statutes administered by the U.S. Bureau of Employees' Compensation, Department of Labor.

Closing of the Prosecution

U.S. Attorneys are authorized to decline prosecution in any case of the type here under discussion, without prior consultation or approval of the Criminal Division. If, however, prosecution has been initiated by way of indictment or information, the indictment or information shall not be dismissed until authorization to do so has been obtained from the Criminal Division unless the reason for the dismissal is one which does not necessitate the prior approval of the Criminal Division. (See "Dismissals", this Title.)

In each instance in which a case is closed by a U.S. Attorney without prosecution, the U.S. Attorney's files should reflect the action taken and the reason therefor. If an indictment or information is to be dismissed, the instructions under "Authorization for Dismissal", this Title, should be followed.

AUTHORIZING PROSECUTION

Prosecution in illicit still cases, wherein it is not practical, and in many cases impossible, to contact the U.S. Attorney prior to

filing a complaint, is initiated by the Alcohol, Tobacco and Firearms Division, Internal Revenue Service. In all other cases, prosecution should not be instituted in any district without the express authorization of the U.S. Attorney or his representative. In a great number of cases, prosecution is authorized on the basis of an oral statement of the facts to the U.S. Attorney or his Assistants by a representative of an investigative agency. While this practice is desirable and necessary in the great majority of cases, it is suggested that in all cases involving doubtful situations or complicated features, it is of considerable value to postpone the granting of authority until the submission and review of a written report.

Before authorizing prosecution in cases, many U.S. Attorneys and their Assistants solicit the opinion of the investigative officer as to what he thinks of the case. While the opinion of an investigator having firsthand knowledge of the case is of considerable benefit in evaluating a case, attention is invited to the fact that some of the investigative agencies or units have strict rules prohibiting investigative personnel from giving opinions of this character. Such rules do not, of course, prevent the attorney from obtaining the views of the investigator concerning the availability and character of the evidence to be relied upon, the value and credibility of prospective witnessess, and the strength and weaknesses of the case as a whole.

In many instances there may be State charges involving more serious offenses outstanding against an individual who is to be the subject of a Federal prosecution. Frequently where a Federal prosecution preempts the local State action the defendants involved lose an opportunity for a speedy trial on the more serious State charges and at the same time the State's case is dissipated by the passage of time. Therefore, when a U.S. Attorney becomes aware of outstanding State charges of a more serious nature or it, on balance, appears that offenses of an equal nature are determined to be primarily of State concern, he should as a matter of courtesy accommodate the interested State when that State demonstrates a desire to proceed with its local prosecution.

Furthermore, it is Department policy that after a State prosecution there should be no Federal trial for the same act or acts unless there are compelling Federal interests involved, in which case prior authorization should be obtained from the appropriate Assistant Attorney General having jurisdiction over the subject matter of the case.

Specific Authorization Before Prosecution

Because of the importance of adopting a uniform and consistent prosecutive policy, no prosecutions will be instituted without specific authorization from the Criminal Division in the following types of violations:

Antiracketeering cases not involving the use or threat of force or violence, 18 U.S.C. 1951.

Antiriot cases, 18 U.S.C. 245(b)(3).

Civil Rights Act of 1960; violations of Act arising out of labor disputes or statutes assigned to Criminal Division.

Contempt of Congress, 2 U.S.C. 194.

Copyright law, 17 U.S.C. 104 and 105.

Desecration of the flag, 18 U.S.C. 700.

False statements to Federal investigators, 18 U.S.C. 1001. (Important: Consult this heading under "Specific Violations" section).

Federal election laws.

Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 401-531. No prosecution under 29 U.S.C. 502 should be initiated without prior submission of the case for review by the Criminal Division. The Criminal Division should be notified immediately upon receipt of any complaint involving a labor organization, or an official thereof, which appears to be subject to racketeer influence.

Loansharking statutes, 18 U.S.C. 891 et seq.

Purchase and sale of public office, 18 U.S.C. 214, 215.

Railway Labor Act, 45 U.S.C. 152 and 181.

Security Act, Securities Exchange Act and Investment Advisers Act of 1940, as amended (15 U.S.C. 77a et seq.; 15 U.S.C. 78a, et seq.; 15 U.S.C. 80b–1, et seq.), except where violations are brought to the attention of U.S. attorneys by the Securities and Exchange Commission.

Selective Service matters, in the following types of cases only:

1. Second delinquency cases involving subjects who have been previously prosecuted under the Act and have served sentences;
2. Counselling, aiding and abetting evasion or refusal;
3. Mutilation of selective service certificates.

Strikebreakers statute, 18 U.S.C. 1231.

Unlawful possession or receipt of firearms; cases arising under Section 1202(a) of Title VII of Public Law 90-351, the Omnibus Crime Control and Safe Streets Act of 1968, as amended.

White Slave Traffic Act (18 U.S.C. 2421, et seq.), non-commercial cases.

Wiretapping and electronic surveillance; cases arising under Title III of P.L. 90–351, the Omnibus Crime Control and Safe Streets Act of 1968.

STATUTE OF LIMITATIONS

The period of limitations applicable to general criminal offenses is controlled by Section 3283 of Title 18, United States Code. Indictments may be found and information instituted within 5 years after the commission of such offenses.

Certain criminal offenses have their own limitation provisions. Violations of the bankruptcy laws (concealment of assets) are governed by 18 U.S.C. 3284; violations of the internal revenue laws by 26 U.S.C. 6531; violation of the espionage laws (18 U.S.C. 792–794) by Section 19 of the Internal Security Act of 1950 (64 Stat. 1005), now codified at 18 U.S.C. 792 note; violations of the Subversive Activities Control Act of 1950 (64 Stat. 992; 50 U.S.C. 783(e)); violations relating to misuse, etc., of citizenship or naturalization papers and passport frauds by 18 U.S.C. 3291, and actions to recover penalties and forfeitures accruing under the customs laws by 19 U.S.C. 1621. The statute of limitations with respect to capital offenses has been abolished by 18 U.S.C. 3281 and with respect to fugitives from justice by 18 U.S.C. 3290.

Contempts constituting crimes under 18 U.S.C. 402 must be prosecuted within 1 year from the date of the act complained of as provided in 18 U.S.C. 3285. Violators of the customs laws or the slave trade laws of the United States are prosecuted within 5 years next after the commission of the offense under 18 U.S.C. 3283.

The wartime suspension of the limitation statute under 18 U.S.C. 3287 has now lapsed, but inasmuch as this provision has been, since the 1948 revision, part of positive criminal law, it becomes automatically applicable to offenses involving fraud or attempted fraud against the United States, etc., "when the United States is at war". Section 3290 of Title 18, United States Code, provides

that no statute of limitations shall extend to a fugitive from justice.

COMPLAINTS

When the complaint is the sole basis for the issuance of an arrest warrant under Rule 4, the complaint must allege sufficient facts to show that there is probable cause to believe that an offense has been committed and that the defendant committed it. *Giordenello v. United States,* 357 U.S. 480 (1958). In such cases, the complaining officer must allege not only the affirmative acts upon which he relies to establish probable cause, but must state either that he has personal knowledge of the facts or if made on information and belief, the sources thereof. Oral information given by the complaining officer to the Commissioner will not buttress the complaint. *United States* v. *Interrabolo,* 192 F. Supp. 587 (D. Mass. 1961). But where an arrest is made without a a warrant under circumstances which constitute probable cause, the subsequent complaint under Rule 5 need only charge the essential elements of the offense and need not, on its face, show probable cause. *Byrnes* v. *United States,* 327 F. 2d 825 (9th Cir. 1964). Where the complaint precedes the arrest, but the arresting officers have sufficient knowledge or information to justify an arrest without a warrant, it is immaterial that the complaint on which the warrant was issued was insufficient, on its face, to show probable cause. Here, the case is the same as if a lawful arrest had been made without a warrant.

Complaints must be made upon oath before a Commissioner or other officer empowered to commit persons charged with offenses against the United States. *Pugach* v. *Klein,* 193 F. Supp. 630 (S.D. N.Y. 1961). Oaths before a notary public are not sufficient.

The approval in writing by U.S. Attorneys of sworn complaints by private citizens is required only where violations of the internal revenue laws are involved (18 U.S.C. 3045). However, Commissioners are instructed to refer the complainant in all cases to the U.S. Attorney. (Manual for U.S. Commissioners, p. 5 (1948.) This practice was recommended by the Judicial Conference of the United States. *Pugach* v. *Klein, supra,* 193 F. Supp. at 637.

If a commissioner is conveniently near, the complaint should be presented to him. It is not necessary to travel a considerable distance for that purpose, however, when one of the local officials enumerated in 18 U.S.C. 3041 is available. In the latter case, the

arrested person should be turned over to the Marshal at the earliest possible time.

When a person arrested without a warrant is brought before the Commissioner or other officer, a complaint shall be filed forthwith. Rule 5(a).

ARRESTS

Warrant of Arrest

The issuance, form, execution and return of arrest warrants are governed by Rules 4(a) and 9(a). Except for special reasons, the warrant should issue as soon as possible after the defendant's identity is established.

In most instances warrants are directed to Marshals or FBI agents who have power to arrest for any violation of Federal statutes. (Sec. 3052 and 3053, Title 18, United States Code.) Other Federal agents can execute arrest warrants for violations of specific statutes.

The original warrant runs throughout the United States. Arrests may be made thereunder even though the arresting officer does not have physical possession of the warrant. However, the arresting officer must inform the defendant of the offense charged and of the fact that a warrant has been issued and show it to the defendant upon request as soon as possible.

More than one warrant may issue on the same complaint, indictment, or information. Where there are several defendants, it is preferable that separate warrants issue for each defendant.

A warrant of arrest may issue against a defendant named in an information only when the information is "supported by oath" (Rule 9(a)), that is, by a sworn statement of the U.S. Attorney, or of one conversant with the facts, in a supporting affidavit that there exists probable cause.

Summons

Both Rules 4 and 9 contain provisions permitting the use of a summons in place of a warrant. Often there is no need to arrest persons charged with petty offenses or technical violation of law. It has been customary in some localities for the U.S. Attorney in cases involving minor infractions of the law to telephone the defendant or his attorney and agree upon a time for preliminary hearing or arraignment. The Rules sanction this informality by

adopting the use of a summons. When the proceeding is founded upon a complaint, a summons may be issued upon request of the U.S. Attorney (Rule 4(a)). However, where the proceeding is founded upon an indictment or information, the summons may be issued either by direction of the court or upon request of the U.S. Attorney (Rule 9(a)). The summons may be served by any person authorized to serve a summons in a civil action.

Service on Corporation

Service is accomplished by delivering a copy of the summons to an officer, or to a managing or general agent or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the corporation's last known address within the district or at its principal place of business elsewhere in the United States. The failure to respond to a summons is not contempt of court, but is ground for issuing a warrant (Rules 4(a) and 9(a)).

Duty of Arresting Officer

Upon making an arrest, whether with or without a warrant, the arresting officer is charged with the duty of taking the accused *without unnecessary delay* before the nearest U.S. Commissioner or judicial officer having jurisdiction under 18 U.S.C. 3041, for a hearing, commitment, or bail (Rule 5).

Fugitives

Where an indictment has been returned against a defendant or where a defendant has actually become a fugitive from justice, the occasion may arise when such defendant may contact the U.S. Attorney for the purpose of surrendering himself. In any such instance, the U.S. Attorney should suggest that the surrender be made to the Marshal. If the defendant or fugitive insists upon surrendering to the U.S. Attorney, the surrender should be accepted.

Whenever the U.S. Attorney receives any indication that a fugitive may be about to surrender, he should immediately notify by telephone the agency which investigated the case, the U.S. Attorney in whose district the prosecution is pending, and the

official to whom a warrant for the arrest of the defendant may have been issued. In cases of widespread public interest, the Criminal Division should also be notified. In the event the surrender of the defendant or fugitive is made directly to the U.S. Attorney, the prisoner should be turned over to the Marshal forthwith and notification of that action immediately communicated to the agency which investigated the case.

JURIES

The laws governing the qualifications, drawing, and summoning of grand and petit jurors are set forth in 28 U.S.C. 1861–1869. In addition, Rule 6 of the Federal Rules of Criminal Procedure and 18 U.S.C. 3321 are concerned with grand juries.

The present provisions are contained in the Jury Selection and Service Act of 1968, which was signed by the President on March 27, 1968, and became effective on December 22, 1968. The purpose of the legislation was to insure that, in all Federal courts, juries will be selected at random from a source which represents a fair cross section of the community in the district or division. The Act sets forth detailed requirements with which each judicial district's selection plan must comply, thus insuring a high degree or uniformity among the districts with respect to jury selection.

The basic source of names of prospective jurors is the voter registration list, except in the District of Columbia, Puerto Rico, and Guam. Supplemental sources may be used where necessary to foster the cross-section policy.

If U.S. Attorneys believe that the requirements of the statute are not being met, they are requested to bring the matter to the attention of the Department.

INDICTMENT AND INFORMATION

"Guides for Drafting Indictments" in four volumes has been distributed to U.S. Attorneys who are requested to keep the Criminal Division advised of judicial opinions of general interest in pleading matters. U.S. Attorneys are also kept currently informed of decisions construing indictments through the Appendix portion of the Bulletin.

In cases involving novel, difficult, or doubtful questions of criminal pleading, whenever possible a draft of the proposed in-

dictment should be submitted to the Criminal Division, reasonably in advance of presentation to the grand jury, together with a brief statement of the facts. The return of indictments in important cases should be reported promptly and a copy of the indictment furnished when practicable.

In order to enable the Division to obtain the advice of the Solicitor General in seeking review of decisions adverse to the Government, you are reminded that you should promptly (within 1 or 2 days, if possible) notify the Appellate Section of all final decisions by district judges dismissing indictments. You should forward a full copy of the opinion and your specific recommendations together with any pertinent papers.

Waiver of Prosecution by Indictment

Rule 7(b) permits a defendant charged with an offense punishable by imprisonment for over 1 year or at hard labor to be prosecuted by information if, after he has been advised of the nature of the charge and of his rights, he waives in open court prosecution by indictment. Although prosecution by information is not obligatory under the Rule when indictment is waived (*Rattley* v. *Irelan*, 197 F. 2d 585 (D. C. Cir. 1952)), a defendant so electing should ordinarily be prosecuted by information, especially when he is confined in jail through inability to make bail. Waiver is not limited to cases where a defendant intends to plead guilty. Even though not specifically required by the Rule, a written waiver of indictment should be used in every case. Waiver of prosecution by indictment may be made either in the district where the offense was committed and the defendant arrested, or in any district where the warrant of arrest is executed and defendant desires to make such waiver. *United States* v. *East*, 5 F.R.D. 389 (N.D. Ind. 1946). If waiver is made in a district other than the district where the offense was committed, the original waiver, or a certified copy thereof, should be transmitted by the U.S. Attorney in the district of arrest to the U.S. Attorney in the district where the warrant and complaint issued, for filing with the Clerk of his District Court. Waiver must be made in open court, but can be *signed* beforehand. *United States* v. *Jones*, 177 F. 2d 476 (7th Cir. 1949). The term "open court" means waiver in the courtroom with the court in session and the judge presiding. Waiver before a U.S. Commissioner would not satisfy the Rule. The right to counsel before waiving indictment is implicit under the "open

court" requirement of Rule 7(b) because when a defendant appears without counsel, Rule 44 requires the court to advise him of his right to an attorney and to appoint one unless he elects to proceed without counsel or is able to obtain counsel. In using suggested Form 18 in the Appendix of Forms to the Rules of Criminal Procedure for written waiver of indictment, there should be added the statement that defendant waives his right to counsel, if he elects so to proceed. Such addition will put the record in good shape if defendant should later assert that he was ignorant of his right to counsel when he waived indictment and consented to be prosecuted by information.

Reindictment

Statutory provisions permit the return of a new indictment whenever the original indictment or information filed pursuant to Rule 7(b) is found to be defective or insufficient for any cause and the period prescribed in the statute of limitations has expired or will expire before the end of the next regular session of the Court. The new indictment may be returned not later than the end of the next succeeding regular session of court, following the session at which the original indictment was found defective or insufficient, during which a grand jury shall be in session (18 U.S.C. 3288 and 3289).

The addition of counts to a new indictment after a conviction has been reversed on appeal is both undesirable as a matter of policy and questionable as matter of law. Although this practice has not yet been successfully challenged, three members of the Supreme Court have expressed strong doubts as to its legality. See *United States* v. *Ewell*, 383 U.S. 116 (1966), dissent of Justice Fortas at 126.

In the typical narcotics case, for example, when the defendant was originally indicted under 21 U.S.C. 174 or 26 U.S.S. 4705(a), the addition of counts under 26 U.S.C. 4704(a) is unwarranted except in those situations where it is intended that the defendant be permitted to plead to an offense with a lower minimum penalty or that the judge be afforded an opportunity to take account of the time already spent in prison.

RULE 20 TRANSFERS

Rule 20 provides that a defendant may state in writing that he wishes to plead guilty or nolo contendere, waive trial in the

district in which the indictment or information is pending and consent to disposition of the case in the district in which he was arrested or is held, subject to the approval of the U.S. Attorney for each district. (See Form 11, Appendix).

A transfer is not available to a defendant released on bail who goes to another district and attempts there to invoke it.

Advising Defendant of Rule Procedure

The U.S. Attorney should ascertain that every defendant not being proceeded against as a juvenile delinquent, who is arrested in his district, is advised of Rule 20 before he is ordered removed. Information on the Rule 20 transfer right may be given by the arresting officer, by the U.S. Attorney or by a U.S. Commissioner. Care must be taken to insure that the defendant understands that the decision whether he will plead guilty rests entirely with him, and that if he requests a transfer both U.S. Attorneys must consent.

Action by U.S. Attorneys

If the defendant is willing to consent a transfer of the charges and to plead guilty in the arresting jurisdiction, the U.S. Attorney in the demanding jurisdiction is notified and furnishes a copy of the pending indictment or information to the U.S. Attorney in the arresting jurisdiction to be shown to the defendant. The necessary consents are exchanged and filed with the court clerk in the district of origin who transmits his file, including these documents and the original indictment or information, or certified copies thereof, to the court clerk in the district of arrest before defendant enters his plea. Promptness is a very necessary factor in Rule 20 transfers. Should the defendant change his mind and plead not guilty or the court declines to accept his plea of guilty (*Singleton* v. *Clemmer*, 166 F. 2d 963 (D.C. Cir. (1948)), the case must be retransferred to the district of origin.

Exchange of Information, Files, Etc.

The clerk's file will not normally contain any of the investigative reports and other material which the U.S. Attorney will have received and placed in his own file. These documents are of informational value to the attorneys and the sentencing judge

in the other district, and frequently that file is also forwarded, or the investigative agency is requested to submit duplicate reports to the second district, by the U.S. Attorney in the district of origin. Should the latter request that his file be returned after sentence has been imposed, that request may be complied with. Correspondence between the attorneys can usually effect this exchange of material. The originating U.S. Attorney should advise the Marshal of his district as to the disposition made of the arrest warrant.

Interpretation of Rule 20 in Relation to Prison Inmates

The benefits of Rule 20 can and should be extended to State and Federal prisoners who wish to invoke it prior to their release under current sentences. Use of the rule by prison inmates facilitates disposal of outstanding charges against them, reduces custodial responsibility, and saves transportation costs in removing prisoners to other districts for trial. In addition it alleviates hardship under the detainer system, since the rules of the Parole Board make ineligible for parole consideration a prisoner against whom a detainer is on file upon pending charges. In order to make Rule 20 available to prison inmates, the procedure should be initiated by indictment or information, not by a complaint. A transfer to the district of the prisoner's incarceration can be accomplished through the use of the writ of habeas corpus ad prosequendum issuing out of the district court for that district. However, before the writ can be utilized for the purpose of bringing the prisoner before the court for disposition of the pending charge, the court must have acquired jurisdiction of the case by transfer. To that end, the following procedures are suggested.

If a prisoner desires a transfer, the first thing to determine, if he is confied in a State penitentiary, is whether the State authorities will surrender him temporarily under a writ ad prosequendum to the Marshal for appearance before the Federal court. If State authorities refuse to surrender the prisoner for that purpose, the matter is ended. Two heads of Federal institutions are under general instruction to honor all writs issuing from the Federal district courts and served upon them by the Marshal, who will assume custody of the prisoner under the writ.

If State authorities are agreeble or confinement is in a Federal prison, the prisoner should be furnished a copy of the pending indictment or information. His written statement that he wishes

to plead guilty, to waive trial in the district in which the prosecution is pending, and to consent to disposition of the case in the district in which he is held, will be obtained and filed, with the consents of both U.S. Attorneys concerned, with the clerk of the district court in which the indictment or information is pending. That clerk will then transmit the papers in the proceeding, or certified copies thereof, to the Clerk of the Court in the district where the defendant is held, as required by the Rule. The Court in the latter district will thereupon acquire jurisdiction and may then issue a writ of habeas corpus ad prosequendum for the prisoner's production before it for plea and sentence, after which the prisoner will be returned by the Marshal to the State or Federal institution from which he was removed in accordance with the arrangement previously made.

In the event a district judge declines jurisdiction unless an arrest is made prior to the actual transfer, the rule may still be made available to a prisoner if a bench warrant is obtained in the district of the offense on the pending indictment or information. The Marshal in that district may then transmit the warrant to the Marshal in the other district, who will execute it by arresting the prisoner pursuant to arrangements previously made with the prison authorities for such arrest for the purpose of initiating a Rule 20 transfer. Upon the filing of the defendant's statement and the U.S. Attorneys' consents with the clerk of the court in which the prosecution is pending and his transfer of the papers to the Clerk of the Court for the district where the defendant is held, the defendant should be arraigned in the latter court for disposition of the case as the rule prescribes. This alternative procedure does not, of course, contemplate disturbance of the actual custody of the prisoner prior to his arraignment on the completed transfer.

These procedures relate to prisoners only, and may not be utilized to broaden the concept of arrest in the ordinary Rule 20 transfer case. Where prisoners are involved, prosecution of other outstanding Federal charges should proceed by indictment or information, not by complaint.

Utilization of Rules 7(b) and 20(b) Together

When a warrant of arrest issues upon a complaint, and the arrest is made in another district, Rules 7(b) and 20(b) may be utilized together. Rule 20(b) provides that in such a case the defendant

"may state in writing that he wishes to plead guilty or nolo contendere, to waive trial in the district in which the warrant was issued and to consent to disposition of the case in the district in which he was arrested, subject to the approval of the U.S. Attorney for each district." It is not necessary that this statement be made in open court. Upon receipt of the defendant's written statement, the U.S. Attorney should add his consent and forward the same or a certified copy thereof to the U.S. Attorney in the district where the warrant was issued. The U.S. Attorney in the latter district should add his consent to the defendant's written statement and should thereupon prepare an information in the case. The information and the written consent should then be filed with the Clerk of the Court of the district where the warrant was issued, who, in turn, will transmit the same, or a certified copies thereof, to the Clerk of the Court in the district where the arrest was made. When the defendant is brought before the court to plead to the information, he may at that time waive indictment as provided in Rule 7(b).

Disposal Under Rule 20 of Federal Charges Pending in Several Districts

Frequently a defendant arrested in one district on a Federal charge pending in another district is also wanted in still other districts for violations of Federal statutes. This defendant may be willing to plead to all such charges in the district of his arrest under the first charge. Such procedure is permissible, *Levine* v. *United States*, 182 F. 2d 556 (8th Cir. 1950), *certiorari denied*, 340 U.S. 921 (1951).

While the defendant may properly be taken before a Commissioner on each such charge prior to being taken into court to sign waivers of indictments, such procedure is not required. Since the waiver of indictment must be made in open court under Rule 7(b) and since a judge has all the powers of a Commissioner under Rule 40, there is no objection to asking the judge, when the defendant is brought before him to waive indictment on the first charge and wishes to have the other pending charges disposed of by transfer, to perform the duties prescribed by Rule 40 and accept waivers of indictments as to the latter charges. Where charges from other districts come in after the defendant has waived indictment on the first charge the same procedure may be followed, thus obviating the need for two appearances, the first before the

Commissioner, and the second before the judge. For a misdemeanor, an information is sufficient to initiate the Rule 20 transfer in a district wherein arrest has already been made on another charge without bringing the defendant again before a judge or Commissioner, unless it be for purposes of bail while the several transfers are being processed.

REMOVALS

Arrest in Nearby District

Rule 40(a) eliminates the necessity of removal proceedings when arrest is made in a nearby district as therein defined. Subsection (a), however, makes a distinction between (1) cases of arrest without a warrant or with a warrant issued upon a complaint, and (2) cases of arrest with a warrant issued upon an indictment or information. When the arrest is made in a case of the second type the defendant shall be taken before the district court in which the prosecution is pending (unless he gives bail before a Commissioner in the district of arrest). *Butler* v. *United States*, 191 F. 2d 433 (4th Cir. 1951). It is clear that in this type of arrest there is no removal proceeding. A different procedure is specified by subsection (a) of Rule 40 for cases where the arrest is made without a warrant or with a warrant issued upon a complaint. In such cases the defendant must be taken before the nearest available Commissioner (who may be a Commissioner of either the district of arrest or the district of prosecution) or other nearby officer empowered to commit for the purpose of affording him a preliminary hearing in accordance with Rule 5. That hearing is not a removal proceeding but merely a preliminary hearing, identical to those afforded to defendants arrested in the same district where the crime is committd, to determine whether there is probable cause to hold them for the grand jury.

Arrest in Distant District

When arrest is made in a distant district as defined in Rule 40(b) the procedural requirements therein set forth must be strictly complied with before a warrant of removal issues. The hearing may be had before a U.S. Commissioner or judge of the district court, but the warrant of removal may issue only by order of the judge.

Arrest made under a bench warrant.—In those instances where a defendant is arrested on a warrant based upon an indictment or information under Rule 9 he is entitled to a removal hearing, unless he waives hearing, and may not be removed without a removal warrant. Where a defendant fails to appear for trial and a bench warrant issues for his arrest such a wrrant is still a warrant of arrest under the original indictment or information under Rule 9. Therefore, when rearrested in a distant district, the defendant would be entitled to a removal hearing and should not be removed except pursuant to a warrant of removal. If a convicted defendant is arrested under a bench warrant issued from a Federal Court in another district a removal hearing before a Commissioner is unnecessary and the arrested person may be removed forthwith to the other district from which the bench warrant issued without a warrant of removal. See *MacNeil* v. *Gray*, 158 F. Supp. 16 (D. Mass. 1957).

Arrest of escaped prisoners.—An escaped prisoner is not entitled to a removal hearing before being returned to prison. *Rush* v. *United States*, 290 F. 2d 709 (5th Cir. 1961). See also *Mullican* v. *United States*, 252 F. 2d 398 (5th Cir. 1958).

Cooperation Between U.S. Attorneys and Marshals

Although the arrest in the distant district is promptly made, the removal hearing under Rule 40(b), if not waived, cannot be completed until certified copies of the complaint, indictment, or information and the warrant arrive from the requesting U.S. Attorney of the district where the charges are pending. The warrant of arrest should be forwarded through the office of the local Marshal to the Marshal of the district where service is to be made. Cooperation between the offices of the Marshal and the U.S. Attorney in both districts is essential. The U.S. Attorney in each district should seek to work out a satisfactory procedure with the Marshal whereby each will know of receipt of a warrant and supporting papers. When a warrant is sent to another district the U.S. Attorney and the Marshal should see to it that at the same time the supporting papers and additional information are forwarded for the use of the U.S. Attorney, the U.S. Commissioner and the district judge in the district of arrest. While continuance of the hearing for a reasonable time is permitted under subsection (4) of Rule 40(b), a warrant issued in the district in which the offense was committed must be presented before a defendant may be removed as provided in the Rule.

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Difference Between Indictment and Information or Complaint

If the prosecution is by indictment, a warrant of removal is mandatory upon production of a certified copy of the indictment and proof, by admission or otherwise, that the defendant is the person named therein. But if prosecution is by information or complaint, a certified copy thereof must be produced and proof made of probable cause or belief that the defendant is guilty of the offense charged before a removal warrant issues.

Bail

Bail for appearance in the district of the offense may be had if a warrant of removal issues. (Rule 40(b)(3).)

Appeal

An order of removal is not appealable. *Melt.e: v. United States*, 188 F. 2d 916 (9th Cir., 1951).

ARRAIGNMENT, PLEA AND TRIAL

Lists of Witnesses and Jurors in Capital Cases

In cases involving treason or other capital offenses the defendant must be furnished at least 3 days before trial, a copy of the indictment and lists of the names and addresses of the petit jurors and the witnesses to be called by the Government. 18 U.S.C. 3432. Endorsement on the back of an indictment of names of witnesses before the grand jury is never authorized.

Arraignment

The term "arraignment" refers to the bringing of a defendant who has been indicted or against whom an information has been filed before the U.S. District Court for the purpose of requiring him to enter a plea. Except in cases of petty offenses triable before U.S. Commissioners, appearances of defendants before Commissioners or other judicial officers after arrest are not regarded as arraignments.

Procedure on Arraignment

The procedure is governed by Rules 10 and 43. Where the defendant is a natural person charged with a felony his presence at the

arraignment is required under Rule 43. When the prosecution is for offenses punishable by fine or by imprisonment for not more than 1 year or both, Rule 43 allows the court, with the written consent of the defendant, to permit arraignment in the defendant's absence. Corporate defendants may appear by counsel. While Rule 10 requires that arraignment must be in open court, it does not make the reading of the indictment mandatory, but allows the prosecutor to state the substance of the charge. However, that Rule specifies that a defendant must be given a copy of the indictment or information before he is called upon to plead. If defendant is represented by counsel, service upon his attorney is sufficient compliance with the Rule. (*United States* v. *Shepherd,* 108 F. Supp. 721 (D.N.H. 1952)). There is no charge for such copies and they must be furnished at arraignment. The attorney in charge of the case should have an extra copy of the indictment or information prepared for each defendant named therein, and the attorney representing the Government at the arraignment should ascertain that docket entries are made showing that this provision of Rule 10 has been fulfilled.

Contact with Judge

Government counsel should neither participate in nor request investigating agents to participate in private conferences with the judge prior to the entry of a plea of guilty or the return of a verdict unless the defendant or his counsel is present.

Right To Counsel

The constitutional right of representation by counsel exists not only when a defendant stands trial, but at every significant stage of the proceedings in a criminal case. This includes representation by counsel at a preliminary hearing (Criminal Justice Act of 1964), at a lineup (*United States* v. *Wade,* 388 U.S. 218 (1967)), as well as at arraignment plea, and sentence. (*Johnson v. Zerbst,* 304 U.S. 458 (1938).) When a defendant appears without counsel either before a Commissioner or in the District Court, except in connection with a petty offense, he must be advised of his right to counsel and if unable to obtain one, counsel must be appointed for him unless the right is expressly waived. (Rule 44 F.R.Cr.P., Criminal Justice Act of 1964) U.S. Attorneys should be especially wary in cases in which the defendant waives appointment of counsel and states that he will either engage or act as his own counsel

at trial. Failure to take painstaking care at this point to make certain an indigent defendant understands his right to have counsel appointed may lead to lengthy delays later on. See *Tobin* v. *United States,* 402 F. 2d 307 (2d Cir., 1968).

No plea, regardless of its nature, should be entered until the defendant has obtained or been furnished with an attorney or expressly waived his right to such assistance. (*Walker* v. *Johnson,* 312 U.S. 275 (1941); *Cherrie* v. *United States,* 184 F. 2d 384 (10th Cir. 1950)).

It is Department policy that probationers should be offered the right to appointed counsel in all cases of probation revocation.

Docket Entries

It is of utmost importance that the entries in the docket of the Clerk of the Court show whether or not the defendant in a criminal case was represented by counsel. If the defendant was represented by counsel, the docket entry should show the name or names of such counsel. If the defendant is not represented by counsel, the docket entry should clearly disclose that the defendant was fully informed of his right to counsel and that with full knowledge of the right, he expressly waived the assistance of counsel. Proper docket entries will eliminate the possibility of the defendant later successfully claiming that his constitutional rights were denied because he did not have the assistance of counsel. (See also Title 8, Office Files and Records.)

Pleas

A defendant may plead guilty, not guilty or, with the consent of the court, nolo contendere. The plea of nolo contendere has the effect of a plea of guilty in a criminal case. *United States* v. *Norris,* 281 U.S. 619 (1930). The court may refuse to accept a plea of guilty or nolo contendere. Under Rule 11 a plea of guilty or nolo contendere cannot be accepted by the court without addressing the defendant personally and making a determination that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead, stands mute, or if the court refuses to accept a plea of guilty or nolo contendere, a plea of not guilty must be entered on behalf of the defendant by the court. A plea of not guilty must likewise be entered for a corporation which fails to appear. U.S. Attorneys should make certain that the requirements of Rule 11 are strictly complied with. With

regard to any plea of guilty entered after April 2, 1969, even a minor technical noncompliance with the rule will cause a guilty plea to be thrown out, even if made knowingly and voluntarily.

Nolo Contendere

U.S. Attorneys are instructed not to consent to a plea of nolo contendere except in the most unusual circumstances and then only after their recommendation for so doing has been approved by the Assistant Attorney General responsible or by the Office of the Attorney General.

Alternate Jurors

Whenever a jury trial is likely to be protracted, the U.S. Attorney should suggest to the court the desirability of calling and impanelling one or more alternate jurors (F.R.Cr.P. Rule 24(c), Rule 47(b).)

DISMISSALS

In any case where the U.S. Attorney concludes that because of the expense of producing a defendant for trial, or because the defendant has already been adequately punished, or for similar reasons, further prosecution is not warranted or worthwhile, immediate action should be taken to dismiss the pending indictment in accordance with established procedure, and defendants or their counsel should always be notified when charges are dismissed. However, except as specifically set forth below, no case, civil or criminal, within the supervisory responsibilities of the Criminal Division, should be dismissed without prior authorization of the Department.

Dismissal Without Prior Authorization

U.S. Attorneys need not obtain authority to dismiss cases in the following situations:

(*a*) Where the defendant is dead or by reason of permanent insanity incapable of defending the charges against him;

(*b*) Where a superseding indictment or information has been returned;

(*c*) Where the criminal liability involved in the charge against the defendant has been compromised by the Department;

(*d*) Where the defendant has pleaded guilty, or nolo contendere, or has been convicted after trial, on one count of an indictment or information or under another indictment based upon the same transaction and the U.S. Attorney believes that the punishment imposed is adequate and that further prosecution would not result in an additional sentence. (An exception to this rule must be made in classes of cases where it is desirable to obtain conviction on several types of charges, e.g., misbranding and adulteration under the Food, Drug, and Cosmetics Act, fraud and failure to register under the Securities Act of 1933. In these cases specific authority should be obtained);

(*e*) Where the defendant is serving an adequate sentence imposed by a State court for an offense growing out of the same transaction which is the subject of the Federal charge, and the U.S. attorney believes that Federal prosecution would not result in any additional sentence;

(f) Where the offense is a violation of the customs and narcotics laws and as the result of the evidence adduced upon the trial of codefendants for the same violation the U.S. Attorney is convinced of the defendant's innocence;

(*g*) Where the offense is a violation of the customs and narcotics laws and the defendant is not a dangerous or habitual offender, his offense was a petty one, and the failure to prosecute him would facilitate the conviction of dangerous or habitual offenders who might otherwise escape;

(*h*) Where forfeiture suits have been instituted under the Federal Food, Drug, and Cosmetic Act and the U.S. Attorney has been informed by the local station of the Food and Drug Administration that the product is not available for seizure.

It is emphasized that the above list is not a direction but an authorization to dismiss, if in the opinion of the U.S. Attorney this course is advisable. U.S. Attorneys must satisfy themselves that the conditions upon which dismissals are authorized have been complied with.

Arrangements are discouraged wherein the corporate defendant would plead guilty or nolo with the understanding that the individual defendant or defendants (often important officers or executives of corporate defendant) would be entirely dismissed from the prosecution. It is often important and highly desirable that convictions be secured of one or more individual defendants as well as of the corporate entity. Conviction of the responsible natu-

ral person often is much more effective than conviction of the corporation only, since the fine paid by the corporation may be tantamount to no more than a business expense whereas convictions of the responsible individuals make effective the terms of the program and statute in question.

Often it is desirable to dismiss actions against defendants committed to Federal custody either for psychiatric examination (18 U.S.C. 4244) or until mental competency is restored for trial (18 U.S.C. 4246) when it appears unlikely that competency will be regained. Dismissal is made contingent upon commitment to a State mental hospital. Prior authorization by the Department is required in all cases involving indictments, informations, or complaints under 18 U.S.C. 871 (threats against the President). Correspondence in this regard should be addressed to the General Crimes Section, Criminal Division. In all cases of dismissal the Bureau of Prisons and the Medical Center for Federal Prisoners, Springfield, Mo., should be given notice well in advance, since authority to hold the defendant in custody is based on the complaint or indictment. In cases involving dismissals of prosecution under 18 U.S.C. 871, the Secret Service should be notified as well.

Authorization for Dismissal

In every criminal prosecution in which it is proposed to dismiss an indictment or information in whole or in part, where a plea has not been entered and sentence imposed, the Assistant U.S. Attorney should prepare in quadruplicate Form 1 (Official Department Form No. USA 900), "Authorization for Dismissal of Indictment and Information" (Title 2, Appendix), setting forth the reasons for recommending dismissal. Dismissal of all the counts against a particular defendant is the dismissal of an entire indictment or information as to that defendant. The U.S. Attorney is authorized to dismiss an indictment only in part without prior authorization, viz, with respect to a particular defendant who has entered a plea and has been sentenced on one or more counts. In other words, if a defendant has been convicted on at least one count, generally the U.S. Attorney is authorized to dismiss without prior authority the remaining counts against him, considering the facts and circumstances of the case. The authority to dismiss without prior authorization does not extend to codefendants against whom all counts are still outstanding.

Generally, requests for the dismissal of cases against fugitives

are disapproved as no authority exists for dismissal of a case in which an indictment has been obtained and no judicial action has been had thereon. Only the "triable" criminal caseload is used in evaluating the currency of an office caseload, which category excludes cases in which the United States may take no action, such as where the defendants are fugitives, in the Armed Forces, in State custody, or insane.

In offices having a large number of Assistants or in which the organization thereof warrants, the original and three copies of the form should be submitted to the Chief of the Criminal Section in such office for his action, and to the U.S. Attorney for his action. In smaller offices and those in which there is no division of personnel into sections, the Assistant U.S. Attorney handling the case should submit the form in quadruplicate to the U.S. Attorney for his action.

The U.S. Attorney's approval of dismissal should be indicated where prior authorization from the Criminal Division is not required, or the U.S. Attorney's recommendation of approval should be indicated where prior authorization from the Criminal Division is required.

One signed copy of the form should remain in the U.S. Attorney's case file, and the original and two copies should be forwarded to the Criminal Division. When the dismissal is approved by the Criminal Division in those instances where its prior approval is required, one signed copy will be returned to the U.S. Attorney. In those instances where prior authorization from the Criminal Division is not required, no copy of the form need be returned to the U.S. Attorney by the Criminal Division. One copy of the form will be retained in the Department's case file. In many instances it is the practice of the Department to invite the views of the administrative or investigative agency concerned, or to advise such agency of the action taken, and one copy will be used for that purpose when appropriate.

This procedure is designed to preserve a short form record for the files of the U.S. Attorney and the Department of the reasons underlying each dismissal or request for authorization to dismiss as well as the names of the officials passing thereon. The procedure is applicable in all cases of dismissal.

Motion for Leave to Dismiss Indictment or Information

In cases of considerable public interest or importance when it is advisable to dismiss the entire indictment or information because

of inability to establish a prima facie case, a written motion for leave to dismiss should be filed explaining fully the reason for the request to dismiss. The formal motion will not be used when a dismissal is coupled with a plea of guilty to certain counts of an indictment or when the offense is of a petty nature. The importance of a case, however, is not to be measured simply by the amount of punishment prescribed for the offense. If the case involves fraud against the Government, bribery or some other matter of importance or if any other department or branch of the Government is specially interested, the written form of motion should be used. (App. Form 2.)

Dismissal of Complaints

U.S. Attorneys are not required to obtain prior authorization to dismiss complaints made under Rule 3 before Commissioners or other officers empowered to commit persons charged with offenses against the United States (see 18 U.S.C. 3041). While there may be instances in which such approval should be sought before dismissal, as, for example, in a case where the complaint was filed upon specific instructions from the Department, or there is some other reason in a particular case for requesting approval, the Department's policy is to leave decisions with respect to dismissal of complaints within the discretion of the U.S. Attorneys, subject only to the requirements of Rule 48(a), as applied in their respective districts.

Rule 48(a) provides that the Attorney General or the U.S. Attorney may, by leave of court, file a dismissal of an indictment, information or complaint. The advisory committee's final draft of the Rule submitted to the Supreme Court did not require leave of court for a dismissal. The committee's note to the Rule states that the word "complaint" was included with indictment and information in order to clarify the power of the U.S. Attorney to enter a nolle prosequi of a prosecution during the interval before an indictment is found, when the defendant has been held for grand jury action. In adding the requirement of leave of court for a dismissal, the Supreme Court did not distinguish between a complaint, on the one hand, and an indictment or information, on the other.

The Department interprets the requirement that leave of court must be obtained for dismissal of a complaint as applicable only to those complaints upon which the accused has been held to

answer in the district court after a preliminary examination before a Commissioner. In such cases it is believed that there can be no dismissal of the complaint without leave of court simply because the case has not been presented to the grand jury. The U.S. Attorney must have leave of the court to dismiss, whether given in a prior blanket authorization to dismiss complaints, or in each instance.

Where, on the other hand, a complaint made before a Commissioner has served no other purpose than the issuance of a warrant of arrest, and has resulted neither in an arrest nor a holding to answer in the District Court, it is believed that the Commissioner may dismiss the complaint without consulting the court. The Department reached this conclusion, which has been communicated to the Administrative Office of the U.S. Courts, on the basis of the control exercised over complaints by the U.S. Commissioners under Rules 4(a) and (c) and 5(c). Under those Rules a Commissioner may issue a warrant of arrest upon a showing of probable cause in a complaint filed before him; he may discharge a defendant brought before him following arrest on a complaint for which no probable cause is shown; and he has authority to cancel an unexecuted warrant of arrest. It would seem, therefore, that the Commissioner can erercise a like control over a complaint that has served only as a basis for issuing a warrant of arrest, whether or not the warrant is actually executed, or is still outstanding as a basis for a detainer. This interpretation of the rule has not been judicially tested, and in each district the U.S. Attorney must be governed by the District Court's interpretation of Rule 48(a) in that respect.

Care should also be taken that the Marshal of the district is promptly informed by the U.S. Attorney of the dismissal of a complaint, whether by the court or the Commissioner, in order to facilitate cancellation of unexecuted arrest warrants, as provided in Rule 4(c)(4). Such notification is also important when a warrant of arrest is outstanding in connection with a detainer, as the warrant will have been forwarded by the Marshal of the district where it was issued, to the Marshal in the district of detention, who will have to return it to the Marshal of the issuing district for cancellation by the Commissioner after the complaint has been dismissed.

RETURN OF WARRANT OR SUMMONS UPON COMPLAINT

Whenever a case in which a warrant or summons is outstanding is dismissed or closed, the U.S. Attorney will prepare form No. USA–19 in duplicate and forward both copies to the Marshal. The Marshal will retain the original in his files and forward the copy, together with the unexecuted warrant or unserved summons, to the issuing officer. No covering letter of transmittal should be necessary, since form No. USA–19 and the warrant or summons will contain all the information required by the issuing officer.

If form No. USA–19 is received by a Marshal who has forwarded the subject warrant or summons to another Marshal for service, he should immediately transmit both copies of form No. USA–19 to such Marshal who will proceed as outlined above.

The use of this form should help to eliminate the possibility that a warrant or summons issued in a criminal action will be executed or served after it should have been returned unexecuted or unserved.

DETAINERS

Since many State penal institutions grant so-called furloughs or leaves of absence to prisoners against whom Federal detainers have been filed, U.S. Attorneys, in requesting local prison authorities to detain prisoners, should include specific instructions that the FBI be advised before any leave is granted to such prisoners.

COMMITMENT

Attorneys should take steps to make certain that all defendants are committed pursuant to the mandate of the court immediately following the termination of their judicial proceedings.

SENTENCE IN CRIMINAL CASES

Every Federal sentence must direct commitment of the convicted defendant to the custody of the Attorney General, who has the statutory duty of enforcing execution of the sentence. It is the duty of the U.S. Attorney as representative of the Attorney General to assure himself that the sentence is legal and properly imposed. To that end he is required to call to the court's attention any illegality or irregularity appearing at the time sentence is

pronounced, and to examine the judgment prepared by the Clerk before it is submitted to the sentencing judge for his signature pursuant to Rule 32(b), Federal Rules of Criminal Procedure. The Federal prosecutor should make certain that the sentence presented for signature is:

1. Definite as to duration, excepting only commitment of a youth offender under 18 U.S.C. 5010(b);

2. Not less than the minimum nor more than the maximum fixed by law;

3. Clear as to the intent of the court; and

4. In exact conformity with the sentence orally pronounced. Every sentence should be so clearly worded and so specific in its directions as to leave no reasonable doubt in the minds of those charged with its execution. A judgment open to doubt in any respect should be called to the attention of the court immediately. In that way the matter can be resolved satisfactorily while circumstances and facts are fresh in mind.

Particular attention is called to the following:

(*a*) A separate judgment should be imposed, signed, and entered in each criminal case.

(*b*) The judgment should specify whether separate sentences imposed under different counts or under different indictments are to be served consecutively to each other or concurrently with each other, and should indicate the precise order of service as to sentences directed to be served consecutively. When multiple sentences are imposed without direction as to service in relation to each other they will be computed as running concurrently under well-settled rules of judicial construction.

(*c*) A sentence imposed during imprisonment under another Federal sentence should specify whether it is to be served concurrently with, or consecutively to, such earlier sentence or sentences.

(*d*) Service of sentence does not commence until the defendant is received at the institution designated for service of such sentence or is in Federal custody awaiting transportation to the designated institution, 18 U.S.C. 3568. This statute as amended provides that on all sentences imposed on or after September 20, 1966, the Attorney General shall give defendants credit toward service of their sentences for any days spent in custody in connection with the offense or action for which sentence was imposed.

This includes credit for all pretrial custody, including custody under a conviction which was reversed for a new trial. As to sentences imposed before September 20, 1966, and subsequent to September 2, 1960, credit can be given only for days spent in custody before imposition of sentence for want of bail, where the statute under which defendant was sentenced requires imposition of a mandatory minimum sentence.

(*e*) A direction in the judgment that the sentence shall run concurrently with time owing by the defendant as a parole violator under a previous sentence is beyond the power of the court, and, therefore, ineffective. See *Zerbst* v. *Kidwell*, 304 U.S. 359, 362, (1938); *Tippitt* v. *Wood*, 140 F. 2d 689 (D.C. Cir. 1944). When a court directs concurrent service in such a case its attention should be called to the fact that its desire may be accomplished by imposing a sentence equal to the difference between the term it would impose if the subject owed no time as a violator, and the time owing as a violator.

(*f*) Upon conviction under a one-court indictment for an offense not punishable by death or life imprisonment, but punishable by imprisonment for more than 6 months, the court may impose a sentence in excess of 6 months; may direct that 6 months or less of such sentence be served in a jail or a treatment institution; suspend execution of the remainder of the sentence and place the defendant on probation for such period and upon such conditions as the court deems best. 18 U.S.C. 3651, as amended August 23, 1958. The Senate Report, No. 2135, August 4, 1958, makes it clear that this legislation applies only in those cases where the court had authority to grant probation prior to its enactment.

(*g*) The power to suspend execution of sentence and place a defendant on probation is terminated immediately upon imprisonment under such sentence or under any one of several sentences ordered to run consecutively. *Affronti* v. *United States*, 350 U.S. 79 (1955).

Commitment Preceding Final Judgment

Upon entering a judgment of conviction, if the court desires more information as a basis for determining the sentence to be imposed it may commit the defendant to the custody of the Attorney General for a study and report including data as to previous criminal experience, social background, capabilities, and other pertinent factors. Such commitment is deemed to be for the maxi-

mum sentence of imprisonment prescribed by law. The report must be furnished to the court by the Director, Bureau of Prisons within 3 months unless the court grants time, not exceeding an additional 3 months, for further study. Upon receipt of the report, 3 choices are open to the court. It may place the defendant on probation, or affirm the sentence originally imposed, or reduce the sentence of imprisonment and order commitment under any applicable statute. Any sentence imposed under this statute runs from the date of the original commitment. Section 3, Public Law, 85–752, approved August 25, 1958, and designated 18 U.S.C. 4208(b).

Setting of Parole Eligibility Date

Legislation approved August 25, 1958, confers power on the court, in its discretion, either to fix the eligibility date for parole when sentence is imposed or at the same time specify that the date of the parole eligibility may be determined by the Board of Parole.

The law states that upon entering a judgment of conviction, if the court pronounces a sentence of more than 1 year it may designate in the sentence a minimum term at which the prisoner shall become eligible for parole consideration. Such minimum term may be less than, but shall not be more than, one-third of the maximum sentence imposed. Or, the court may fix the maximum term of imprisonment and specify in the sentence that the prisoner may become eligible for parole consideration at such time as the Board of Parole may determine. Section 3, Public Law 85–752, designated 18 U.S.C. 4208(a).

If the court invokes neither of the two foregoing provisions, parole eligibility will be controlled by 18 U.S.C. 4202, which makes every prisoner sentenced to serve more than 180 days, except violators of certain narcotic statutes, eligible for parole consideration upon completing service of one-third of the sentence. Juvenile delinquents and committed youth offenders are eligible for parole consideration at any time after commencement of service of their sentences.

Sentence During State Imprisonment

When a prisoner serving a State sentence is brought into Federal court for prosecution which terminates with conviction and imposition of a Federal sentence, a direction that it shall run

concurrently with the State sentence contravenes the provisions of 18 U.S.C. 3568. See *Rohr* v. *Hundspeth,* 105 F. 2d 747 (10th Cir. 1939) ; *Vanover* v. *Cox,* 136 F. 2d 442 (8th Cir. 1943) ; *Gunton* v. *Squier,* 185 F. 2d 470 (9th Cir. 1950), and *Strewl* v. *McGrath,* 191 F. 2d 347 (D.C. Cir. 1951), *cert. den.* 343 U.S. 906 (1952). If the court is of the opinion that the sentence which it would normally impose, when added to the State sentence, would constitute punishment too severe in the light of the offenses it should consider imposition of a lighter term. Another alternative would be for the court to recommend that the Attorney General (pursuant to his authority under 18 U.S.C. 4082) designate as the institution for service of the Federal sentence the particular State institution where the State sentence is being served. For this purpose the court may use the space provided at the bottom of Form 25 entitled "Judgment and Commitment," which appears in the Federal Rules of Criminal Procedure. Such designation permits the Federal sentence to run while the prisoner is serving his State sentence.

Reduction of Sentence

Rule 35, Federal Rules of Criminal Procedure, authorizes a court to reduce a sentence within 120 days after its imposition, or within 120 days after receipt of a mandate affirming the judgment of dismissing an appeal, or within 120 days after receipt of an order of the Supreme Court denying certiorari. Upon expiration of the period set by Rule 35, the court loses power to reduce sentence even though application for a reduction was made within the period. The court is without power to extend the period. See Rule 45(b), Federal Rules of Criminal Procedure.

APPEALS

Petitions for rehearing en banc, as well as appeals from the granting of pretrial motions to suppress evidence, cannot be filed without the prior authorization of the Solicitor General. Two copies of all briefs and printed records on appeal should be forwarded to the Department as soon as possible. The Appellate Section of the Criminal Division should be notified immediately (within a day or two) of all appellate decisions adverse to the Government. See also Title VI, Appeals.

RELEASE OF DETAINED PERSONS

The Bail Reform Act of 1966, Public Law 89–465, sets forth the procedure for release of detailed persons. The most important provisions of this Act are found in 18 U.S.C. 3146–3152 which provide that persons charged with noncapital offenses, when brought before a Commissioner or other judicial officer, are to be released on personal recognizance or upon the execution of an unsecured appearance bond in a specified amount, unless the judicial officer determines that such a release will not reasonably assure the appearance of the person as required, in which case the judicial officer imposes the first of the following conditions (or a combination thereof, if necessary) which will reasonably assure the person's appearance: (1) Place the person in the custody of a designated person or agency; (2) place restrictions on travel, association, or place of abode; (3) require the execution of an appearance bond in a specified amount, and the deposit of a maximum of 10 percent of the amount of the bond, to be returned upon performance of the conditions; (4) require execution of a bail bond with surety or a cash deposit; (5) impose any other condition deemed reasonably necessary to assure appearance, including a condition requiring that the person return to custody after specified hours.

In imposing conditions the judicial officer takes into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, his family ties, employment, financial resources, character and mental condition, length of residence in the community, conviction record, and record of appearance at court proceedings or failure to appear.

If the detained person is unable to meet the conditions imposed, or if he is released on the condition that he return to custody after special hours, or if the original conditions are amended resulting in either of the above situations, the person may ask for a review by the judicial officer. If conditions resulting in full release are not then imposed, the judicial officer must put his reasons for the conditions imposed in writing.

The detained person may ask that the court having original jurisdiction over the offense charged review the conditions imposed. An appeal will lie from this court's decision, and the appellate court may affirm the lower court's order, reverse, or remand for further hearings.

The procedure is the same with regard to persons charged with capital offense, or persons who have been convicted and have appealed, unless the court is of the opinion that no condition will assure the appearance of the person, or that his release will pose a threat to anyone in the community. In these cases, the person will not be released.

Failure to appear results in forfeiture of any security plus the imposition of a fine or sentence or both, varying with the seriousness of the crime.

U.S. Attorneys are urged to familiarize themselves with the provisions of this act.

COLLECTION OF CRIMINAL FINES AND FORFEITED APPEARANCE BONDS

The imposition of a sentence which includes a fine in a criminal case does not terminate the U.S. Attorney's connection with the case. While the prime objective of the Department is to insure the speedy and effective enforcement of the criminal laws with its consequent deterrent effect, it is of the utmost importance that unpaid fines should not be overlooked and that all monies due the United States are paid. Similarly, prompt and vigorous action is required in the collection of forfeited appearance bonds, both surety and personal recognizance.

Fine Judgments

Fine judgments cannot be compromised by the Department as this is the prerogative of the President. (Constitution of the United States, Art. II, Sec. 2; 10 Op. A.G. 344.) Petitions for Executive clemency should be addressed to Pardon Attorney. Fines, or judgments taken as a result of fines, do not draw interest. (*Pierce* v. *United States,*' 255 U.S. 398 (1921); *United States* v. *Jacob Schmidt Brewing Co.,* 254 F. 714 (D. N.Dak. 1918).) They abate with the deaths of fine debtors whose estates cannot be charged therewith. (*United States* v. *Mitchel,* 163 F. 1014 (D. Ore. 1908); *United States* v. *Jacob Schmidt Brewing Co., supra; Dyar* v. *United States,* 186 F. 614 (5th Cir. 1911).) They are not dischargeable by bankruptcy. (Collier on Bankruptcy, 14th ed., Vol. 1, p. 1596; *Parker* v. *United States,* 153 F. 2d 66 (1st Cir. 1946); *In re Thomashefsky,* 51 F. 2d 1040 (2nd Cir. 1931).) Judgments based on fines or appearance bonds should direct that the costs be paid,

unless a different course is directed by the court, local custom, rule or statute.

Procedurally, criminal fines unlike civil judgments, cannot be closed as uncollectible but are closed only by payment, death or Executive clemency.

Section 3565, Title 18, United States Code, provides that a fine in a criminal case in which judgment or sentence is rendered may be enforced by execution against the property of a defendant in the same manner as judgments in civil cases are enforced.

Remission of Fines

Any person against whom a fine is outstanding and who desires to apply for remission of a part thereof and wishes to demonstrate his good faith by making a part payment should be advised to make payment to the Clerk of the Court. He should be informed that the money so paid will be applied to the fine and, irrespective of the outcome of his petition, will not be refunded to him. Policies and procedures governing the remission of fines are discussed under Title 1, Office of the Pardon Attorney.

Investigations

An important part of this work is the conducting of investigations:

(*a*) To learn, before sentence, the ability of an accused to pay a fine.

(*b*) To ascertain whether an applicant for discharge under 18 U.S.C. 3569 is entitled to release as an indigent prisoner.

Pending Appeal

Fines and costs in criminal cases may be collected during the pendency of an appeal unless the defendant procures a stay of execution as to that part of the judgment. Rule 38(a), Federal Rules of Criminal Procedure, provides, among other things, that the trial court or Court of Appeals "may require the defendant pending appeal to deposit the whole or any part of the fine and costs in the registry of the District Court, or to give bond for the payment thereof, or to submit to an examination of assets, and it may make any appropriate order to restrain the defendant from dissipating his assets."

Orders for such deposit of the whole or a substantial part of the fine pending appeal should be requested in all cases where

funds are available. The above provision for "any appropriate order to restrain the defendant from dissipating his assets" should receive the careful attention of all U.S. Attorneys. Emphasis in this area should be given to organized crime and fraud cases.

Judgment Collection Efforts

1. *Demand.*—Demand for payment should be made promptly upon the entry of judgment in favor of the United States. The debtor may pay without the necessity of enforced collection procedures. If the debtor responds to the demand with a claim of inability to pay, (1) arrange for a personal interview with him to discuss the matter, and/or (2) obtain a sworn personal financial statement on form DJ–35.

2. *Personal interviews.*—The possibilities of effecting collections will be definitely increased if debtors are personally interviewed by the attorney handling the case. Personal interviews may be arranged by (*a*) notice to the judgment debtor to appear for discussion, (*b*) advice by the FBI to the debtor to contact the U.S. Attorney, if the debtor is interviewed by a special agent, or (*c*) by utilization of supplementary proceedings under Rule 69(a) of the Federal Rules of Civil Procedure.

3. *Inability to find debtor.*—If demand letter is returned undelivered and postal authorities cannot supply a better address, local telephone and city directories should be checked. In cases where a defendant has been placed on probation, or released on parole, the records of the local probation officer should reflect the correct address.

If it is determined that a debtor has removed to another judicial district the file should be forwarded to the appropriate U.S. Attorney. The receiving U.S. Attorney should send notice of payment to the U.S. Attorney where the judgment was rendered in order that his records and that of the court may reflect payment.

4. *Credit information.*—If up-to-date credit information or a current financial statement executed by the debtor is not available, an executed DJ–35 form should be obtained, if possible during a personal interview. The presentence report of the probation officer should provide some information as to the current financial condition of a defendant. The records of the probation officer might also be a continuing source of information in cases where a defendant has been placed on probation, or released on parole, or discharged pursuant to the provisions of 18 U.S.C. 3569. If satisfac-

tory credit information cannot be obtained by these means and a more searching examination into the debtor's circumstances and property dispositions is desired, it may become expedient to examine the debtor in a supplementary proceeding under Rule 69(a) of the Federal Rules of Civil Procedure with form USA–46 used as an aid or a guide to the interrogations. Such a proceeding would be particularly appropriate where it is believed that assets have been concealed or fraudulently transferred. The debtor may be interrogated orally, or may be required to answer written interrogatories. (Rules 69(a) 26–37, and 45(d), F.R.C.P.) If the answers are not candid or complete, or if additional evidence is needed to establish concealment or fraudulent transfer, investigation by the FBI should be requested. As an alternative to the supplementary proceeding or as a preliminary step to the same, the FBI may be called upon to investigate the financial ability of the judgment debtor in cases where $500 or more is involved.

5. *Judgment as a lien.*—Prompt action should be taken to perfect the Government's judgments as a lien by registering, recording, docketing or indexing it as required by State law. See 28 U.S.C. 1962. While there may be no immediate prospect of enforced collection from a judgment debtor, establishing a judgment lien against his property will usually result in payment at such time as the debtor seeks to sell his property or add a mortgage. Establishment of a lien should be accomplished in the jurisdiction in which the debtor resides and in all other jurisdictions in which property may be found. See 28 U.S.C. 1963 concerning the recordation of the judgment in other jurisdictions.

It should be noted, however, that collection efforts should consist of more than the liening of property as a criminal fine judgment abates with the death of the debtor.

6. *Execution and sale.*—If sale upon levy of execution is feasible, action to levy and sell should be initiated when all other efforts to collect the judgment have failed. Reference should be made to the exemption statutes applicable in the State where the judgment debtor's property is located to ascertain the feasibility of execution and sale. See Rule 69(a), F.R.C.P. Sale should not be attempted absent exact information concerning the value of the property and the existence and value of prior liens and encumbrances.

A writ of execution must be issued from and returnable to the court which rendered the judgment, but may be executed in any State or territory or in the District of Columbia. (28 U.S.C. 2413.) Enforcement of a judgment in one district does not preclude

enforcement action to effect collection of the unpaid balance in another district or even in a State court. (*Edmonston* v. *Sisk,* 156 F. 2d 300 (10th Cir. 1946).) State law governs the appraisal of property for sale under levy of execution. (28 U.S.C. 2005.)

7. *Installment payments.*—Prompt payment of a judgment in full is to be preferred in every case in which a lump sum payment can be obtained or enforced. If a lump sum payment cannot be arranged, periodic payments may be the only feasible means of satisfying the Government's judgment.

8. *Collection by offset.*—The United States as a creditor has the same right to apply money in its hands belonging to a debtor in extinguishment of debts due it that any other creditor has. (*United States* v. *Munsey Trust Co.,* 332 U.S. 234, 239 (1947); cf. 31 U.S.C. 227.)

9. *Garnishment of wages or other sums owed the debtor.*—If the applicable State exemption statutes are such that garnishment is feasible, and the judgment debtor can afford to make reasonable payments but has refused to do so, garnishment proceedings should be utilized. While the wages of Federal employees cannot be garnished, arrangements can usually be made through the judgment debtor's supervisor for the debtor to make payments.

10. *Other sources of recovery.*—When a judgment-debtor has disposed of property under circumstances indicating that such action was taken to defeat collection by the Government, an FBI investigation or supplementary proceedings should be used to discover such property and permit its pursuit into the hands of subsequent owners. (*Pierce* v. *United States,* 255 U.S. 398 (1921).) If the judgment debtor is a corporation, do not overlook the possibility of recovering from officers, stockholders, fiduciaries, or affiliated companies on account of corporate resources siphoned off in contravention of the corporate charter, State law or in violation of the priorities established by 31 U.S.C. 191 and 192 with respect to insolvent debtors. The FBI should be asked to audit the corporate books and records, if corporate assets are insufficient to satisfy the judgment without the recovery of such diversions. In some instances recovery may be had against another company or person on the alter ego theory. See *Consolidated Products Co.* v. *DuBois,* 312 U.S. 510 (1941), 13 Am. Jur., "Corporations," §1382.

It should be noted that unpaid criminal fine judgments in regard to corporations may be closed when the corporation has been legally dissolved in its State of incorporation. That is, the

corporation must be more than no longer doing business, it must cease to exist as a corporate entity. However, prior to closing if the corporation has been dissolved we should insure that such action was not taken to defeat collection efforts by the Government.

11. *Future review of judgments for renewal of liens and collection.*—Some judgments may be identifiable at once as absolutely uncollectible for all time, and in such cases there is no point in perpetuating a judgment lien or undertaking further collection action.

Judgments which have not been processed sufficiently to permit a determination that they are presently uncollectible should be maintained in a pending or open status and action should be taken thereon in accordance with instructions. These judgment files should be reviewed no less often than quarterly to see that appropriate action is being taken on a current basis in accordance with these instructions. If installment payments or other action requiring a shorter deadline are involved, these files should be suspended accordingly.

When a fine judgment has been processed sufficiently to permit a determination that collection cannot be effected, and it is presently uncollectible, it should be placed in an "inactive" or "suspense" category.

Judgments maintained in the "inactive" or "suspense" file should be reviewed at least annually to determine whether written demand on the judgment debtor should be made and to insure that the judgment liens do not expire. (Execution must issue within the time required by State law. *Custer* v. *McCutcheon,* 283 U.S. 514 (1931).) While judgments in favor of the United States do not outlaw liens resultant therefrom may. (28 U.S.C. 1962.) Accordingly, a motion should be filed or such other action should be taken as is required, pursuant to the law of the State where the judgment is recorded, to review the judgment lien before its expiration. If a judgment lien has become dormant, due to the lapse of time, a new suit may be brought on the old judgment to reestablish the judgment lien. (*Miller* v. *United States,* 160 F. 2d 608 (9th Cir. 1947) ; *Schodde* v. *United States,* 69 F. 2d 866 (9th Cir. 1934) ; *United States* v. *Jenkins,* 141 F. Supp. 499, 503–504 (S.D. Ga. 1956).) The resulting judgment is a new judgment and should be recorded or indexed as required by State law in order to perfect the judgment lien. In no event should a debtor ever be advised, directly or indirectly, that a judgment against him has been inac-

tivated. There is always the possibility that some unpredictable circumstances will produce a voluntary payment.

Up-to-date credit information should be obtained on judgments maintained in the "inactive" or "suspense" file at least once each 5 years to determine their potential collectibility. Steps should be taken to enforce collection in accordance with instructions contained in paragraph 1, *supra*, of this Title, as the facts, disclosed by current credit data, dictate. When it is discovered that the debtor is deceased or the corporation legally dissolved the case should be closed.

12. *Collateral on bail bond*: *Application to fine.*—Cash or securities deposited by a surety as collateral on a bail bond cannot be applied in satisfaction of a fine imposed on the defendant who appeared in accordance with the obligation of the bond, but a cash or security deposit made by the defendant as security for his attendance may be so applied. (*Rudd* v. *United States*, 138 F. 2d 745 (7th Cir. 1943); *United States* v. *Widen*, 38 F. 2d 517 (D. C. N.D. Ill. 1930); *United States* v. *Werner*, 47 F. 2d 351 (D.C.N.D. Okla. 1931).)

13. *Probation: Fine commitment.*—Where defendant is sentenced to a fine and imprisonment and is placed on probation, the U.S. Attorney should make every effort to have the payment of the fine within a limited period "in one or several sums," made a condition of the probation. (18 U.S.C. 3651.)

14. *Pauper's oath.*—If a prisoner, held for nonpayment of a fine, or fine and costs, is discharged from custody, under 18 U.S.C. 3569, his debt to the Government is not discharged. The only effect of such discharge is to release the prisoner from further confinement and not to satisfy, set aside, or vacate the claim of the Government against the defendant, or to prevent its enforcement by execution. (See *Allen* v. *Clark*, 126 Fed. 738 (4th Cir. 1903); *Grier* v. *Kennan*, 64 F. 2d 605 (8th Cir. 1933).)

15. *Sureties.*—Rule 46(e) provides that every surety, except a corporate surety, shall justify by affidavit and may be required to describe the property by which he proposes to justify and the encumbrances thereon, together with the number and amount of other bonds and other undertakings for bail entered into by him and remaining undischarged and all of his other liabilities. The Rule also provides that no bond shall be approved unless the surety thereon appears to be qualified.

Subsection (d) of the same Rule provides that one or more sureties may be required, cash or bonds or notes of the United States

may be accepted and in proper cases no security need be required. Where sureties are required, careful examination should be made into their qualifications with a view to reducing to the lowest possible limit the number of uncollectible judgments on forfeited appearance bonds.

Officers taking bonds should be required as far as possible to ascertain definitely at such time whether the proffered surety is or is not able to pay the penalty of the bond. Except where an obligor consents to waive the protection afforded by State homestead exemption laws, the officer taking the bond should satisfy himself that the property described in the affidavit of justification is sufficient aside from exemptions.

Appearance Bond Form No. Cr. 17, with affidavit annexed, which provides for an explicit statement of the surety's property and obligations, and for detailed statements of other bonds on which the proffered surety is at that time responsible, may be obtained from the clerk of the court or the Administrative Office of the U.S. Courts.

All returns of nulla bona executions or other indications of inability to pay bonds, should be immediately investigated to ascertain what officer or other person is responsible for that result.

U.S. Attorneys should vigorously prosecute, under the criminal laws for perjury or false swearing, those sureties who have sworn falsely as to their property when signing bonds.

16. *Forfeitures.*—Prompt action is urged in taking forfeitures, both surety bonds and personal recognizances, at the session in which the defendant fails to appear and in making motions at the same session for judgments of default and execution under Rule 46 (f) (3). If it is found that a forfeiture or judgment should not have been taken, the court has ample authority under subsections (f) (2) and (f) (4) of Rule 46 to set aside the forfeiture or remit the judgment in whole or in part.

U.S. Attorneys should object to the setting aside of forfeitures and the remission of judgments of default, unless the costs are paid and the Government reimbursed for any expenses incurred. Included in these expenses, among others, are witness fees and travel expenses of U.S. Marshals and/or agents of referring agency; expenses incurred by referring agency for fugitive search, etc.

17. *Default on bond.*—Under Rule 46 (f) (3), there is no necessity for instituting a separate action to recover on a forfeited appear-

ance bond as the liability of principals and sureties may be enforced on motion.

18. *Liens.*—In case a release of the lien resulting from a fine or judgment is desired, it should be shown that the lien is unenforceable or that the amount tendered for the release is the equivalent of that which the Government should expect to recover by the enforcement of the lien.

YOUTH CORRECTIONS ACT

The purpose of the act is to provide a more flexible method of sentencing convicted youth offenders in order to secure corrective treatment and release under supervision. The court may invoke the alternative sentencing provisions of the Federal Youth Corrections Act (18 U.S.C. 5005-5026) if—

(1) The defendant has been convicted of a criminal offense, whether a felony or misdemeanor or petty offense, under regular adult procedure, and

(2) At the time of conviction the defendant was under 22 years of age, or

(3) At the time of conviction he has attained his 22d birthday but has not attained his 26th birthday, and the court finds, after consideration of the defendant's previous record of delinquency or crime, his social background, capabilities, health, and other factors, that there is reasonable ground to believe that he will benefit from treatment under the Act. Section 4, Public Law 85-752, approved August 25, 1958, and designated 18 U.S.C. 4209.

If the above requirements are met and the court in its discretion decides to proceed under the provisions of the Youth Corrections Act, the court is vested with authority as follows:

Probation

If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation (18 U.S.C. 5010 (a)). However, it should be noted that such suspension of sentence and placement on probation is forbidden after conviction for certain violations of the Narcotics Control Act of 1956. See 26 U.S.C. 7237 (d) as amended by that Act.

Indeterminate Sentence Not Exceeding 6 Years

The court may commit the youth offender to the custody of the Attorney General for treatment and supervision until discharged by the Youth Correction Division of the Board of Parole, 18 U.S.C. 5010(b). A youth offender may be given an indeterminate sentence under section 5010(b) irrespective of the maximum term of imprisonment otherwse provided by law for the offense of which he has been convicted. However, where the youth offender enters a plea of guilty to a crime for which the maximum penalty is less than the maximum under the indeterminate sentencing of the Youth Act, it is essential that he understand, at the time of his plea, the alternative sentencing provisions of the Youth Act. When he appears for sentencing, if there appears doubt that he was aware of such provisions at the time of his plea, he should be permitted to withdraw his plea, if he so elects.

Indeterminate Sentence Exceeding 6 Years

If the aggregate punishment otherwise provided by law for the offense or offenses of which the youth offender has been convicted exceeds 6 years, and if the court finds that the youth offender may not be able to derive maximum benefit from treatment by the Youth Correction Division of the Board of Parole prior to the expiration of 6 years from the date of conviction, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision of any further period that may be authorized by law for the offense or offenses of which he stands convicted or until discharged by the Youth Correction Division, 18 U.S.C. 5010(c). Such a sentence extends the permissible period of treatment and supervision for such additional time in excess of 6 years as the sentencing court has fixed.

Commitment for Observation and Study

If the court desires additional information as to whether a youth offender will derive benefit from treatment under subsections (b) or (c) of Section 5010, it may order his commitment to the custody of the Attorney General for observation and study at an appropriate classification center or agency, 18 U.S.C. 5010(e). The law provides that within 60 days from the date of such order, or within such additional period as the court may grant, the Youth Correction Division must report its findings to the court.

Commitment Without Regard to the Act

If the court finds that the youth offender will not benefit from treatment under subsections (b) or (c) of Section 5010, the court may then sentence him under any other applicable penalty provision of law, 18 U.S.C. 5010(d).

Juvenile Delinquents Not Committable as Youth Offenders

A juvenile who has been processed under the Juvenile Delinquency Act and found by the court to be a juvenile delinquent, but not convicted under regular criminal procedure, may not be committed under the provisions of the Youth Corrections Act. See revisers notes under 18 U.S.C. 5033; also 18 U.S.C. 5006, particularly (e) and (h); and 5023(b).

Release of Committed Youth Offenders

A committed youth offender may be released conditionally under supervision by the Youth Division at any time, 18 U.S.C. 5017(a). The offender may be discharged unconditionally upon expiration of 1 year from the date of conditional release. Section 5017(b). Youth offenders committed under Section 5010(b) or 5010(c) must be released conditionally under supervision not later than 2 years before expiration of their respective maximum terms. The maximum term under Section 5010(b) is set by the statute at 6 years; under Section 5010(c) the court fixes the maximum term. Sections 5017 (c) and (d).

JUVENILE DELINQUENCY

The procedure established by the Federal Juvenile Delinquency Act, 18 U.S.C. 5031–5037, shall be applied in the case of every person who violates a law of the United States—

(1) Who has not attained his 18th birthday at the time of the offense;

(2) Who consents to juvenile procedure in writing; and,

(3) Whose violation of law is not punishable by death or life imprisonment.

If the three listed conditions are present, no prosecutive action can be taken against the violator except pursuant to the Juvenile

Delinquency Act unless the Attorney General specifically directs otherwise. Once proceedings have been commenced the violator may, however, be diverted to local authorities under the provisions of 18 U.S.C. 5001. (See *Diversion to State Authorities, infra.*)

When the U.S. Attorney believes that the circumstances in the case of any law violator who had not reached his 18th birthday at the time of the violation merits regular criminal procedure, he may request authorization of the Department to so proceed. Such authorization is required by statute, 18 U.S.C. 5032. In making the request the U.S. Attorney should submit a statement of the facts, with reasons in suppodt of his request, and await Departmental approval. The statement of facts should include the date of birth of the juvenile; previous history of delinquency; and previous history of court proceedings involving the subject—with positive indication of whether such proceedings were prosecutions under criminal law or under juvenile law. The statement of facts and reasons should also in ordinary cases recite the efforts made to effect diversion to State authority under 18 U.S.C. 5001. (See this title.)

Form of Consent

The requirement that the consent which is a prerequisite to proceeding under 18 U.S.C. 5032–5033 be in writing is construed as referring to the juvenile's signature appended to a written consent after the court has explained to him his rights and the consequences of his consent. A printed form of consent, Form USA–24, is available upon requisition made to the Department. A majority of judicial districts are using this Form and its wider use is advocated as an acceptable aid.

Juvenile Procedure; Due Process Requirements

A proceeding against a juvenile under the Federal Juvenile Delinquency Act is not a prosecution for a crime; and it results in an adjudication of status, not a conviction of an offense. Nevertheless, because of the potential consequences to a juvenile under a delinquency statute, the Supreme Court has held that due process standards of criminal procedure are applicable to juvenile proceedings. See *In re Gault, et al.*, 387 U.S. 1 (1967). In this regard the statute's own standards should be carefully followed, e.g., the juvenile must forthwith be taken before a committing magistrate, 18 U.S.C. 5032. See *United States* v. *Glover*, 372 F. 2d 43 (2d Cir.

1967). In addition, under *Gault* the juvenile must be afforded rights to notice, counsel, and confrontation, as well as the privilege against self-incrimination.

In cases where counsel has not been retained or appointed by the court or where the juvenile has indicated his desire to waive counsel, the need for representation by counsel should be urged upon the juvenile and the court.

Form of Information

The information filed against the juvenile requires no set form. However, the language should leave no doubt that it alleges an act of juvenile delinquency instead of a violation of substantive law. This conforms with the reviser's notes under 18 U.S.C. 5033, that the proceeding shall result in the adjudication of a status rather than conviction of a crime.

Judgment

Under the provisions of 18 U.S.C. 5034 the court, after a finding of juvenile delinquency, may place the juvenile on probation or commit him to the custody of the Attorney General for a period not exceeding minority. In no case may the commitment exceed the maximum term prescribed by the statute which was violated. The court is without power to impose a fine.

A juvenile who has been processed under the Juvenile Delinquency Act and found by the court to be a juvenile delinquent, but not convicted under regular criminal procedure, may not, as noted above in the discussion of the Youth Corrections Act, be committed under the provisions of the Youth Corrections Act. See reviser's notes under 18 U.S.C. 5033; also 18 U.S.C. 5006, particularly (e) and (h); and 5023(b).

Deferred Prosecution of Juveniles

This procedure, also known as the Brooklyn Plan, has been used with the approval of the Department since 1946. It provides a procedural method whereby, in carefully selected cases, the U.S. Attorney may defer for a definite period any legal process against a juvenile violator under 18. Use of the deferred prosecution method is restricted to violators who otherwise would be processed as juvenile delinquents.

In general, the prerequisites for using the deferred prosecution plan are that the violation of law committed by the juvenile is not serious, that previous behavior and background are good, and that the prospect for reclamation is favorable. Before making a decision the U.S. Attorney should request the probation officer to make an investigation and submit a report. If the U.S. Attorney thereupon concludes that deferred prosecution is warranted, he summons the juvenile and his parents or guardian to meet in his office together with the probation officer and the interested law enforcement officer. He then explains the plan, which involves placing the juvenile on unofficial probation for a definite number of months with the written consent of a parent or guardian. The conditions to be observed during the period are similar to those which an adult must observe when granted probation after conviction. Department Form No. USA–15 is to be used for deferred prosecution cases.

Overly long periods of probation are not favorable for supervision of juveniles selected for deferred prosecution. As a general rule 18 months is considered an ample maximum time and longer periods should not be set except in very unusual circumstances. When a juvenile successfully concludes a period of unofficial probation, the case is closed and the juvenile is left without the stigma of a court record. Conversely, upon misconduct during the period of supervision a proceeding under the Juvenile Delinquency Act, based on the original violation, may be begun.

Diversion to State Authorities

Under the provisions of 18 U.S.C. 5001 any person under 21 years of age who is charged with a violation of Federal law or with juvenile delinquency, and has thereby also violated State law or is a delinquent under State law, may be transferred to the appropriate State authorities by the U.S. Attorney if they are willing to assume jurisdiction and deal with such person under State law.

The transfer power authorized by Section 5001, applicable to all violators under 21, is of special importance and advantage in relation to those under 18 who are subject to processing as juvenile delinquents. Consistent with due regard for the maintenance of Federal law, primary consideration should be given to surrender of juveniles to the authorities of the State in their home communities for appropriate treatment under State law. This authority

to divert when deemed advisable is vested in the discretion of the U.S. Attorney under 18 U.S.C. 5001. While each such case calls for a sound decision concerning diversion in the light of all the facts, diversion should not be precluded merely because the juvenile is an escapee from a State juvenile facility, or has previously served a period in such facility, or is currently on probation granted by a State juvenile court.

Diversion to State authorities, with their consent, is of particular importance as to violators of tender years. Federal facilities do not include accommodations or programs for juveniles just entering the teen age or below teen age. Juveniles in that class who violate Federal law must be regarded as the responsibility of the State and local authorities.

It is of utmost importance in effecting diversion to State authority that U.S. Attorneys advise the investigating agency of the urgency of determining accurately the age of the accused before Federal jurisdiction is assumed, and, if a juvenile, whether he is either on probation to State authority or a runaway from State custody. If the accused person was a juvenile at the time of the commission of the offense but had not previously come under State jurisdiction, it is equally urgent that the U.S. Attorney should provide for early inquiries of State and local authorities as to whether they will accept jurisdiction of their juvenile. Careful determination of these essential facts before Federal jurisdiction is assumed will eliminate unnecessary expenditure of time in later effecting appropriate return of the juvenile in State custody.

In recent months it has also been noted that delays of considerable duration have occurred in some districts between the date of decision to divert to State authority and actual return of the subject juvenile to State custody. Some delays are harmful both (1) to the juvenile, through his being held unnecessarily in local jails, sometimes without juvenile facilities, and (2) to our prosecutive policy for diversion of such juveniles, in that delay in turning the juvenile over to State custody can cause a failure to accomplish diversion.

U.S. Attorneys, when notifying the U.S. Marshal's office of the diversion should also personally see to it that U.S. Marshals are made aware that it is imperative for juveniles to be moved at the earliest possible time, even if special trips are necessary.

MENTALLY INCOMPETENT DEFENDANTS

Sections 4244—4248, Title 18, U.S.C., prescribe the procedure required when the mental competency of a defendant comes under suspicion either before trial or shortly after commitment under sentence, and also when mental incompetency is present upon expiration of sentence.

Examination—Hearing—Commitment

Section 4244 requires the U.S. Attorney to file a motion for judicial determination of the mental competency of a person in custody charged with violation of Federal law if he has reasonable cause to believe that the mental condition of the defendant renders him unable to understand the charges against him or properly assist in his defense. Such motion may also be filed on behalf of the accused or by the court on its own motion.

Thereupon the court must order an examination of the accused as to his mental condition by at least one qualified psychiatrist who must make a report thereon to the court. It is urged that such examinations be made by private psychiatrists or on an outpatient basis at a hospital or clinic. It is the responsibility of the U.S. Attorney to determine the availability of board-certified psychiatrists and to maintain a panel from which selections may be made. If it should be found necessary, the court may order the accused committed to a private hospital for examination, but such commitments should be avoided where possible. Only in exceptional circumstances should defendants be committed to Federal custody for such examinations. Such circumstances would be the absence of other facilities or in cases where there is need for longer term commitment for examination under more secure conditions.

Whenever the accused is referred for examination, it is imperative that the U.S. Attorney forward to the examining doctor a summary letter setting forth a full exposition concerning the alleged crime together with all background information on the accused, including his history of criminal convictions and any prior history of mental illness. When the examination is to be made locally, the order for examination should also direct that the examiner render an opinion as to the accused's mental responsibility at the time of the alleged offense, if the U.S. Attorney

believes that, in addition to a determination of competency, an examination as to mental responsibility at the time of the offense will effect a savings in trial time or would be otherwise beneficial in the trial or other disposition of the case. The opinion on the accused's mental responsibility at the time of the offense, within the framework of the mental responsibility tests applicable in the trial district, is to be obtained in cases of local examinations in view of the fact that the local doctors will be available for testimony on this issue. However, in the exceptional cases where defendants are committed to the custody of the Attorney General for examination at the Medical Center for Federal Prisoners, Springfield, Mo., the order for examination should not direct that an opinion be given as to the accused's mental responsibility at the time of the offense, in view of the fact that the possible need for testimony on this issue in distant jurisdictions would place too heavy a burden on the limited medical staff available at Springfield.

With regard to the original mental examination it is of the utmost importance that the services of local or the nearest available, qualified psychiatrists be utilized as far as possible. If satisfactory examination cannot be secured in the area the Bureau of Prisons will offer suggestions upon request. When commitment is ordered for the conduct of the examination the use of the nearest hospital or other facility acceptable to the court is recommended. Commitment to the Medical Center for Federal Prisoners, Springfield, Mo., should not be ordered for the initial examination and report under Section 4244 because the accommodations of that institution are constantly overtaxed by defendants committed as mentally incompetent under authority of 18 U.S.C. 4246.

Where the report finds that the accused is presently mentally incompetent, the statute requires that the court hold a hearing upon due notice, and make a finding on the evidence. If the court finds that the accused is in fact mentally incompetent it may order him committed, pursuant to 18 U.S.C. 4246, to the custody of the Attorney General until he is mentally competent to stand trial or until the criminal charges are disposed of according to law. Persons so committed to the custody of the Attorney General are generally held at the Medical Center for Federal Prisoners, Springfield, Mo.

Commitments to Federal custody based on such findings of incompetency for trial can result in incarceration for many months or even years. The precommitment hearing mentioned in 18 U.S.C. 4244 is not described in the statute. In some cases the hearing

has been held on the basis of the medical reports without the presence of the reporting psychiatrist. This has resulted in habeas corpus suits challenging commitment to custody under 18 U.S.C. 4246 on the basis that the precommitment hearing was lacking in due process because held on the basis of reports without live testimony by the psychiatrist. Waivers of the presence of the reporting psychiatrists have been held by the District Court for the Western District of Missouri to be ineffective since the accused is considered mentally incompetent, nor can waivers by the accused's counsel be considered appropriate. Consequently the habeas corpus courts have frequently found the hearing to have been invalid and have ordered the return of the accused to the committing court for a new hearing.

In order to insure a proper precommitment hearing under 18 U.S.C. 4244, U.S. Attorneys should as a general rule subpoena the reporting psychiatrist to testify in person. In this manner the defense attorneys and the U.S. Attorney will be enabled properly to probe the basis of the conclusion of lack of mental capacity for trial, within the definition established in decisions under the mental competency statutes. The need for personal appearance of the reporting psychiatrist points up the necessity that whenever possible local examinations or local commitments for examination be made in order to obviate extensive travel by the Springfield staff.

When commitment follows a finding of mental incompetency the U.S. Attorney should make certain that the commitment order includes a brief statement of the charges pending against the subject. The order should be accompanied by copies of any official reports relating to the charges and the background of the accused, and a copy of the psychiatric report upon which the finding of incompetency is based. The furnishing of such material enables institutional authorities to chart appropriate treatment whereas, without it, they must depend upon information furnished by the subject which may be inaccurate.

Competency Recovered—Trial

Upon receipt of notice from the authorities of the Medical Center for Federal Prisoners, Springfield, Mo., that a defendant has recovered mentally to the point of being able to stand trial, i.e., he understands the charges pending against him and is able to assist in his defense, the U.S. Attorney should promptly cause issuance

of a writ of habeas corpus ad prosequendum out of his court to be executed by the U.S. Marshal for his district by taking the defendant into custody at the named institution. No funds are available to the institutional authorities for the return of a defendant to the district from which he was committed.

When such defendant has been returned to the trial district, he should be put on trial at the earliest possible date. Trial cannot proceed without an antecedent judicial finding, with or without hearing, that the accused has recovered mental competency. If the court, upon all the evidence in hand, is unconvinced as to mental recovery it may order the subject returned for further treatment under the original commitment.

In all cases where the defendant is returned to the trial district with maintenance of his competency contingent upon his continued usage of psychotropic drugs, the U.S. Attorney should request a full hearing on the question of the defendant's competency. An additional independent psychiatric examination should be requested where it appears that it may be of assistance at the hearing.

If sound reasons exist why a case should not proceed to trial after mental recovery, the U.S. Attorney should submit a fairly comprehensive statement to the Department with request for authority to dismiss the charges.

Mental Incompetency Undisclosed at Trial

When a board of examiners referred to in 18 U.S.C. 4241 has examined a sentenced prisoner and has found probable cause to believe that he was mentally incompetent at the time of trial, provided such issue was not raised and determined during trial, the Director, Bureau of Prisons, is required to certify the finding of the board, and such certificate with copy of the finding must be transmitted to the clerk of the sentencing court. For the issue to be barred as having been raised and determined during trial, the trial judge must have held a hearing on the issue, followed by a finding of mental competency. *Stone* v. *United States*, 358 F. 2d 503 (9th Cir. 1966). On receipt of the certificate from the Director, the court must hold a hearing. If it concludes that mental incompetency existed at the time of trial it must vacate the judgment of conviction and grant a new trial.

The issue of mental incompetency at the time of trial, absent its determination during trial, is not available to a sentenced defendant to compel submission of a certification of incompetency

at the time of trial to the District Court. Such certification may be initiated only by the Director, Bureau of Prisons, upon the finding of the board of examiners. See *Nunley* v. *Chandler,* 308 F. 2d 223 (10th Cir. 1962) ; *Burrow* v. *United States,* 301 F. 2d 442 (8th Cir. 1962) ; *United States* v. *Thomas,* 291 F. 2d 478 (6th Cir. 1961) ; *Hoskins* v. *United States,* 251 F. 2d 51 (6th Cir. 1957).

Duration of Custody

The second sentence of 18 U.S.C. 4246 authorizes the trial court, if after hearing under Sections 4244 or 4245 it finds that the conditions enumerated in Section 4247 exist, to commit the prisoner to the custody of the Attorney General. Such commitment shall continue in accordance with Section 4248 until he either recovers competency, or until suitable arrangements have been made for custody by State authorities, or he no longer constitutes a danger to the officers, property, or interests of the United States.

In *Greenwood* v. *United States,* 350 U.S. 366 (1956), such a commitment was contested on constitutional grounds. The psychiatric finding was that early restoration to competency was unlikely but that he was not considered dangerous except that he might return to the same criminal activities if released. The district court, on the basis of this evidence, committed the defendant pursuant to Section 4247. The Supreme Court held that the commitment was valid because he was in lawful custody under criminal charges and because the power to hold him under those charges had not been exhausted. The Court also pointed out that the legislative history of 18 U.S.C. 4244–4248 clearly indicated that those statutes were designed to deal with mental disability which was more than temporary. That finding annulled the holding in *Wells* v. *Attorney General,* 201 F. 2d 566 (10th Cir. 1953), that in a mental competency hearing the trial court must make a finding whether the mental disability is temporary or permanent; that commitment under Section 4246 is only authorized if the mental condition is temporary, and that if the condition is permanent the defendant must be discharged unless State authorities will assume custody.

Under 18 U.S.C. 4248 the Attorney General is authorized to transfer a person committed under either Section 4246 or 4247 to proper State authorities at any time. When the evidence adduced at a hearing under Section 4244 indicates mental illness acute in nature or of long standing, and defendant's offense was not of a serious character, the U.S. Attorney should give consideration,

with the consent of the court, to transfer of the defendant to proper State authorities. To that end the assistance of the probation officer and the Bureau of Prisons should be invited.

PAROLE

Every prisoner, with exceptions outlined below, who is in custody under a Federal sentence of more than 180 days becomes eligible for parole consideration upon serving one-third of the term or terms imposed if he has observed the rules of the institution in which he is being held. 18 U.S.C. 4202. When plural sentences are ordered to run consecutively the aggregate term is the basis for computing parole eligibility. Consecutive sentences are aggregated without regard to their length and no distinction is made as to a term of imprisonment imposed under a felony conviction and another imposed under a misdemeanor conviction. The law also provides that a prisoner serving a life sentence or a term exceeding 45 years shall be eligible for parole consideration after serving 15 years. 18 U.S.C. 4202.

Exceptions

Committed juvenile delinquents and commited youth offenders may be released on parole supervision at any time after commitment. See 18 U.S.C. 5037 and 18 U.S.C. 5017(a), respectively. Persons convicted of certain offenses enumerated in the Narcotic Control Act of 1956 are ineligible for parole at any time. See 26 U.S.C. 7237 as amended by 7237(d).

Legislation approved August 25, 1958, vests the court with certain discretionary powers as to parole eligibility. It provides that upon entering a judgment of conviction, if the court pronounces a sentence of more than 1 year, it may designate in the sentence a minimum term at which time the prisoner shall become eligible for parole consideration. Such minimum term may be less than, but shall not be more than, one-third of the maximum sentence imposed. It provides further that the court may fix the maximum term of imprisonment and specify in the sentence that the prisoner may become eligible for parole consideration at such time as the Board of Parole may determine. Section 3, Public Law 85–752, designated 18 U.S.C. 4208(a).

Reports to Board of Parole

In certain cases the U.S. Attorney or the trial judge may wish to make recommendations to the Board of Parole with regard to future parole of a convicted prisoner. In these cases revised form 792, "Report on Convicted Prisoner by U.S. Attorney" should be used. The form provides a uniform method by which the U.S. Attorney may forward information regarding the offense for which the prisoner was convicted and his prior criminal background and may make recommendations regarding future parole, and the trial judge may comment with regard to the sentence imposed and future parole of the prisoner.

The U.S. Attorney should forward this form to the warden or superintendent of the institution to which the prisoner is committed.

In order to insure that all pertinent information is made available to the Pardon Attorney and the Board of Parole when U.S. Attorneys contact these offices in connection with individuals who are subject to their jurisdictions, it is requested that such contacts be by letter over the signature of the U.S. Attorney, with a copy of the letter forwarded to the Criminal Division. This procedure will enable the Criminal Division to check its files and personnel for other pertinent information which should be considered by the Pardon Attorney or the Board of Parole.

Period of Supervision

A prisoner released on parole remains under supervision to the expiration of the maximum term of sentence. 18 U.S.C. 4203. When a prisoner whose sentence includes a committed fine is released on parole, and the fine remains unsatisfied upon expiration of the maximum term of sentence, the period of supervision is extended for such additional time as he may take to pay his fine or secure his discharge by law. *United States* v. *Gottfried,* 197 F. 2d 239 (2d Cir. 1952).

The Attorney General has delegated to the Board of Parole the power vested in him by 18 U.S.C. 3569 to discharge such parolee from supervision if it is found, after denial by the U.S. Commissioner of the parolee's application for discharge as a pauper, that the property possessed by the parolee, or part thereof, is reasonably necessary for his support or that of his family.

A prisoner who is denied parole serves his term less good-time deductions, and is then released under parole supervision for the

remainder of his maximum term less 180 days. 18 U.S.C. 4164. This form of release is called mandatory release.

Violator Warrants

In the case of a prisoner released on parole, a warrant charging violation of the conditions of parole may be issued by the Board of Parole at any time prior to expiration of the maximum term of sentence. 18 U.S.C. 4205. In the case of a prisoner under supervision on mandatory release, a warrant may be issued at any time prior to expiration of the maximum term of sentence less 180 days. *Birch* v. *Anderson,* 358 F. 2d 520 (D.C. Cir. 1965).

If the misconduct constituting the violation of parole involves the commission of crime and results in imposition of another sentence, either State or Federal, execution of the warrant for violation of parole will be withheld until the prisoner is eligible for release under the later sentence unless earlier execution of the warrant is ordered by the Board.

A Federal court has no power to direct that a sentence shall run concurrently with time owing as a parole violator under a previous sentence and the Board of Parole is not required to order execution of its warrant before eligibility for release under the new sentence. See *Zerbst* v. *Kidwell,* 304 U.S. 359 (1938); *Tippit* v. *Squier,* 145 F. 2d 211 (9th Cir. 1944).

When a court directs concurrent service in such case, its attention should be called to the fact that its desire may be accomplished substantially by imposing a sentence equal to the difference between the term it would impose if the subject owed no time as a violator, and the time owing as a violator.

PROBATION

Authority To Grant Probation

Upon entering a judgment of conviction of any offense other than offenses punishable by death or life imprisonment, and other than certain violations of the Narcotic Control Act of 1956, the court may, in its discretion, suspend either the imposition or execution of sentence and place the defendant on probation for a period not exceeding 5 years. 18 U.S.C. 3651. Probation may be granted where the offense is punishable only by a fine (*United States* v. *Berger,* 145 F. 2d 888 (2nd Cir. 1944)), or by both fine

and imprisonment. When the offense is punishable by both fine imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. In such case, payment of the fine may be made one of the conditions of probation.

The fact that a statute prescribes a minimum penalty, as is the case in certain of the internal revenue statutes relating to liquor violations, is not a bar to suspension of imposition or execution of sentence and the grant of probation. Where the defendant is a corporation, the court may suspend imposition or execution of sentence and place the corporation on probation.

Upon conviction under a one-count indictment for an offense not punishable by death or life imprisonment, but punishable by imprisonment for more than 6 months, the court may impose a sentence in excess of 6 months; may direct that 6 months or less of such sentence be served in a jail or a treatment institution; suspend execution of the remainder of the sentence and place the defendant on probation for such period and upon such conditions as the court deems best. 18 U.S.C. 3651, as amended August 23, 1958. The Senate Report, No. 2133, August 4, 1958, makes it clear that this legislation applies only in those cases where the court had authority to grant probation prior to its enactment.

Limitation

The court may not order restitution, as a condition of probation, in excess of the actual damage or loss to the victim of the offense for which conviction is had or to which a plea of guilty is entered. *Karrell v. United States,* 181 F. 2d 981 (C.A. 9, 1950), cert. den. 340 U.S. 891 (1950). Consequently an order of restitution cannot include sums representing alleged losses caused by offenses which were not charged in the indictment, or which were charged in counts which have been dismissed, or on which the defendant has been acquitted.

Advantage of Suspending Imposition

If sentence is imposed, its execution suspended, and the defendant placed on probation, the court is without power to increase the sentence if probation is subsequently revoked. On the other hand, if the court suspends imposition of sentence and places the defendant on probation, it has authority, upon revoking probation, to impose any sentence which it could have imposed original-

ly. 18 U.S.C. 3653. Thus, there is ordinarily a distinct advantage in suspending imposition rather than execution of sentence when probation is contemplated. Furthermore, suspension of imposition of sentence may prove to be an incentive to good conduct because of the uncertainty of the extent of punishment which violation of the conditions of probation may incur.

Time of Grant

The power to suspend execution of sentence and place a defendant on probation is terminated immediately upon imprisonment under such sentence, and is terminated as to all of the sentences composing a single cumulative sentence immediately upon imprisonment for any part of the cumulative sentence. *Affronti* v. *United States,* 350 U.S. 79 (1955).

Effective Date of Probation

Absent a specific direction to the contrary, the probationary period will commence to run at the time the court grants probation. This is true though the defendant is sentenced to imprisonment on another count of the same indictment or is at the time of the probation order already serving a State or Federal sentence of imprisonment. In such case the period of probation will run concurrently with the prison sentence. *Engle* v. *United States,* 332 F. 2d 89 (6th Cir. 1964) ; *Sanford* v. *King,* 136 F. 2d 106 (5th Cir. 1943). However, the court has power by specific direction to make the probation period take effect upon termination of the prison term. *Ex parte Lloyd* v. *Kelly,* 302 U.S. 312 (1937) ; *Cosman* v. *United States,* 302 U.S. 617 (1938) ; *Gaddis* v. *United States,* 280 F. 2d 334 (6th Cir. 1960).

Revocation

If within the period of probation the defendant violates any of the conditions which have been imposed by the court, the order granting probation may be revoked and sentence imposed, or if sentence has been previously imposed, such sentence or any lesser sentence may be ordered executed. An order of revocation may be entered only after hearing upon the alleged violation of probation. *Escoe* v. *Zerbst,* 295 U.S. 490 (1935).

Any warrant for the arrest of the probationer for violation of probation must be issued no later than 5 years from the effective date of the grant of probation. 18 U.S.C. 3653. Compare *Jutras* v.

United States, 340 F. 2d 305 (1st. Cir. 1965) ; *Demarois* v. *Farrell,* 87 F. 2d 957 (8th Cir. 1937), cert. den., 302 U.S. 683; *United States* v. *Gernie,* 228 F. Supp, 329 (S.D.N.Y. 1964).

PRODUCTION OF PRISONERS FOR PROSECUTION OR TESTIMONY

Prosecution of Prisoner in Federal Court

U.S. Attorneys should not defer prosecution of defendants under pending indictments merely because such defendants are currently serving sentences. A defendant in custody under sentence has the same constitutional right to a speedy trial as do other defendants and unnecessary postponment of trial may result in serious disadvantage to both the Government and the accused. As to the Government, the chances of conviction may be lessened by deterioration of the evidence. As to the prisoner, a detainer filed against him subjects him to certain institutional restrictions which remain in force until disposition of the outstanding charges. Furthermore, if prosecution is delayed until a defendant becomes eligible for discharge, and a new sentence is then imposed, he loses the benefit of aggregated good time under 18 U.S.C. 4161 which he could earn if he had been tried and convicted while in prison under the first sentence.

When a prisoner serving sentence in one district has an indictment or information pending against him in another district, and he requests the transfer thereof to the district where he is in custody under Rule 20, Federal Rules of Criminal Procedure, U.S. Attorneys are urged to cooperate in consummating the transfer unless sound practical reasons require a contrary conclusion. The procedure in such a matter it outlined in this Title.

When a detainer has been filed against a prisoner and the charges on which it rest are dismissed or otherwise disposed of during service of sentence, the U.S. Attorney should immediately notify, and request acknowledgment from, the U.S. Marshal who holds, or who filed, the warrant so that the detainer may be lifted.

Procedure for Producing Federal Prisoner in Federal Court

When a defendant under indictment is serving a sentence in a Federal penal institution, a writ of habeas corpus ad prosequendum should be obtained for his production at the trial, whether such

trial will be had in the district where the defendant is incarcerated or in another district. Such writ must be addressed to the warden or superintendent who has actual custody of the prisoner, to the U.S. Marshal of the district where the prisoner is in custody, and to the U.S. Marshal of the district where trial will be had if in a district other than the district of custody. When a Federal prisoner is wanted as a witness in Federal court in a criminal case his appearance may be secured by writ of habeas corpus ad testificandum addressed to the same officers as in a writ of habeas corpus ad prosequendum.

The heads of all Federal penal institutions have instructions, upon presentation in person of a writ of habeas corpus ad prosequendum or ad testificandum issued by a Federal court in proper form, to surrender the wanted prisoner into the custody of the Marshal who thereupon becomes responsible for the custody of the prisoner. Upon conclusion of the trial or testimony the prisoner shall be returned promptly to the institution from which he was brought unless the Marshal who has him in custody receives contrary directions from the Director, Bureau of Prisons.

A writ of habeas corpus ad testificandum must not be used to produce a Federal prisoner for examination by U.S. Attorneys or investigative agencies.

Procedure for Producing State Prisoner in Federal Court

If Federal charges are pending against a prisoner serving a State sentence, the consent of the State authorities should be sought to have him produced solely for the purpose of trial under a writ of habeas corpus ad prosequendum. If the State authorities desire to produce the prisoner at the place of trial under State guard, the writ should be addressed only to the warden or superintendent of the State institution. If the State authorities do not care to do so, the writ should be addressed to the warden or superintendent having custody of the prisoner and to the U.S. Marshal of the district in which the State institution is located. Production of the prisoner by the Marshal for the trial district should have the prior approval of the Administrative Division of the Department in the interest of the most economical procedure.

A writ of habeas corpus ad prosequendum issued to secure the appearance of a State prisoner must include the direction that the prisoner be returned to the State institution immediately upon conclusion of the trial. That direction must be strictly observed. *United States ex rel. Moses* v. *Kipp*, 232 F. 2d 147 (7th Cir. 1956).

Production of Prisoner To Testify in Civil Action

A writ of habeas corpus ad testificandum issued in a civil case, whether Federal or State, to secure the testimony of a Federal prisoner by his personal appearance should be opposed by the U.S. Attorney in all but the most exceptional cases where lack of the testimony could result in a serious miscarriage of justice. The prisoner's testimony may be secured by taking his deposition pursuant to an appropriate order by the court having jurisdiction of the case, and at the convenience of the warden of the institution where the prisoner is in custody.

Procedure for Producing Federal Prisoner in State Court

It is the policy of the Department to cooperate in the production of Federal prisoners, either under sentence or awaiting trial, in connection with criminal matters pending in State courts, provided their production does not interfere with any pending Federal case or investigation. Production of a prisoner will be authorized only pursuant to a properly drawn writ of habeas corpus ad prosequendum or ad testificandum issued by a State court.

When the prisoner is confined in a non-Federal institution within the Federal judicial district in which the State court is located, the writ shall be directed to the U.S. Marshal of that district. Upon the receipt of such a writ the Marshal will advise the U.S. Attorney for the district of the request. The U.S. Attorney shall, if he is satisfied that the production of the prisoner in the State court will not interfere with any pending Federal case or investigation and will not in any way be inconsistent with the interests of the Federal Government, authorize the Marshal to execute the writ. Otherwise he shall advise the Director, Bureau of Prisons, of his reasons for declining approval.

When the prisoner is confined in a non-Federal institution outside the Federal judicial district in which the State court is located, or in a Federal institution, prior approval of the Director, Bureau of Prisons is required before a State writ may be honored. State or local officers seeking production of such a prisoner should be advised to submit the facts in writing to the Director.

Authorization for production of any Federal prisoner in State court shall be subject to the following conditions:

(*a*) The State shall make arrangements for payment to the U.S. Marshal of a sufficient sum of money to defray the expenses

of travel from the place in which the prisoner is incarcerated to the place of trial.

(*b*) The sum so paid shall be sufficient not only to pay the expenses of the prisoner but also the necessary expenses of custodial officers responsible for his transportation from their regular station of duty to the place where the prisoner is incarcerated, and from that point to the State court, returning the inmate to the place of incarceration and then back to official headquarters.

(*c*) The sum paid by the State authorities should be sufficient to pay for subsistence and shelter of the prisoner and the custodial officers during the entire time of their absence from headquarters.

(*d*) The prisoner shall at all times, including the time of trial, remain in the custody of the Federal officers.

(*e*) The arraignment and trial shall be conducted with all possible dispatch.

(*f*) Where the prisoner is produced on a writ of habeas corpus ad prosequendum, in the event of a conviction on a State charge, any judgment imposed shall be directed to begin at the expiration of the Federal sentence which the prisoner was serving at the time of issuance of the writ or at the expiration of any sentence imposed in connection with the Fereral charges pending in the judicial district at the time that production was authorized.

(*g*) The Federal custodial officers shall be permitted to return the prisoner to the place of his confinement promptly upon termination of the State trial.

(*h*) During the time a Federal prisoner is in the custody of the marshal or authority of a writ of habeas corpus issued out of the State court, the prisoner shall not be allowed to have interviews with any persons who are not directly connected with the trial; he shall not at any time be photographed, nor shall he be accorded any privileges not approved for Federal prisoners serving sentence.

HABEAS CORPUS

Availability of Writ

A Federal prisoner may contest the legality of his custody by petitioning the district court for a writ of habeas corpus. Such petition must be directed to the court of the judicial district in which the prisoner is being held. *Ahrens* v. *Clark,* 335 U.S. 188 (1948).

If the prisoner is contesting the validity of the sentence under which he is held, the writ of habeas corpus is ordinarily not available to him as a remedy, but he must proceed instead by a motion attacking sentence in the judicial district in which sentence was imposed. 28 U.S.C. 2255. Irrespective of whether the prisoner has failed to seek relief under 28 U.S.C. 2255 or has sought such relief and it has been denied, he can proceed by means of petition for a writ of habeas corpus only if a motion under Section 2255 is inadequate or ineffective to test the legality of his detention.

A district court may not entertain a petition for a writ of habeas corpus which seeks discharge from custody based upon the manner of prison administration and the treatment and discipline of prisoners. *Williams* v. *Steele*, 194 F. 2d 32, *reh. den.* 194 F. 2d 917 (8th Cir. 1952), *cert. den.* 344 U.S. 82; *Garcia* v. *Steele*, 193 F. 2d 276 (8th Cir. 1951); *Powell* v. *Hunter (Warden)*, 172 F. 2d 330 (10th Cir. 1949).

Procedure in Habeas Corpus Actions

A petition for a writ of habeas corpus which on its face is devoid of any merit may be denied summarily by the court; otherwise the court is required either to award the writ or to issue an order directing the respondent to show cause why the writ should not be granted. 28 U.S.C. 2243.

The documentary evidence needed by the U.S. Attorney to make a return to the writ, or to make answer to the order to show cause, may be secured from the authorities of the prison where the petitioner is in custody, from the Bureau of Prisons, from the Board of Parole, or from the clerk of the sentencing court, depending upon the character of the allegations in the petition. Each allegation of the petition should be either admitted, denied, or answered by way of explanation. Any allegation which is ignored by the respondent's return or answer must be accepted as true unless the court finds to the contrary from the evidence. 28 U.S.C. 2248.

When a petition for a writ clearly presents only an issue of law, the court may dispense with the presence of the petitioner at the hearing on the pleadings. 28 U.S.C. 2243. The U.S. Attorney, in his discretion, may bring this fact to the court's attention after the pleadings are filed and before hearing is set.

When a petition is followed by award of the writ or a rule to show cause, and it appears that the identical issue or issues were disposed of on a previous application for a writ, and that the current petition contains no new issue, the U.S. Attorney should file a motion to dismiss on that ground in conjunction with his return or answer. Such procedure is proper under authority of 28 U.S.C. 2244.

CIVIL PROSECUTION OF ARMED FORCE PERSONNEL

The Attorney General is authorized to investigate violations of Federal criminal statutes involving Federal officers and employees. Any department and agency of the executive branch is required to report such violations to him (28 U.S.C. 535). Because of the authority of the military departments to investigate and prosecute persons subject to their jurisdiction, the military were exempted from the requirement. However, in an effort to determine the spheres in which the military and the Department of Justice would operate, when both had jurisdiction, the Attorney General and the Secretary of Defense negotiated a memorandum of understanding in 1955, providing when each would assume the investigation and prosecution of military personnel committing violations of Federal criminal statutes. (Military personnel may be prosecuted civilly under the Assimilative Crimes Act even though subject to the Uniform Code of Military Justice.) Copies of the memorandum together with a letter of explanation, were sent to each U.S. Attorney on November 25, 1955. Additional copies of the memorandum and letter will be made available upon request.

The agreement reaches the subject under two situations: (1) Crimes committed on military installations, and (2) crimes committed off military reservations. Specifically, the memorandum of understanding provides that when offenses are committed on military installations, the military department concerned shall investigate and prosecute when such department determines that there is reasonable likelihood that only persons subject to the Uniform Code of Military Justice are involved in the crime as principals, accesssories, or victims. Persons subject to that Code are designated in article 2 thereof (see 50 U.S.C. 552). With reference to victims, the memorandum recognizes two situations

in which the military department shall investigate and prosecute even though the victim is not subject to the Uniform Code of Military Justice: (1) In "extraordinary cases" and (2) where the victim is a bona fide dependent or member of the household of military or civilian personnel residing on the military reservation. In the first situation the military department concerned is required to advise the FBI of the crime and that such department is investigating the matter.

The term "extraordinary cases" is not defined in the memorandum of understanding. When the military department asserts jurisdiction in a so-called "extraordinary case" the U.S. Attorney should ascertain the reasons for that determination and if, after study of the information obtained, he does not concur in the decision of the military department, he should cause the matter to be renewed with such department. The U.S. Attorney should communicate with the Criminal Division if unable to adjust the matter with the military department.

If the military department, on the basis of the standards discussed above, does not assert jurisdiction it shall promptly inform the FBI of the offense. In that event, the FBI shall investigate "unless the Department of Justice determines that investigation and prosecution may be conducted more efficiently and expeditiously by the military department concerned." This determination requires the most mature consideration and should be made only after sufficient facts have been obtained to permit an intelligent decision. We suggest as possible criteria: (1) The nature of the offense, (2) the absence or presence of aggravating circumstances, (3) whether prosecution of the persons not subject to the Uniform Code of Military Justice with the military personnel is impracticable because of difficulties of proof, (4) whether the ends of justice will be met by prosecution of the military personnel before a military tribunal. This list is not intended to be exhaustive and there may be other appropriate matters for consideration by the U.S. Attorney in any given case. Where, however, the U.S. Attorney has any doubts, the views of the Criminal Division should be sought.

If the crime, except in minor offenses, involves fraud against the Government, misappropriation, robbery, or theft of Government property or funds, or is of a similar nature, it is required that the military shall advise the FBI even though only military personnel are involved and the offense occurred on a military reservation. The phrase "except in minor offenses" is subject

to interpretation. If a case is brought to the attention of a U.S. Attorney where a military department has determined that an offense is minor and, based on available information, the U.S. Attorney believes it should have been reported to the FBI, he should immediately communicate with the appropriate military commander. If the U.S. Attorney, after discussion with the military commander, remains of the conclusion that the matter should have been reported to the FBI, but the military commander has declined to do so, it is requested that he communicate expeditiously with the Criminal Division.

With reference to nonminor offenses of the types named above, the military department shall initiate investigation "unless it receives prompt advice that the Department of Justice has determined that the crime shall be investigated by the FBI*** for the purpose of prosecution in civil courts." Thus, there is cast on the Department of Justice the necessity of a prompt and definite decision which may be difficult to make absent detailed facts. Where the allegation appears serious, even though the available information is scant, it would appear that the exercise of caution dictates that doubts should usually be resolved in favor of investigation by the FBI.

The memorandum of understanding provides that crimes committed by persons subject to the Uniform Code of Military Justice shall be investigated by the FBI when such crimes are committed outside the military reservation and are within the investigative jurisdiction of the FBI. However, there are two exceptions in which the military departments are permitted to retain investigative jurisdiction: (1) When the crime is committed by military personnel while on organized maneuvers and no person except military personnel is involved as a principal, accessory or victim; (2) where the military departments concerned believe that the crime involves special factors relating to the administration and discipline of the armed forces which would justify investigation by them for the purpose of prosecution before a military tribunal. In the second situation, the military authorities are required to advise the FBI and indicate their views in the matter. If the Department of Justice agrees, the military department concerned may then initiate the investigation. The Department of Justice appreciates that the Department of Defense is concerned with the administration and discipline aspects of certain crimes. But here, as in the situation discussed above, it is desired that each U.S. Attorney closely appraise the facts of each case

so that the responsibilities of civil authority shall be protected.

In this connection it should be noted that the Supreme Court in *O'Callahan* v. *Parker*, 395 U.S. 258 (1969), has sharply cut back the military's jurisdiction under the Uniform Code of Military Justice to try members of the armed forces for crimes committed outside military reservations.

It is recognized that the memorandum of understanding has not covered all conceivable phases of the matter and that certain provisions of the memorandum may permit of varying interpretations. For that reason the Criminal Division will consider any matter which the U.S. Attorney may desire to raise with reference to the memorandum.

Another agreement between the FBI and the Department of Defense provides that where the FBI has been requested by military authorities to conduct an investigation to locate a deserter for return to military control the Bureau will assume jurisdiction, as long as the military is not aware of the deserter's whereabouts at the time the request is made. In sanctuary instances involving both deserters and AWOL's the military authorities will investigate, since the FBI only has jurisdiction over deserters. In all other cases the military departments will assume responsibility for apprehending military absentees.

Policy

It is the policy of the Department not to forego or dismiss prosecution solely because offenders are about to become members of the Armed Forces. The Armed Forces are not to be regarded as correctional institutions or used as an alternative for punishment for crime; military service is the performance of a patriotic duty. In exceptional cases, imminent military service may be considered, together with other factors, in deciding against prosecution if: The offense is trivial or insubstantial, involving little injury to the public or the Government; the offender is generally of a good character, has no record or habits of anti-social behavior and does not require rehabilitation through existing criminal institutional methods; and failure to prosecute the particular case will not seriously impair observance of the law in question or respect for law generally. Any effect upon a decision not to prosecute because of the fact of imminent military service should be vitiated if the offender is not inducted within a reasonable period.

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No proceeding in habeas corpus to secure the release of members of the Armed Forces held by State authorities for trial on criminal charges should be instituted without prior authorization by the Department. U.S. Attorneys are to extend all possible courtesies and assistance to service courts and their officers in securing the issuance of process to compel the attendance of witnesses, in accordance with the provisions of 22 U.S.C. 703 which provides for the arrest of members of the armed forces of the United Kingdom and Canada within the United States and authorizes U.S. district courts, upon application, to compel attendance of witnesses before service courts.

DELIVERY OF MILITARY PERSONNEL FOR CIVIL PROSECUTION

Article 14 of the Uniform Code of Military Justice (10 U.S.C. 814) provides:

(*a*) Under such regulations as the Secretary of the Department may prescribe, a member of the Armed Forces accused of an offense against civil authority may be delivered, upon request, to the civil authority for trial.

(*b*) When delivery under this article is made to any civil authority of a person undergoing sentence of a court-martial, such delivery, if followed by conviction in a civil tribunal, shall be held to interrupt the execution of the sentence of the court-martial, and the offender after having answered to the civil authorities for his offense shall, upon the request of competent military authority, be returned to military custody for the completion of the said court-martial sentence.

Pursuant to the authority contained in Article 14, the Department of the Army has issued Army Regulation 633–1, dated September 13, 1962, and the Department of the Air Force has issued Air Force Regulation 111–11, dated July 31, 1963. Both regulations, drafted after conferences with representatives of the Department of Justice, enunciate the policy of the military to cooperate fully with civil authorities. The Commandant of the Coast Guard has also issued a Coast Guard regulation, section 0705, Coast Guard Supplement to the Manual for Courts-Martial, United States, 1951.

Article 14 authorizes any commanding officer exercising general court-martial jurisdiction to surrender military personnel under

his command to civil authority when charged with civil offenses. When making the request for surrender, the following information should be furnished to the military authorities:

(1) A copy of the indictment, information or warrant.

(2) Sufficient information to identify the person sought as the person who allegedly committed the offense.

(3) A statement of the maximum sentence which may be imposed upon conviction.

Army Personnel

The Army regulation provides that if the request for surrender is based only upon a warrant, the commanding officer may initiate an inquiry to determine whether reasonable cause exists for the issuance of the warrant. However, if the warrant is accompanied by a written statement of the U.S. Attorney that a preliminary official investigation of the offense charged shows that there is reasonable cause to believe that the offense was committed by the person named in the warrant, the commanding officer may effect the surrender without further inquiry being made.

The Army regulation also provides a form of contract to be executed by the civil authority when the surrender is made, the form being as follows:

In consideration of the delivery of .....,
(Grade and Name)
....., U.S. Army, to the civil
(Service Number)
authorities of the ....., ...,
(United States) (State of)
at ....., for trial upon the charge of,
(Place of Delivery)
....., I hereby agree, pursuant to
the authority vested in me as .....,
(Official Designation)
that the commanding officer of .....
(General Court-Martial Jurisdiction)
will be informed of the outcome of the trial and that said
..... will be returned to the
Army authorities at the aforesaid place of delivery or to such other Army installation as may be designated by the authorities of the Department of the Army, without expense to such Department or to the person delivered, immediately upon dismissal of the charges or completion of the trial in the event he is acquitted, or immediately upon satisfying the sentence of the court in the

event he is convicted, and a sentence imposed, or upon other disposition of the case, unless the Army authorities shall have indicated that return is not desired.

The arrest will be made, in the usual course of events, either by the Marshal or a special agent of the FBI. Neither of these officers is in position to comply with the terms of the required agreement and the execution of the form should be made by the U.S. Attorney in the district of prosecution. To prevent any delay, the U.S. Attorney should execute the required form in duplicate and deliver the original to the civil arresting officer for transmittal to the military authorities. If the prisoner is convicted and delivered to a Federal institution for service of sentence, the duplicate copy should be sent with the commitment papers to the warden. The expenses incurred in the performance of the contract for the redelivery to the Armed Forces of military personnel previously delivered to the Department of Justice for prosecution shall be defrayed from the travel allotment of the Marshal who transports such personnel.

Air Force Personnel

The Air Force Regulation provides that the commanding officer of a command exercising general court-martial jurisdiction, or a wing or base commander when authorized by the officer exercising general court-martial jurisdiction, may authorize the delivery to civil authority of a member of the Air Force under his command, when such member is accused of a civil offense. The regulation, however, distinguishes between offenses punishable by imprisonment for more than 1 year and those offenses punishable by imprisonment for a lesser period, vesting discretion in the case of the latter offenses in the commanding officer to determine whether the delivery will be made.

The request, regardless of the period of permissible punishment, should be accompanied by the indictment, information, or warrant. In instances where the request for surrender is based solely upon a warrant, the U.S. Attorney should furnish to the Air Force authorities a written statement to the effect that an indictment will be sought and that substantial grounds exist for the belief that an indictment will be returned.

The Air Force, as a condition for delivery of the offending airman, requires an agreement from the civil authorities that the airman will, at the appropriate time, be returned to Air Force control. The agreement is similar to that required in the case of Army personnel.

Navy and Marine Corps Personnel

Inasmuch as the commanding officers of naval bases, stations, and commands are authorized to deliver enlisted men of the Navy, Marine Corps, and Coast Guard (in time of war) into custody of civil authorities (Federal, State, Territorial, and local) upon presentation of proper warrant, U.S. Attorneys should make the necessary arrangements for surrender directly with the local officers.

If disciplinary proceedings are pending against the individual or he is undergoing sentence, prior specific authority from the Navy Department in Washington, D.C., must be obtained by the local commanding officer before the individual may be surrendered to the civil authorities. Also, the local officer may, if unusual circumstances exist, refer the request for surrender to the Navy Department for approval. In such cases, it may be desirable, after applying to the commanding officer, to request the Criminal Division to undertake negotiations with the Navy Department to expedite action upon the request.

With respect to Coast Guard personnel in time of peace commanding officers are authorized to deliver personnel to Federal authorities on presentation of a proper warrant in all cases except where disciplinary proceedings are pending or the person is undergoing a sentence of a court-martial or when in the opinion of the commanding officer unusual circumstances exist which warrant reference of the matter to the Commandant of the Coast Guard.

INTERNATIONAL EXTRADITION

International extradition proceedings are governed by treaties with foreign countries. Under most of the current treaties there is no obligation on the part of the Attorney General or the U.S. Attorneys to represent a foreign government seeking the extradition of a fugitive found in the United States. Although informal advice and assistance may be given to the representative of a foreign government, when requested, the latter should retain private counsel. The Department should be informed when such advice and assistance is sought. U.S. Attorneys should not formally participate in requests for extradition by foreign governments unless specifically authorized to do so by the Attorney General.

Assistance to Demanding Government

Where a treaty such as that with Mexico provides that the legal officers of the United States shall assist the officers of the demanding government before the magistrate in securing the arrest and extradition of a fugitive, the request for extradition generally is forwarded to this Department by the Secretary of State. If the request and all documents submitted appear to be in order and a prima facie case appears to have been made out, the U.S. Attorney, in whose district the fugitive is said to be taking refuge, will be directed by the Department to apply to the extradition commissioner, district court, or other appropriate officer for a warrant for the arrest of the fugitive and have him brought before said officer for a hearing on the extradition request pursuant to 18 U.S.C. 3184. In unusual cases, the representative of the foreign government seeking the extradition of a fugitive may be advised to contact the U.S. Attorney, who will be instructed by the Department to assist said representative by every legal means within his power, if the treaty so provides.

Complaint for Demanding Government

In cases where the U.S. Attorney has been authorized to file a complaint for the representative of the demanding government, the following form has been found to be adaptable, but the form and language should be strengthened wherever possible:

In the ..... District of .....
In the matter of the extradition of .....
a fugitive from the justice of .....
To The Honorable .....:
(Commission or Judge)

Your complainant, the U.S. Attorney for the..... District of ..... under oath, deposes and says:

That, in the above matter, he acts for and in behalf of the Government of .....;

That he is informed, through diplomatic channels, that the said ..... is duly and legally charged with having committed the crime of ..... in the said .....

That the said ..... has fled outside the boundaries of the said .....; that warrant

for the arrest of the said ..... cannot be served in said .....; and that the said ..... has sought an asylum within the jurisdiction of the United States and may be found in the State of ..... and the city of ..... at .....;

That the said crime of ....., which the said ..... is charged to have committed in said foreign country is among the offenses enumerated in the treaty existing between the United States and the said ..... proclaimed .....;

That said crime of ..... is more particularly referred to in articles ....., sec. ..... of said treaty;

That, through diplomatic channels, your complainant is informed and believes the requisition for the herein-named fugitive, ..., has been made in conformance with the treaty, accompanied by the formal papers upon which demand for extradition is founded;

That your complainant has in his possession the formal extradition papers;

Whereupon, your petitioner acting under the authority and in the behalf stated, prays the consideration of this petition and that a warrant may issue for the arrest of the said .... charged as aforesaid, that he may be brought before a Commissioner or Magistrate qualified to act in extradition matters, to the end that evidence of criminality may be heard, and if on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of said treaty, said Magistrate or Commissioner shall certify the same to the Secretary of State at Washington, D.C., in order that warrant may issue upon the requisition of the proper authority of said foreign government for the surrender of the said ..... according to the stipulations of said treaty, and for such other action as the said Commissioner or Magistrate is required under the provisions of said treaty and the laws of the United States to take.

Dated at .....
..... District } ss.
of .....

Before me ..... for the ..... District of ..... personally appeared the

complainant, ..., the attorney of the United States for the ..... District of ..... on ....., 19...., who being duly sworn, says that the foregoing information is true, as he verily believes.

.....

The U.S. Attorney will represent the foreign government at the hearing. It is the policy of the Department to oppose bond in extradition cases. If the extradition Commissioner or other Magistrate before whom the matter is brought finds from the documents and other evidence submitted by the foreign government that there is probable cause for the extradition, he will report his findings to the Secretary of State, who may then issue a warrant for the surrender of the accused to the demanding country. The fugitive has a right to sue out a writ of habeas corpus. The U.S. Attorney will represent the custodian if a writ is sought.

At times, it becomes necessary for the Department to request the arrest of a fugitive for extradition prior to receipt of the formal papers. In such instances, you will be directly contacted by the Department. An amendment to the sample complaint would be required.

Extradition of Fugitive From Foreign Land

If this Government desires the extradition of a fugitive who has fled to a foreign land, this Department makes a request upon the State Department which takes the matter up with the foreign government in which the criminal is found. All requests for extradition must be made through the Attorney General.

Essentials for Extradition Proceedings

Before making application to the Attorney General, for extradition proceedings, the U.S. Attorney should assure himself of the existence of the following essential facts:

(*a*) The warrant of arrest issued in this country cannot be served owing the flight of the accused to a known locality in a foreign country.

(*b*) A treaty of extradition is in existence between the United States and the country of asylum.

(*c*) The offense committed in this country is (1) among those enumerated in such treaty, and (2) is made criminal by the laws of both countries.

(*d*) Sufficient evidence is in the possession of the U.S. Attorney for presentation to the surrendering government to make out a strong case—such a case as would justify the committal of the accused under the laws of this country.

The citations for all existing extradition treaties between the United States and foreign countries can be found in the pocket part to 18 U.S.C.A. 3181. Should the U.S. Attorney need any assistance in this area, he should contact the Administrative Regulations Section of the Criminal Division.

Arrest and Detention of Fugitive

Pending the preparation of the formal papers, it is sometimes necessary to secure the arrest and provisional detention of the accused, and, in such a case, if the further flight of the fugitive is feared, application should be made to the Attorney General, by telephone or telegram, for his arrest and detention. Such application should be followed by a letter which should contain the following information:

(*a*) The name in full of the accused and his assumed name or names, if any;

(*b*) Nationality of the accused;

(*c*) A physical description of the accused;

(*d*) The place and address in the foreign country where the accused can be found;

(*e*) The date of the indictment, if an indictment has been filed;

(*f*) The specific offense or offenses charged;

(*g*) The date of the commission of the offense and the place where committed; and

(*h*) Whether a warrant of arrest has been issued and the reason for nonservice in this country.

It should be borne in mind that the request for provisional detention does not take the place of the application for extradition and the formal papers hereinafter mentioned.

In the event the fugitive is arrested and detained in the foreign country, the U.S. Attorney requesting the arrest will be promptly advised. After making a request for the provisional arrest of a fugitive, the application for extradition and the other necessary papers should be promptly prepared and forwarded in quadruplicate

(one set for each fugitive) to the Attorney General. One set of documents for each fugitive must be covered with an exemplification certificate.

The preparation and submission of the formal papers should be expedited as much as possible as failure to do so may result in the escape or release of the fugitive.

When the essential facts noted above have been found to exist, the formal papers should be transmitted to the Attorney General. These should be accompanied by four copies of a letter similar to the following:

SIR: I transmit herewith a copy, in quadruplicate, duly authenticated, of the indictment, warrant of arrest with the Marshal's return thereon, and the evidence upon which the charges in the indictment are based, in the case of the *United States* v. .... indicted ....., 19 .... in the U.S. District Court for this district, charged with having committed the offense of ..... in violation of .....

I hereby request that demand be made upon the Government of ..... to which the defendant has fled, for the surrender of the said ....., to be brought back to this district for trial under said indictment.

The name of the accused is ..... (include any assumed name). He was born on ....., in ..... He is a citizen of ..... His physical description is as follows: ..... and he may be found at .....

The specific offense charged against him is as follows: (If the offense charged is embezzlement, larceny, or the like, the actual amount involved should be stated, indicating from whom taken, and whether the property is of a public or private nature. In the case of an injury, the name of the person injured should be given. The date and place of the offense should be given in every case.)

I suggest ..... as the person to be named in the President's warrant as the agent of the United States to receive and convey the fugitive to the place of trial in this district.

This request for the surrender of the fugitive is made solely for the purpose expressed in this application, and not to enforce the collection of a debt or to avoid the penalty of a bail bond, or for any private purpose, and, if the application is granted, the criminal proceedings shall not be used for any other purpose.

.....

It is helpful, but not neccesary, that the agent selected to receive the fugitive from the hands of the foreign authority and to convey him to this country be able to identify the accused.

As stated, four sets of the following papers (one exemplified) should accompany the application for extradition for one accused of a crime. One set is to be retained in the Office of the Secretary of State, one in the Department, and the others go abroad. One set should be submitted for each fugitive.

(*a*) The indictment.

(*b*) The warrant of arrest, with the marshal's return endorsed thereon.

(*c*) Photograph, if available, of accused attached to and properly identified in an affidavit; and/or fingerprint chart, if available.

(*d*) The evidence upon which the charges made in the indictment are based.

All such papers should have formal, legal captions.

The indictment should be a true copy of that paper as filed in the office of the clerk of the U.S. District Court. The clerk should attach to such copy a certificate to the effect that it is a true copy of the indictment filed in the case of the *United States* v. ....., No. ....., pending in the U.S. District Court for the District of ..... The clerk should sign his name and official title, and affix the seal of the court to the certificate.

The warrant of arrest, with the Marshal's return, is a part of the records of the court. A copy should be prepared by the clerk and certified in the manner indicated for the copy of the indictment.

The evidence is usually submitted in the form of affidavits from witnesses. At times, extracts from grand jury testimony are forwarded. When this is done, prior permission from the court for their release is required. The extracts should be properly authenticated under the seal of the court.

The affidavits should be prepared with formal captions, showing the title of the case, the docket number, and the court in which it is pending. They may be executed before any person lawfully authorized to administer oaths and to execute such papers, but preferably, in cases involving violations of a Federal statute, before a Clerk or Deputy Clerk of a U.S. court. or a Commissioner.

The officer before whom the affidavits or depositions are executed should affix his official signature and seal to each of them.

After the Clerk, or his deputy, has certified any paper, or the U.S. Commissioner has affixed his purat to any paper executed before him, his official identity should be established by the usual certificate of a judge of a U.S. court under the seal of the court.

Unfortunately, Clerks do not have standardized exemplification certificate forms for use on affidavits given before them for use in an extradition request by a U.S. Attorney in another Federal district. Clerks, however, may adopt the standard exemplification certificate form, or they can create an exemplification form that will serve the particular needs of the occasion. The following form has been used successfully:

I, ..., Judge, U.S. District Court for the ..... District of ....., do hereby certify that ....., whose name and signature appear on the attached affidavit is and was at the date thereof (deputy) Clerk of said court, duly appointed and sworn, and is authorized to administer an oath for general purposes.

This the ..... day of ....., 19 .....

..... Judge, United States District Court for the ..... District of .....

If it would cause undue delay or be impracticable for other reasons, to secure the services of a Federal officer, the affidavits may be executed before a duly authorized State officer, whose official identity should be established under seal in accordance with the State law.

Extradition proceedings may begin before the defendant has been indicted, although it is preferable that an indictment is pending. In such cases contact the Administrative Regulations Section prior to forwarding any request.

When the defendant, after trial and conviction or confinement in this country, has fled to a foreign jurisdiction, the papers necessary to secure his return should consist of a copy of so much of the record of the court as will show:

(*a*) That conviction was obtained after a regular trial.

(*b*) The date of such conviction.

(*c*) The offense of which the fugitive was convicted.

(*d*) The specific law violated.

(*e*) The sentence, if imposed, and the date of such imposition.

If, at the time of his flight, the defendant was at large on bail, the copy of the court proceedings should show the proceedings involving the forfeiture of his bond and the issuance, if any, of the process of court to effect his arrest.

The record of the court should be prepared in quadruplicate with proper formal captions and should be authenticated officially by the Clerk of the Court under its seal, the latter's official identity being established by certificate of the U.S. judge under the seal of the court.

Passports

In all important cases where the U.S. Attorney has some basis for suspecting that the defendant will seek to flee the country, he should make as a condition precedent to the issuance of a bond, the requirement that the fugitive present his passport to the Clerk of the Court. Where the defendant has no passport or to avoid the issuance of a duplicate passport, the U.S. Attorney should forward to the Passport Office, Department of State, a copy of the warrant of arrest along with a request to withhold the issuance of a passport and all passport privileges.

OFFERS IN COMPROMISE

Authority to Compromise

Compromise offers of criminal liability may be considered only when authorized by statute. Some of the statutes may include a provision authorizing the Attorney General to act. However, such authority as to others is lodged in the Attorney General by reason of the reference of a case to the Department (U.S. Attorney) for prosecution or suit. See Section 3 and 5 of Executive Order 6166 (5 United States Code, following 124–132 (1964 Ed.) and 5 U.S.C. following Sec. 901 (1967 Ed.)).

The majority of offers in compromise within the assignment of the Criminal Division arise in customs, internal revenue and related liquor law, narcotic law, and Contraband Transportation Act cases. However, others occasionally may be submitted in firearms, gambling tax, immigration, civil aeronautics, slot machine, and other types of cases.

Offers in compromise may in many instances, such as those under the internal revenue and related liquor laws, the customs laws and the Contraband Transportation Act, be considered and

acted upon by the appropriate officials of the Treasury Department, prior to reference of a case to the Department for prosecution or suit. Thereafter the jurisdiction to act on offers is in the Department of Justice.

Types of Liability Subject to Compromise

The Assistant Attorney General, Criminal Division, by delegation from the Attorney General has jurisdiction, within statutory and the above limitations, of offers in compromise submitted in respect to the following types of liabilities in cases referred to the Department for prosecution or suit:

(1) Criminal, forfeiture, civil penalty, and tax liability in cases arising under the internal revenue laws respecting liquor, narcotics, marihuana, firearms, gambling occupation and device, and other similar regulatory tax provisions (not including income, excess profits, estate, gift, wagering, manufacturers' excise or social security taxes or those arising under the tax provisions of the District of Columbia Unemployment Compensation Act, the Bankhead Cotton Control Act, the Bituminous Coal Act, the Carriers Taxing Act, and other nonregulatory excise tax laws and the Agriculture Adjustment Act and act amendatory thereto, of which the Tax Division has jurisdiction) from the time the case is referred to the Department, or U.S. Attorney, for prosecution or suit and while the criminal or forfeiture phases are pending. See 26 U.S.C. 7122. Thereafter any undisposed of tax phase including tax penalties, is within the jurisdiction of the Tax Division.

(2) Civil penalty, forfeiture, and duty liability under the customs laws, in the same circumstances except that when the criminal, penalty, or forfeiture phases are no longer pending, such jurisdiction is in the Civil Division. See 19 U.S.C. 1617, as affected by Executive Order 6166 (5 United States Code, following 124–132 (1964 Ed.) and 5 U.S.C., following 901 (1967 Ed.)).

(3) Forfeiture liability under the Contraband Transportation Act (49 U.S.C. 784, 19 U.S.C. 1617 and Executive Order 6166), the Gambling Devices Act (15 U.S.C. 1177, 19 U.S.C. 6117, and Executive Order 6166), and laws to protect the "Dry States" (18 U.S.C. 3615 and 26 U.S.C. 7122).

(4) Federal Alcohol Administration Act (27 U.S.C. 207 and Reorganization Plan No. IV—See 5 U.S.C. 133t).

(5) Other types of cases within the assignment of the Criminal Division that arise occasionally.

Compromise of Criminal Liability; Civil Liability

There is no statutory authority to compromise criminal liability under the customs laws, the Gambling Devices Act, or the laws to protect the "Dry States." Neither criminal nor forfeiture liability under the Indian liquor laws may be compromised. It is the long-established policy of the Department not to compromise criminal liability incurred under the narcotic laws. Compromises of criminal liability in gambling tax cases are not favored. No offer covering any civil liability will be accepted if such action would jeopardize the success of any contemplated or pending criminal prosecution. The U.S. Attorney's views in that respect will be given great weight.

The general policy in internal revenue liquor cases is not to compromise willful criminal liability involving any appreciable tax loss, especially if the evidence reasonably sustains the charge, or the offenders are notorious liquor law violators, racketeers, or members of so-called criminal syndicates. Offers covering criminal liabilities of illicit distillers and traffickers in considerable quantities of nontaxpaid liquor are not entertained except in very rare and unusual circumstances. Also, generally the criminal liability of wholesale liquor dealers and others responsible for the shipment or introduction of large quantities of liquor into dry areas should not be compromised. However, where the violation is not flagrant or is technical, or the evidence is weak, or the other surrounding circumstances do not justify prosecution, compromise of criminal liability may be warranted. Some liquor law violations involve trivial or no tax loss, but do warrant some punishment short of criminal prosecution. If all reported cases were prosecuted the court dockets would be crowded and the judges probably would object to their courts being turned into "police courts." This in turn may adversely affect the sucessful prosecution of the really important cases. Nevertheless, where technical violations become extremely widespread it may be necessary to prosecute in order to serve as a deterrent to other potential violators, since the acceptance of compromise offers under such circumstances has proved ineffective.

Liquor Cases

There may be liquor cases where offers to compromise forfeiture,

tax and criminal liability are made. From the criminal angle, the previous observations are pertinent. In the forfeiture phase the principal question is whether the amount offered, compared with the value of the property, considering the sufficiency of the evidence and probable expenses of prosecution, including depreciation and storage charges, would justify acceptance. The congestion of the court docket which would unreasonably delay consummation of forfeiture may be a factor. As to the tax liability, the sufficiency of the evidence, and collectibility are the principal considerations. Usually offers are accepted subject to payment of any tax due. Acceptance of offers in compromise from notorious criminals or racketeers is not favored.

Compromises of Forfeitures of Seized Property

Although forfeitures of seized property may be the subject of compromise, no compromise of the forfeiture of contraband articles, such as illicit spirits, stills, or narcotics, will be accepted. However, the liability to forfeiture of tax-paid liquor, such as that seized under the floor stocks tax or other internal revenue laws may be compromised. Such liquor usually is of little value to the Government in view of 26 U.S.C. 5688, which prohibits the sale of forfeited liquor.

Procedure

If the following procedure is adhered to unnecessary delay in the Department's final action on offers will be avoided. While expeditious action is highly desirable in all cases, it is of particular importance in cases in which storage charges are accumulating and the property is depreciating in value.

Offers may be tendered either before or after institution of action. A certified check, cashier's check or money order payable to the Treasurer of the United States, in the full amount of the offer, should accompany the offer and be retained in the U.S. Attorney's office pending advice as to acceptance or rejection by the Department. The written offer should set forth the exact terms thereof, including an agreement that in the event of acceptance the offeror will pay the costs and expenses (storage charges), especially in forfeiture cases. Usually offers are accepted subject to the payment by the proponent of court costs and out-of-pocket costs to the Government, including any storage

charges. Often it will be desirable for the offeror to pay the storage charges himself directly to the person storing the property.

A copy of the investigating agency's reports respecting the alleged liability should accompany the offers unless the U.S. Attorney believes the Department already has received a copy. If the U.S. Attorney has no extra copy, a detailed statement of the essential facts upon which the Government's case is based should be forwarded.

The Department should be advised of the status of the related court proceedings, and of the probable effect of the acceptance or rejection of the offer.

If practicable in important cases the U.S. Attorney should obtain a statement of the view of the investigating agency's field office. This, together with his recommendation giving detailed supporting reasons for accepting or rejecting the offer, should be transmitted to the Department. When the Department receives the offer, except in minor or routine cases, the views of the investigating agency's headquarters office are sought. This data is essential so that a memorandum brief showing the reason for the Department's action may be prepared. By delegation or authority from the Assistant Attorney General, Criminal Division, the appropriate section chief may take final action on offers, except that the approval of the Attorney General is required if the Government's claim exceeds $250,000.

The U.S. Attorney is informed by letter or telegram of the acceptance or rejection of the offer, giving the basis of such action if it is not in accord with his recommendation. The U.S. Attorney should promptly advise the offerer or his counsel in writing of such action. If the offer is accepted and covers criminal liability included in an indictment or criminal information, the U.S. Attorney may seek dismissal as to the proponent. If the accepted offer covers forfeiture liability, he may cause dismissal of the complaint and authorize the release of the seized property or cause any bond filed in lieu thereof to be canceled. If the accepted offer covers civil penalties the suit to collect them may be dismissed as to the proponent. However, the indictment or information, suit or libel should not be dismissed or the property released if the terms of the offer and acceptance have not been fully complied with or if the U.S. Attorney is otherwise directed by the Department. The compromise medium should not be used to deprive any bona fide claimant of seized property of his day in court if he desires a hearing on the merits of the forfeiture.

If the offer is rejected, the U.S. Attorney should proceed as if no offer had been submitted, unless otherwise directed by the Department. If the offer is accepted, the check should be disposed of in accordance with the procedure set forth in Memo 207, revised.

Any wholly unsubstantial offer, or one submitted for the apparent purpose of delaying prosecution or suit, may be rejected summarily by the U.S. Attorney. Thereupon the U.S. Attorney should make refund and proceed with the case. However, when any bona fide offer is tendered, the U.S. Attorney may, if the interests of the United States will not be jeopardized thereby, withhold further proceedings pending submission to and consideration of the offer by the Department.

REMISSIONS OF FORFEITURE

Petitions seeking remission or mitigation of forfeitures and civil penalties may be considered only when authorized by statute. Those coming within the Criminal Division's jurisdiction relate almost entirely to seizures of property under the internal revenue liquor and related liquor laws and the Contraband Transportation Act (narcotics, firearms, and counterfeiting), and seizures of property and penalties under the customs laws. However, occasionally petitions may be submitted in Gambling Devices Act, civil aircraft and other cases coming within the assignment of the Criminal Division.

It should be remembered that the courts have exclusive jurisdiction to remit or mitigate forfeitures of vehicles seized under the Indian liquor laws (18 U.S.C. 3619), and that after a decree of forfeiture has been entered against a vehicle seized under the internal revenue liquor laws, the court has exclusive jurisdiction to remit or mitigate the forfeiture (18 U.S.C. 3617). However, the petitioner before the court in these cases has the burden of establishing compliance with the prerequisites to allowance set forth in the statute. If remission is granted by the court, since that is an adverse judgment to the Government, the question of whether or not an appeal should be noted must be submitted to the Solicitor General. Hence the necessary papers for that purpose should be transmitted to the Department promptly and steps should be taken to preserve the res by obtaining a stay of execution or, if a stay cannot be obtained, by filing a protective notice of appeal, Title 6, U.S. Attorneys' Manual, pending decision

by the Solicitor General respecting the taking of appeal.

If the General Services Administration, pursuant to 40 U.S.C. 304, has requested for official use a vehicle subject to forfeiture under the internal revenue laws relating to liquor, that agency should be notified immediately of the filing with the court of any petition seeking a remission of mitigation of forfeiture of a lien, giving the amount claimed, and should be requested to advise whether, in the event of allowance of the lien by the court, it is willing to pay for the vehicle or whether its request has been withdrawn. Since the court's decree, forfeiting a vehicle in a liquor revenue case and recognizing the lien of a petitioner, is considered an adverse judgment, steps should be taken to preserve the res pending consideration of appeal by the Solicitor General.

The provisions of the customs laws (19 U.S.C. 1613 and 1618) respecting remission or mitigation of forfeitures and penalties by the executive branch of the Government are also applicable to such liabilities in respect to the internal revenue laws, the Contraband Transportation Act, the Gambling Devices Act and the laws to protect the "Dry States." See 26 U.S.C. 7327; 49 U.S.C. 784; 15 U.S.C. 1177, and 18 U.S.C. 1615. Section 1613 authorizes granting of relief to a claimant out of the proceeds of sale of forfeited property. Section 1618 relates to the remission or mitigation of the forfeiture of the res. Most petitions are filed for consideration in accordance with the provisions of Section 1618.

Procedure

Before referring a case to the Department (U.S. Attorney) for prosecution or suit, jurisdiction to act on such petitions is in the seizing agency. (Seizures under the Gambling Devices Act are made by agents of the FBI.) Thereafter, pursuant to Executive Order 6166 (5 U.S.C. following 124–132 (1964 ed.) and 5 U.S.C. following sec. 901 (1967 ed.)), the jurisdiction to act on petitions is in this Department. Liquor law, wagering tax, customs, and Contraband Transportation Act cases are referred when the appraised value of the seized property exceeds $2,500 or when a claim and cost bond are filed. It should be noted that while the court has exclusive jurisdiction to remit or mitigate forfeitures of vehicles seized under the internal revenue liquor laws after a decree of forfeiture is entered, the Department exercises such jurisdiction after reference of a case to it and prior to the entry of such a decree. The courts have no authority to remit or miti-

gate forfeitures of other types of property seized under the internal revenue laws, nor in respect to any seizures under the Contraband Transportation Act, the Gambling Devices Act, or other liquor laws, except Indian liquor laws, as previously indicated.

Petitions for the consideration of the Criminal Division should be under oath, addressed to the Attorney General and filed through the U.S. Attorney for the district where the seizure was made. Such petitions should set forth the interest of the petitioner in the subject of the petition, the basis of the petition and if the claimant, such as a finance company, is founding his petition on a conditional contract of sale, copies of the contract or mortgage, the note which is secured thereby, the purchaser's application or statement upon which the sale was based, and any other pertinent papers should accompany the petition. Such petitions and attachments should be filed in triplicate.

When the U.S. Attorney receives a petition and attachments, he should forward a copy immediately to the seizing agency with a request that the allegations in the petition be investigated and its findings reported to him, together with a recommendation on the merits of the petition. The Department should also be informed of the filing of such a petition. Thereafter when this report is received the petition with attachments and the data furnished by the seizing agency should be transmitted to the Department, together with the U.S. Attorney's recommendation. Unless the papers set forth the facts of the seizure, the U.S. Attorney also should advise the Department in that respect.

Petitions are acted upon in the Criminal Division and are approved or disapproved by the appropriate section chief under authority delegated to him by the Assistant Attorney General of the Criminal Division. If a good faith petition is filed and it appears that the interests of the United States will not be jeopardized thereby, further action in the case may be withheld pending submission and consideration of the petition.

When the Department receives these papers, a memorandum brief setting forth the basis of the action taken is prepared. The U.S. Attorney is advised of such action and should immediately notify the petitioner or his counsel in the matter. If the petition is allowed, the seized property may be released upon compliance with the terms of allowance indicated in the letter from the Department. If the vehicle is to be returned to an intervening lienor, either a release from the title holder or a stipulation from the

petitioner lienor that he will save the Government, its agents and/or employees, harmless from any suit arising out of the release of the vehicle to him should be obtained. However, should any other bona fide claimant indicate a desire to contest the forfeiture on the merits, the forfeiture should be consummated and the court should be requested to include in its decree the provisions of such allowance. If the petition is denied, the case should proceed as if no petition had been filed.

Petitions are considered on the basis of whether the petitioner has shown that the forfeiture was incurred without willful negligence, or without any intention to defraud the revenue or to violate the law. They are addressed to the discretion of the Attorney General and action by him thereon is not subject to review by the courts, except possibly on the basis that it was arbitrary or capricious. See *General Finance Company, etc.* v. *United States,* 45 F. 2d 380 (5th Cir. 1930) ; *United States ex rel. Walter E. Heller and Company* v. *Mellon,* 40 F. 2d 808 (D.C. Cir., 1930), cert. den. 281 U.S. 766 (1930) ; *United States* v. *One* 1961 *Cadillac,* 337 F. 2d 730 (6th Cir. 1964) ; and others. No exact rule which would apply to such discretionary action in each case may be given. However, if a petitioner has placed his property in, or has permitted property in which he claims an interest, to be in the possession of a person with a record or reputation for certain law violations, usually petitions are denied unless the petitioner establishes that a reasonable effort had been made to ascertain the moral character of that person, such as previously having made a good faith inquiry of a law enforcement agency in that respect. Failure to make such an inquiry under these circumstances is considered to be negligence. This pattern follows largely the requirements of 18 U.S.C. 3617, which is not binding insofar as administrative action is concerned, since the provisions of that section only relate to the prerequisites to allowance by the court in internal revenue liquor vehicle cases.

The filing of a petition for remission or mitigation of forfeiture is on the assumption, at least for the purpose of action on the petition, that the property is forfeited. Hence, the major consideration in acting on petitions is not whether the evidence is sufficient to consummate the forfeiture, but whether the petitioner has established his good faith, innocence, and lack of negligence. There may be instances where mitigation of the forfeiture or penalty would be justified.

In allowing petitions, the allowance relates only to the actual

interest of the petitioner in the property. Thus if a finance company is claiming through a security agreement only the unpaid balance on the contract is allowable, less any unearned interest, finance charge (time price differential or markup charge) and insurance; the portion earned is computed pro rata on the basis of the time expired from the inception of the contract to the date of seizure. The U.S. Attorney may request the seizing agency to compute such amount. If the petitioner's determined interest in the property exceeds its appraised value, the property may be released upon notice from the Department of the allowance of the petition, and payment of costs and out-of-pocket expenses to the United States. If the appraised value is greater than the petitioner's determined interest, the property may be released upon the payment of such difference by the petitioner, plus costs and out-of-pocket expenses to the United States. The amount of the difference between the allowed interest in the property and its appraised value as of date of seizure should be paid to the U.S. Attorney in the form of a certified check, cashier's check, or money order, made payable to the Treasurer of the United States, which should be transmitted to the referral agency in accordance with the procedure set forth in Memo 207, revised.

The sum paid as costs and expenses may be paid by the petitioner to the appropriate official; i.e., the Clerk of the Court or the U.S. Marshal, as the case may be, or preferably, for outstanding storage charges, to the person storing the property.

Petitions should be disposed of promptly, particularly those relating to property under seizure, to avoid depreciation and storage charges. Therefore, the U.S. Attorney is urged to make every effort to see that the necessary papers respecting petitions are forthcoming and transmitted to the Department.

In cases falling within the jurisdiction of the Narcotic and Dangerous Drug Section, that section will notify all parties concerning the disposition of petitions referred to it. Where the petition is granted or forfeiture mitigated, the petitioner will be advised to confer with the U.S. Attorney concerning the terms of remission or mitigation and their implementation. In the case of a denial, the notice will set forth in detail the basis for the action taken and will advise petitioner that in the absence of a request for reconsideration filed with the section, with a copy to the U.S. Attorney, setting forth in detail the grounds for the request, the forfeiture proceeding will go forward. In the event no copy of a petition for reconsideration is received by the U.S. Attorney within

the time specified, the case should go to trial. If such a petition is received, however, no action should be taken by the U.S. Attorney pending final disposition of the request for reconsideration by the Narcotic and Dangerous Drug Section.

Terms and Conditions Under Which Remission of Forfeitures Is Granted by the Department

Lienholders

A. Reported net equity less than appraised value of property at time of seizure:

1. If petitioner wishes only to have its lien satisfied:

The matter must proceed to judgment. Based either upon stipulation of the parties or advice to the court that the Department has allowed the petition, the decree of forfeiture should incorporate the conditions for remission. Thus, the court can be requested to order the vehicle sold and the proceeds distributed as follows:

(*a*) Payment of the costs and expenses of seizure, forfeiture and sale;

(*b*) Liquidation of the petitioner's reported net lien less all costs and expenses including storage charges;

(*c*) Balance to be paid to the Government.

(Example)

1. Selling Price	$2,500
2. (*a*) Payment of petitioner's net lien	2,200
(*b*) Less costs	100
	2,100
3. Balance to be distributed	400
4. Costs (previously deducted from petitioner's net lien—see item 2(b))	100
5. Net balance retained by the Government	300

If there is to be a judicial sale, the petitioner should be notified directly of the time and place thereof, so as to assure the petitioner of the opportunity for its representatives to be present to protect its interests.

2. It petitioner desires possession of vehicle:

Petitioner will be required to pay the difference between its

reported net lien and the appraised value of the vehicle as of the date of seizure, plus the storage charges and costs incident to the seizure. In this event, if a complaint has been filed, the vehicle may be released and the forfeiture proceedings may be discontinued upon payment of the above sums, provided that the registered owner and any bona fide claimant other than the petitioner are in default and a stipulation is made by the petitioner holding the Government and its agents and employees harmless from any subsequent claims, or if they are not in default, provided that a release of all claims to the vehicle from the registered owner and any known claimant other than the petitioner, is furnished. On the other hand, if no complaint has been filed, a release by the registered owner or a hold harmless agreement by the petitioner should be furnished.

It should, of course, be remembered that if the record owner or any other claimant is to contest the forfeiture, the judicial condemnation of the vehicle should be consummated. In that event the court should be apprised of the granting of remission by the Attorney General, and the decree of forfeiture should be drafted accordingly.

Moneys received in this matter should be dispensed in accordance with Departmental Memo 207, second revision, dated March 10, 1958.

B. Reported net equity greater than appraised value of property:

Upon payment of all costs and expenses incident to the seizure including court costs and storage charges, the vehicle may be released, provided that a complaint for forfeiture has not been filed and a release of all claims to the vehicle by the registered owner or a stipulation by the petitioner that would save the Government and its agents and employees harmless from any claims arising out of the release of the vehicle is furnished. If a complaint has been filed, the vehicle may be released and the forfeiture proceedings may be discontinued, provided that the registered owner and any bona fide claimant other than the petitioner are in default and a save harmless agreement is furnished by the petitioner, or if they are not in default, provided that a release is obtained from the registered owner and any known claimant other than the petitioner.

However, if the owner of record or any other claimant is to contest the forfeiture, it will be necessary that the judicial condemnation of the vehicle be consummated. In that event, if for-

feiture is decreed, the administrative allowance of the petition should be brought to the attention of the court in order that appropriate provisions may be incorporated in the decree.

Moneys received in this matter should be dispensed in accordance with Departmental Memo 207, second revision, dated March 10, 1958.

C. Registered owner, or owner of property:

Such petitioners may obtain release of property upon payment of all costs and expenses incident to the seizure, including court costs and storage charges.

FEDERAL IMMUNITY STATUTES

Federal immunity statutes, which number approximately 45, may be grouped in two categories:

1. Statutes under which immunity will attach to a witness only after he has claimed a 5th amendment privilege ("claim" statutes); and

2. Statutes under which immunity will attach automatically to a witness who testifies under subpoena ("automatic" statutes).

Most of these are embodied in regulatory statutes to facilitate the enforcement procedures of the various regulatory agencies; a few are applicable also to grand jury proceedings.

Recently, Sections 2514 and 2516 of Title 18, enacted as part of the Omnibus Crime Control and Safe Streets Act of 1968, encompassed many additional crimes in which immunity can be sought, ranging from presidential assassination to bribery in sporting contests.

Attorneys are advised to take extreme care when operating under a statute which grants immunity automatically.

When you have decided that it is advisable to apply to the court for an order compelling testimony or the production of evidence in a particular case, you are requested to consult as early as possible with the Criminal Division prior to taking any action, under any Federal immunity statute (either "claim" or "automatic") under the general supervision of this Division, which might result in immunity for any prospective witness.

All requests to immunize prospective witnesses must be in writing, allowing at least two weeks for consideration by the Division, and must contain the following information:

1. Name of individual for whom immunity is requested.
2. Date and place of birth, if known.
3. FBI number or local police number, if known.
4. Whether any State or Federal charges are pending against the prospective witness and the nature of the charges.
5. Whether the witness is currently incarcerated, under what conditions, and for what length of time.
6. A résumé of the background investigation or proceeding before the grand jury or trial court.
7. The witness' relative importance in the criminal activity in your area, and his part in the matter under investigation.
8. An estimate of what offenses, both Federal and State, may be excused by the grant of immunity.
9. Reasons for the request, including a statement as to what testimony you may expect the prospective witness to give and as to how this testimony will serve the public interest.
10. An estimate as to whether the witness is likely to testify in the event immunity is granted.

It is the policy of the Department not to extend immunity in any case unless there are sound and urgent reasons for doing so. Whenever authority to immunize a witness has been granted in a case under the supervision of the Criminal Division, the U.S. Attorney should later notify the Division as to whether or not subsequent events have caused immunity to attach to the witness, the nature of the information or testimony received after the grant of immunity and the ultimate disposition of the case or matter.

JENCKS ACT

18 U.S.C. 3500

The statute provides that any statement of a Government witness relating to the subject matter of his testimony shall, on appropriate motion, be delivered to the defense for the purpose of cross-examination. If the Government elects not to produce such statement, the testimony of the witness shall be stricken or, in the discretion of the court, a mistrial ordered. Production of the statement may not be required until after the witness has testified. A statement is defined as (1) a written statement made by said witness and signed or otherwise adopted or approved by him, (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of

an oral statement made by said witness and recorded contemporaneously with the making of the statement.

If a statement contains material not relevant to the testimony, it should be delivered first to the court for excision of the irrelevant parts. (3500(c), *Seales* v. *United States*, 260 F. 2d 21 (4th Cir. 1958), *aff'd* 367 U.S. 203 (1961).) The excised parts must be available to the appellate court to test the judgment of the trial court. (*Travis* v. *United States*, 269 F. 2d 928 (10th Cir. 1959), *rev'd on other grounds* 364 U.S. 631 (1961).) The task may not be delegated to attorneys for the Government, but the excision must be made by the trial court. (*Holmes* v. *United States*, 271 F. 2d 635 (4th Cir. 1959).) Where it is doubtful whether the whole or a part of a particular document is relevant to the witness' testimony on direct examination, the document should be submitted to the trial judge for *in camera* determination. (*United States* v. *Accardo*, 298 F. 2d 133 (7th Cir. 1962).)

Demands have frequently been made for the production of notes even though written statements or reports prepared in whole or in part from such notes have already been produced. In *Campbell* v. *United States*, 206 F. 2d 52[illegible] (1st Cir. 1961), *rev'd on other grounds*, 373 U.S. 487 (1963), the defense contended that it is the duty of Government agents to preserve all interview notes in order that they may be available for production, and, additionally, that it is the duty of an agent to take notes at all interviews with a prospective witness in order that there may be notes to preserve and to produce. The court rejected this contention. Agents are not required to preserve their interview notes after they have been transcribed and checked for accuracy. (*Spatuzza* v. *United States*, 331 F. 2d 814 (7th Cir. 1964); *Greco* v. *United States*, 298 F. 2d 247 (2d Cir. 1962) *cert. den.* 369 U.S. 820 (1962).) Good faith destruction of notes is not the equivalent of noncompliance with an order to produce. (*United States* v. *Aviles*, 315 F. 2d 186 (2d Cir. 1963). See also *Hayes* v. *United States*, 329 F. 2d 209 (8th Cir. 1964).)

Attorney's notes and memoranda are not immune from production if they fall within the standards of the Act. (*Saunders* v. *United States*, 316 F. 2d 346 (D.C. Cir. 1963); *United States* v. *Aviles*, *supra*. *United States* v. *Crosby*, 294 F. 2d 928 (2d Cir. 1961).)

When a Government agent testifies, his report with respect to the subject matter of his testimony is producible. (*Holmes* v. *United States*, *supra*; *Clancy* v. *United States*, 365 U.S. 312 (1961);

United States v. *McCarthy,* 301 F. 2d 796 (3d Cir. 1962).) But the statements which witnesses have made to an agent are not producible for the purpose of cross-examining such agent. (*United States* v. *Johnson,* 337 F. 2d 180 (4th Cir. 1964) ; *United States* v. *White,* 342 F. 2d 379 (4th Cir. 1965).)

Doubt as to the producibility of a particular document may arise in connection with interview notes and reports or memoranda not signed or otherwise adopted or approved by the witness. The question presented is whether such document falls within the ambit of the term "other recording." The term "other recording" in (2) of the Act was meant to include more than mere automatic reproduction of oral statements, but was not meant to include summaries of oral statements which evidence substantial selection of material, or contain the agents' interpretation or impressions, or which were prepared after the interview without the aid of complete notes and hence rest on the memory of the agent. (*Palermo* v. *United States,* 360 U.S. 343 (1959).)

Whether a particular document falls within the term "other recording" is a question of fact to be determined by the trial judge (*Hayes* v. *United States, supra*), outside the presence of the jury. (*Williams* v. *United States,* 328 F. 2d 178 (D.C. Cir. 1963).) The answer may be clear from the document itself (*Palermo* v. *United States, supra; Harney* v. *United States,* 306 F. 2d 523 (1st Cir. 1962)), or extrinsic evidence may be necessary to assist the court's determination. (*Palermo* v. *United States, supra; Campbell* v. *United States, supra, Ogden* v. *United States,* 303 F. 2d 724 (9th Cir. 1962).) A hearing to determine the nature of a document is not an adversary proceeding. (*Campbell* v. *United States, supra.*)

When an issue of producibility is properly raised, it is the duty of the court to resolve the same. (*Campbell* v. *United States, supra; Ogden* v. *United States, supra.*) Here the defense has its own responsibilities. The defense must tender an issue of producibility to the court at a time when it is possible for the court to order a particular document produced or make an appropriate inquiry. (*Ogden* v. *United States, supra; United States* v. *Annunziato,* 293 F. 2d 373 (2d Cir. 1961) ; *United States* v. *Klinghoffer Brothers Realty Company,* 285 F. 2d 487 (2d Cir. 1960) ; *United States* v. *Simmons,* 281 F. 2d 354 (2d Cir. 1960) ; *United States* v. *Tellier,* 255 F. 2d 441 (2d Cir. 1958) ; *Rich* v. *United States,* 261 F. 2d 536 (4th Cir. 1958).) The issue is tendered when (1) it is shown that some writing was made at an interview with a witness, (2) a demand is made for production of that particular document,

and (3) in case of nonproduction a further demand is made for an inquiry by the court. See the *Campbell* and *Ogden* cases.

Failure to produce a statement clearly subject to production is not always such an error as to require reversal but in some particular context may be harmless. (*Rosenberg* v. *United States*, 360 U.S. 367 (1959); *United States* v. *Annunziato, supra; Ogden* v. *United States, supra.*)

It is important that the prosecution be prepared to meet issues of production when they arise. This means that the prosecution should know what to expect in a voir dire hearing both from witnesses and from agents who interviewed them. This is not a difficult problem with agents, but a witness may be bewildered when questioned about the taking of notes or the use of documentation at an interview. Concentrating, as he must, on the details of his testimony, he may have only the vaguest impression of what the interviewer did. If he can recall the details, he should recount them if called upon to do so, but his answers should not be mere guesswork. If he does not remember what actually happened, he should say so. Such preparation is an added burden on the prosecution, but it may avoid some pitfalls.

It is not safe to assume that only one agency has investigated a particular matter or that a particular witness has been interviewed by representatives of only one agency. In a case in a Southwestern jurisdiction, a mistrial was declared because some of the witnesses had given statements to an agency other than the Federal Bureau of Investigation, the prosecution had not known of it and did not have the statements available. It is, of course, unreasonable to expect the prosecution to canvass all of the investigative agencies of the Government. The particular type of case should provide some indication as to whether there is overlapping jurisdiction and the witnesses ought to know if they have been interviewed by representatives of more than one agency.

In the handling of these matters, attorneys representing the Government should cooperate with the court and with opposing counsel in such a manner as to secure a fair and expeditious trial. However, no legitimate criticism could be directed toward the prosecution if, in doubtful cases, it chose to stand on the provisions of the Act and dispose of the issues in voir dire hearings.

Any document delivered to the defense pursuant to this Act should be returned to the Government when it has served its purpose. It may be used by the defense solely for the purpose of cross-examination. The defense has no right to retain it or to make

copies of it except where it has been received in evidence. If there is any controversy about this, an order should be sought from the district judge directing the return of the document and prohibiting any use of it other than for cross-examination.

SPECIFIC VIOLATIONS

Agricultural Lending Agencies

Cases involving violations of 19 U.S.C. 658 and 15 U.S.C. 714m, are usually referred directly to U.S. Attorneys by regional attorneys of the Department of Agriculture. U.S. Attorneys are authorized to dispose of the criminal phase of such cases without prior clearance from the Department, and should notify the regional attorney of such disposition by letter, a copy of which should be sent to the Criminal Division.

Investigations of violations of 18 U.S.C. 658, in which the agency involved is the Farmers' Home Administration, and of 15 U.S.C. 714m, will be made by the Department of Agriculture and reports of such investigations will be furnished the U.S. Attorney in whose district the matter is to be prosecuted. Alleged violations of 18 U.S.C. 658, which concern agencies other than Farmers' Home Administration will be investigated by the FBI, and the reports will be submitted directly to the U.S. Attorney who requested the investigation.

Antigambling Statutes

All cases arising under 18 U.S.C. 1084, 1952 and 1953 should be presented directly to the U.S. Attorney in whose district the unlawful activity takes place for an initial prosecutive opinion. Where governmental corruption at the local level is involved the U.S. Attorney should confer with the Department as soon as evidence of such corruption appears.

Forcible entries into buildings for the purpose of arrest or service of search warrants should not be made without prior clearance from the Organized Crime and Racketeering Section of the Criminal Division. Clearance in such situations may be obtained by telephone if deemed essential.

U.S. Attorneys may request the Organized Crime and Racketeering Section for any assistance needed to facilitate the effective enforcement of these important antigambling statutes.

Antiracketeering Act

Title 18, United States Code, Section 1951 is based, with some changes in phraseology and arrangement, on the Act of July 3, 1946, c. 537, 60 Stat. 420 (known as the Hobbs Act) which amended, and in effect repealed, the Act of June 18, 1934, c. 569, Sections 1–6, 48 Stat. 979, 980 (popularly called the Coleman Act).

The statute applies to anyone who in any way obstructs, delays, or affects interstate commerce by robbery or extortion as defined in subsection (b); attempts or conspires to do so; or commits or threatens physical violence to any person or property in furtherance of a plan to do so. Violation of the statute is a felony punishable by a fine of not more than $10,000, or by imprisonment for not more than 20 years, or both.

Prior authorization is not necessary to institute prosecutions for violation of this statute in those cases where there is evidence of actual or threatened force or violence. In cases not involving the use or threat of force or violence the matter should be referred to the Criminal Division for instruction.

For the application of the Act to obstructions of interstate commerce by violence see *United States* v. *Kemble*, 198 F. 2d 889 (3 Cir. 1952), *cert. den.*, 344 U.S. 838. See also: *Hulahan* v. *United States*, 214 F. 2d 441 (8 Cir. 1954), *cert. den.*, 348 U.S. 856, holding that Congress has the power to deal with extortion or attempted extortion actually or potentially affecting interstate commerce, just as it has power to deal with unfair labor practices so affecting interstate commerce and that the exaction of tribute from contractors engaged in local construction work who are dependent upon interstate commerce for materials, equipment and supplies, or who are engaged in constructing facilities to serve such commerce, is proscribed by the antiracketeering statute.

Antiriot Laws

The Federal Antiriot Laws are contained in Public Law 90–284, an omnibus bill (popularly referred to as the Civil Rights Act of 1968), which became effective April 11, 1968 (Secs. 245(b)(3), 2101–2102, and 231–233 of Title 18, United States Code). The Criminal Division has supervisory responsibility and the FBI investigative jurisdiction over violations of these laws.

Five kinds of riot-related activity are covered: (1) Willful injury or intimidation of businessmen incident to a riot (18 U.S.C. 245(b)(3)); (2) inciting or participating in a riot or aiding or

abetting others (18 U.S.C. 2101); (3) teaching or demonstrating the use, application or making of any firearm, explosive, or incendiary device to be unlawfully employed in a civil disorder (18 U.S.C. 231(a)(1)); (4) transporting or manufacturing for transport any firearm, explosive, or incendiary device to be employed in a civil disorder (18 U.S.C. 231(a)(2)); (5) committing or attempting to commit any act to interfere with any fireman or law enforcement officer on duty incident to a civil disorder (18 U.S.C. 231(a)(3)).

The terms "riot" (18 U.S.C. 2102) and "civil disorder" (18 U.S.C. 231(1)), by statutory definition (in contrast to their popular useage) may cover an assembly as small as three persons.

The elements of 18 U.S.C. 2101 are (1) travel or use of an interstate or foreign commerce facility with the intent to incite, organize, promote, encourage, or participate in a riot, and (2) an overt act (or attempted overt act) performed during such travel or use, or thereafter, to accomplish any of the aforementioned purposes. Expressly exempted from the operation of the statute are oral or written advocacy of ideas or expressions of belief, not involving advocacy of any act or acts of violence or assertion of the right to commit such act or acts (18 U.S.C. 2102(b)). Lawful interstate activities of organized labor are also expressly exempted from operation of the statute (18 U.S.C. 2101(c)).

Department Policy

Prosecution under 18 U.S.C. 245(b)(3) may be taken only upon written authorization of the Attorney General or the Deputy Attorney General certifying that a Federal prosecution is in the public interest and necessary to secure substantial justice (18 U.S.C. 245(a)(1)). The Department has an affirmative statutory duty to prosecute violations of 18 U.S.C. 2101 (18 U.S.C. 2101(d)). Nevertheless, Congress has made it clear the antiriot laws do not preempt the jurisdiction of the States (Sec. 245(a)(1), and Sec. 2101(f). Many States have criminal statutes usually associated with rioting (e.g., robbery, burglary, arson, assault, larceny, breach of the peace), and it seems the congressional intent would best be served if Federal prosecution is pursued only when the illegal acts are of an interstate character and not covered by State law or where local prosecution is lax or not feasible.

The Federal Bureau of Investigation should be requested to conduct a preliminary investigation when the office of the U.S.

Attorney receives reliable information of a possible violation of the above quoted sections.

Upon completion of a preliminary investigation, the U.S. Attorney will give the FBI his opinion of the prosecutive merits of the case, what further investigation, if any, should be made and determine, if possible, what State or local action is contemplated, all of which will be incorporated in the FBI report. No prosecution will be commenced without express authorization of the Attorney General, his designee or the Criminal Division. When the U.S. Attorney believes there are compelling reasons for Federal prosecution, he will submit a prosecutive analysis and opinion to the Criminal Division. If prosecution is authorized, the Criminal Division should be kept currently informed of all major developments in each case.

Banking Laws

Title 18, United States Code, Section 656 prohibits theft, embezzlement, obstruction, and misapplication by an officer, director, agent, or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank, or insured bank. For interpretation of phrase "connected in any capacity" see: *United States* v. *Kahn,* 381 F. 2d 824 (7 Cir. 1968), *cert. den.,* 389 U.S. 1015; *Garrett* v. *United States,* 396 F. 2d 489 (5 Cir. 1968), *cert. den.,* November 18, 1968. For definitions of embezzlement, abstraction and misapplication see *United States* v. *Northway,* 120 U.S. 327 (1887), *United States* v. *Harper,* 33 Fed. 471 (S.D. Ohio 1887). With respect to the offense of misapplication, it is necessary to show that funds were actually withdrawn from the possession and control of a bank or converted in some form so that the bank was deprived of the benefit thereof. For cases pertinent to the offense of misapplication, see *United States* v. *Martindale,* 146 Fed. 280 (Kan. 1903); *United States* v. *Heinze,* 218 U.S. 532 (1910); *Mulloney* v. *United States,* 79 F. 2d 566, (1 Cir. 1935), *cert. den.,* 296 U.S. 658; *United States* v. *Mullins,* 355 F. 2d 883 (7 Cir. 1966), *cert. den.,* 384 U.S. 942

Paragraph 3 of 18 U.S.C. 1005 prohibits the making of false entries in any book, report, or statement of a Federal Reserve bank, member bank, national bank, or insured bank. The crime of making false entries includes any entry on the books of the bank which is intentionally made to represent what is not true or does not exist, with the intent required by the statute. The aim of the statute is to give assurance that upon an inspection of a bank,

public officers and others will discover in its books of account a picture of its true condition. *United States* v. *Darby*, 289 U.S. 224 (1933). See also *United States* v. *Giles*, 300 U.S. 41 (1937), and *Hargreaves* v. *United States*, 75 F. 2d 68 (9 Cir. 1935), *cert. den.*, 295 U.S. 759; *United States* v. *Kirkpatrick*, 361 F. 2d 866 (6 Cir. 1966); *United States* v. *Biggerstaff*, 383 F. 2d 675 (4 Cir. 1967).

Cases involving violations of 18 U.S.C. 656 and 1005 are usually reported to U.S. Attorneys by the regional administrators and regional counsel of the Comptroller of the Currency, by the Federal Reserve banks of the Federal Reserve System and by the Federal Deposit Insurance Corporation. After a bank examiner submits a report of possible violations, he considers the case out of his hands. If the U.S. Attorney desires a further investigation, he should refer the case to the local office of the FBI with a request for an investigation. U.S. Attorneys should address all correspondence regarding a criminal prosecution to the Criminal Division, Department of Justice, and not to the office employing the examiner.

U.S. Attorneys should not refrain from prosecuting an individual who is guilty of a violation of the banking laws solely because the officers of a bank do not desire prosecution, or because of the real or fanciful dangers to the bank. The fact that restitution is made in a case is a matter for the court to consider after a plea of guilty or a conviction, and has no bearing on the question of whether a criminal prosecution should be instituted except as it may affect the probability of a conviction. See *Duvall* v. *United States*, 94 F. 2d 611 (3 Cir. 1938).

Whenever the State first takes jurisdiction of a case involving irregularities on the part of officers or employees of State member banks or insured nonmember State banks, and promptly prosecutes and sentences a defendant, no Federal prosecution is necessary unless there is a clear miscarriage of justice in the State proceedings.

Cases involving embezzlement, misapplication, and false entries committed in Federal Credit Unions or any savings and loan association whose accounts are insured by the Federal Savings and Loan Corporation, are prosecuted under 18 U.S.C. 657 and 1006. Reports of irregularities in Federal credit unions are usually submitted to U.S. Attorneys by regional attorneys of the Department of Health, Education, and Welfare. The Federal Home Loan Bank Board submits reports to U.S. Attorneys of irregularities in financial institutions insured by the Federal Savings and Loan

Insurance Corporation. When a further investigation is desired in a particular case, the case should be referred to the local office of the FBI.

Bankruptcy

While the criminal provisions relating directly to bankruptcy are contained in 18 U.S.C. 151 et seq., your attention also is directed to the utilization of sections 1341 and 1343 of Title 18 United States Code, the mail and wire fraud statutes (particularly in instances involving false financial statements). *Dranow* v. *United States*, 307 F. 2d 545 (8 Cir. 1962).

Under 18 U.S.C. 3057(a), Referees, receivers, and trustees having reasonable grounds for believing that violations of bankruptcy law have been committed, or that an investigation should be conducted in such a matter are required to report the facts and circumstances to the U.S. Attorney. Under 18 U.S.C. 3057(b), the U.S. Attorney shall inquire into the facts and report thereon to the Referee, and if it appears probable that an offense has been committed, to present the matter to a grand jury, unless upon inquiry and examination he decides that an investigation is unwarranted, in which case he shall report the facts to the Attorney General for his direction.

Whereas the existence of possible violations may not ordinarily come to the attention of the U.S. Attorney, Section 3057(a) makes their report to him a mandatory requirement. However, reports made pursuant to section 3057 (a) are not necessary conditions precedent for the initiation of FBI investigations as frequently the U.S. Attorney will receive reports of possible violations from other sources. Compliance with Section 3057(a) is immaterial when prosecuting an offender for a bankruptcy offense. *Dean* v. *United States*, 51 F. 2d 481 (9 Cir. 1931), Collier on Bankruptcy (14th ed., Vol. 2, p. 1236).

In all cases the following procedure should be followed: Upon report of a possible bankruptcy violation, the U.S. Attorney shall notify the Referee that (1) either the case will be investigated if reported pursuant to Section 3057(a) or if not made pursuant to that section that a report of a possible violation has been received and will be investigated, or (2) if such a report is made pursuant to Section 3057(a) that the case has been closed or that a report has been received but the case has been closed. If the U.S. Attorney desires investigation, he should refer the case to the local office of the FBI with a request for investigation. At the

termination of such an investigation, the U.S. Attorney shall make a second report to the Referee stating that (1) prosecution has been initiated by return of an indictment or information, or (2) the case has been closed. No explanation of the conclusions reached need be made to the Referee. No reports will be made when the Referee himslf is the subject of the investigation. In the event prosecution is declined, either with or without investigation, cogent and reasonably detailed reasons for such declination together with specific references to the facts of the case shall be reported to the Attorney General (1) by report to the Federal Bureau of Investigation, or (2) by letter addressed to the Criminal Division of the Department of Justice.

Civil Rights Act of 1960

See Title 10.

Violations involving labor disputes.—By the Civil Rights Act of 1960, Congress considerably broadened the authority of the Department in the area of civil rights. A complete statement of the nature of the Act and the procedures to be employed with respect to alleged violations is set forth in Title 10 of the U.S. Attorneys Manual. Insofar as alleged violations of this act arise out of labor disputes or statutes now assigned to the Criminal Division, no investigation or prosecution should be authorized without prior authority from the Criminal Division.

Census Violations

The Bureau of the Census of the Department of Commerce conducts censuses and annual surveys of population, agriculture, manufacturing, and other subjects at various intervals. The censuses are taken pursuant to the Act of August 31, 1954, 68 Stat. 1012, which codified Title 13, United States Code. The annual surveys are authorized by Section 181 of Title 13.

The authority of Congress to enact legislation providing for the collection of data of the types mentioned and of other types called for by the Bureau's schedules of inquiries has been upheld by the courts in *United States* v. *Moriarity*, 106 Fed. 886 (2 Cir. 1901), and in *United States* v. *Sarle*, 45 Fed. 191 (1 Cir. 1891).

Violations may arise from the refusal of individuals or businesses to respond to questionnaires or to furnish census enumerators with information pertaining to the censuses and surveys. The penalty

provisions for violations by respondents are contained in Sections 221 through 225 of Title 13. Section 241 states what shall constitute prima facie evidence of an official request for information in any prosecution under Section 224.

Whenever the Department of Commerce feels that the facts surrounding a refusal to furnish desired census information justify prosecution, the file in each case will be forwarded by the Department to the appropriate U.S. Attorney. In all instances of refusal to answer census questionnaires affecting companies, businesses, religious bodies, and other organizations, the U.S. Attorney should make certain that efforts have been made to persuade the delinquent to comply with the Census Bureau's request. Prosecution should be instituted under 13 U.S.C. 224 only if the delinquent persists in refusal to supply the required census data.

If injunctions are sought to prevent the Bureau of the Census from requiring answers to one or more of the questions on the schedules of inquiries, the necessary facts will be submitted to the appropriate U.S. Attorney by the Department of Commerce.

Interception of Communications

Title III (wiretapping and electronic surveillance) of the Omnibus Crime Control and Safe Streets Act of 1968 (P.L. 90–351, 82 Stat. 211) makes even the endeavor to intercept wire or oral communications unlawful under most circumstances. Parallel provisions cover use and disclosure of intercepted communications. In addition, subject to narrow exceptions, the manufacture, distribution, possession, and advertising of devices primarily useful for the purpose of surreptitious interception of communications is prohibited. Prohibited devices and devices illegally used are subject to forfeiture. Section 605 of the Communications Act of 1934 (47 U.S.C. 605), as amended by Title III, now covers only radio communications and cases in which communications carrier personnel divulge an interstate or foreign wire communication.

Title III does not preempt provisions of local law protecting privacy. Thus many complaints will not require Federal action. Typical of these would be the marital dispute situation wherein a spouse acts without professional assistance or guidance, or the case of an employer who installs listening devices to monitor activities on his own premises. Normally complaints of divulgence and use of radio communications are also best handled under local laws which license certain activities or prohibit possession of certain types of receiving equipment.

Suppliers of equipment and professional interceptors present the primary interest for effective employment of Federal enforcement resources. Vigorous action against such persons by way of prosecution and forfeiture should go far toward protection of privacy in the nation.

Upon receipt of reliable information of possible violations of Title III, U.S. Attorneys should request the FBI to conduct an investigation. Following review of investigative results, the U.S. Attorney will advise the Bureau on the merits of a full investigation and Federal prosecution. In order to obtain uniformity in construction and application of the statute, authority to initiate prosecution is acted upon in the General Crimes Section based upon information supplied by the FBI and the U.S. Attorney.

Forfeitures

The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors and agents of the FBI are authorized and designated to make seizures of interception devices under 18 U.S.C. 2513. U.S. Marshals will accept custody of seized devices and are authorized and designated to perform the various duties with respect thereto under 18 U.S.C. 2513 and the customs laws that would be performed by the collector of customs or any other person in a like case arising under the customs laws.

Consumer Credit Protection Act (Loansharking)

All prosecutions under this Act (18 U.S.C. 891–896) must be submitted to the Organized Crime and Racketeering Section for approval prior to seeking an indictment.

An extortionate extension of credit is prohibited by Section 892(a) and may be proven by any and all means presently permitted in criminal prosecutions. However, Sections 892(b) and 892(c) are intended to provide alternative approaches.

Section 892(b) provides that, if four enumerated elements are established, a prima facie extortionate extension of credit has been shown. The provisions of subsection (b)(3) permitting the introduction of evidence of the victim's belief as to the defendant's reputation and evidence of the defendant's prior criminal acts create no new exception to the general rule that such evidence is admissible to show the state of mind of the victim of an extortion as well as the intent of the extorter. See, *Tolub* v. *United States,* 309 F. 2d 286 (2 Cir. 1962); *United States* v. *Sweeney,*

262 F. 2d 272 (3 Cir. 1959); *Carbo* v. *United States,* 314 F. 2d 718 (9 Cir. 1963). Reputation or "prior acts" testimony is, however, not admissible to show that the creditor did the acts charged or, in the case of reputation, to show that he had the requisite intent, and it is, therefore, advisable for the Government to insure that the trial court clearly limits the use to which the jury may put such evidence. Counsel should be alert to assist the court in the formulation of a proper instruction, both at the time of admission and when the case is presented to the jury. Indeed, careful consideration should be given to the question of whether reputation or "prior acts" testimony is truly necessary to successful prosecution, since the admission of such evidence is a matter of the court's discretion and may invite, at the least, close appellate scrutiny. The same rationale is applicable also to Section 894(b).

Subsection (c) would permit the Government to introduce in its case-in-chief, where no direct evidence of the debtor's belief as to the creditor's collection practices is available, evidence of the defendant's reputation in the community of which the debtor was a member if evidence has already been introduced either to show that the extension of credit involved was civilly unenforceable or to show that the rate of interest exceeded 45 percent. It is the Department's view that the use of reputation evidence in this fashion may well violate the defendant's right to a fair trial and that it may deprive him of his right to confront the witnesses against him, and you are therefore advised that no prosecution should be brounght under Title II where reliance must be placed on the method of proof provided in Sections 892(c) and 894(c).

As indicated in Section 896, Title II is neither intended to preempt the field of loansharking to the exclusion of State law nor to create a Federal crime of usury. Consequently, each potential investigation or prosecution should be judged in terms of the propriety of Federal intervention.

Contempt of Congress

See Title 9: Referral procedures.

Copyright Law

Sections 104 and 105 of Title 17, United States Code, Copyrights, provide criminal sanctions for certain violations of the Title (which has been enacted into positive law). Particularly, willful infringe-

ment for profit (Sec. 104) and fraudulent notice, removal, or alteration of notice of copyright (Sec. 105) are punishable as misdemeanors; the former section by fine and imprisonment, the latter by fine only.

The Federal Bureau of Investigation investigates possible criminal violations of the copyright statute and furnishes copies of the reports to the appropriate U.S. Attorneys and the Criminal Division. These matters often involve varied and complicated activities by several persons, activities in several judicial districts, and technical and difficult questions of law and policy. It is, therefore, requested that if prosecution is instituted in any case under Title 17, the Criminal Division be informed and kept closely advised of developments as they occur.

Counterfeiting and Forgery

Most of the criminal statutes relating to counterfeiting and forgery embodied in 18 U.S.C. 471–509 are primarily designed to safeguard obligations of the United States and foreign governments and also coins and currency. The U.S. Secret Service has investigative jurisdiction over violations of those laws. Reports of investigations are made directly to the U.S. Attorneys.

The voluntary discontinuance of the manufacture of paper money similar to genuine currency may be a satisfactory alternative to the prosecution of a reputable manufacturer.

The mere act of passing a single counterfeit note is not sufficient to create an inference that the passer had knowledge of its spurious nature, and, barring other indicia of scienter, prosecution is generally not warranted. *United States* v. *Ruffino*, 67 F. 2d 440 (2 Cir. 1933).

Title 18, United States Code, Sections 493 and 495, are useful in those cases in which the forged or counterfeit writing does not fall in the classes prescribed in the other sections. For example, the paper involved may not come within the definition of "obligation or security of the United States" as set out in 18 U.S.C. 8 but nevertheless may constitute a "writing" within the meaning of the term as used in Sections 494 and 495. Section 495 has been held to be applicable in prosecutions involving the forgery of indorsement on a Government check on the ground that the words "other writing" are sufficient to bring such conduct within the terms of the statute. *Prussian* v. *United States*, 282 U.S. 675 (1931).

Obstruction of Criminal Investigations

Section 1510 of Title 18 was added by the act of November 3, 1967 (81 Stat. 362) and protects informants and witnesses against intimidation or injury during the investigative stage of Federal criminal cases. Specifically section 1510 prohibits willful attempts, by means of bribery, misrepresentation, intimidation, or force or threats of force, to obstruct, delay, or prevent the communication of information to a criminal investigator concerning a violation of a Federal penal law. The section also proscribes injuring a person or his property because he or another had given such information to a criminal investigator. The law applies only to Federal investigators and State investigators are not included.

Section 1510 has application from the time of the commission of any Federal offense or conspiracy until the institution of a judicial proceeding. Scienter is an essential element of the offense, and no violation occurs if the person did not know that the investigator is a Federal investigator.

The term "criminal investigator" is defined as including any individual duly authorized by a Department, agency, or armed force of the country to investigate or prosecute violations of Federal criminal laws. This includes U.S. Attorneys and Assistant U.S. Attorneys as well as Federal criminal investigators.

Venue over offenses is governed by 18 U.S.C. 3237. Correspondence regarding the enforcement of the law should be addressed to the General Crimes Section of the Criminal Division, or to the Organized Crime and Racketeering Section if the offense involves a matter under the supervision of the latter.

Customs Law Violations

The principal statutes involved are included in Title 19, United States Code; 18 U.S.C. 541–552 and 21 U.S.C. 171 et seq.; criminal prosecutions usually are based under 18 U.S.C. 545 (smuggling, etc., of goods generally), 21 U.S.C. 174 (smuggling, etc., of narcotics), and 21 U.S.C. 176(a) (smuggling of marihuana). Cases involving the unlawful importation of narcotics, marihuana and dangerous drugs are supervised by the Narcotic and Dangerous Drug Section, other types of cases by the Administrative Regulations Section.

The Bureau of Customs primarily is charged with the enforcement of such laws. Violations are referred for prosecution directly

to the U.S. Attorney by the district director of customs, the Department receiving a copy. The criminal phase is reported immediately but forfeiture and civil penalty reports are withheld for a reasonable time so that the Bureau of Customs may receive and act on petitions for remission. Forfeiture and penalty actions are generally withheld by Customs while related criminal prosecutions are pending unless the running of the statute of limitations is imminent.

In general the chief objects of enforcement are to protect the revenue on imported articles and to prevent the smuggling into the United States of prohibited articles. The policy with respect to prosecutions is somewhat similar to that in internal revenue cases. Deliberate and willful frauds, especially when the violations may involve substantial losses of duty, or are part of the operation of a smuggling ring, or involve the clandestine importation of contraband, such as narcotics and marihuana intended for sale, should be prosecuted vigorously.

Importations, not only contrary to the customs laws and regulations but those contrary to the other laws of the United States or valid regulations, may subject the violators and the property involved to the criminal, civil penalty, or forfeiture sanctions of such laws. Thus any of these types of cases may be referred to the U.S. Attorney for prosecution or suit.

Compromise and Forfeiture

Criminal liability under the customs laws may not be compromised. However, compromise offers and petitions for remission of forfeiture of civil penalties may be considered by the Department in cases referred for prosecution or suit. The courts have no powers of remission in customs cases.

Property seized under the customs laws is referred to the U.S. Attorneys for disposition if the value therof exceeds $2,500 or a claim and a cost bond are filed. Illegally imported goods are subject to forfeiture under 18 U.S.C. 545, 19 U.S.C. 1460, 1497, and 1592, while 19 U.S.C. 1595(a) applies to vehicles, etc., used in importing or subsequent transportation, etc., of smuggled goods, as does the Contraband Transportation Act in certain instances.

Unless the forfeiture is remitted administratively or compromised, or the U.S. Attorney declines prosecution because of the insufficiency of the evidence, the forfeiture should be consummated through a filing of a complaint in rem, a copy of which should be

furnished to the Department. Such proceedings should conform as near as possible to those in admiralty. See 28 U.S.C. 2461, rules A, C, E, Supplemental Rules for Certain Admiralty and Maritime Claims, 28 U.S.C. 2d Supp. 1965–66.

Notice of Forfeiture Proceedings

Rule C(4) of the Civil Supplemental Rules, Admiralty and Maritime Claims, provides for notice by publication in any in rem action. No other notice is required. The provisions of the rule are applicable in forfeiture cases under the internal revenue, narcotics, and customs laws. However, U.S. Attorneys should insure that in all forfeiture actions instituted under the above laws any person known to have an interest in property subject to judicial forfeiture is also served with copies of the complaint, the warrant for the arrest of the property, and notice of the pendency of the action. Such notice should set forth the time within which any claimant must file his answer as set forth in subdivision (6) of the rule. This should be done personally if expedient, or by certified mail, return receipt requested, addressed to the last known address of such person.

Forms of complaint are set forth for guidance in Title 8, U.S. Attorneys' Manual.

When the value of the seized property is depreciating rapidly, its storage costs are on the rise, and the trial is not immediately foreseeable, the wisest course may be to secure the written agreement of all interested parties to:

1. Sell the property pursuant to court order and deposit the proceeds into court (see 19 U.S.C. 1612); or

2. Bond (vehicles) out pursuant to terms similar to those in 18 U.S.C. 3617(d).

If agreement cannot be reached among the parties, the U.S. Attorney can petition the court for an order to sell the property under supplementary admiralty Rule E(9)(b).

Civil Penalty Actions

Several provisions of the customs law provide that civil penalties equal to the value of articles illegally imported may be imposed upon those who were involved in the illegal activity. Under some provisions, such as 18 U.S.C. 545 and 19 U.S.C. 1592, the penalty is imposed as an alternative to forfeiture of the articles.

However, some sections such as 19 U.S.C. 1497 provide that the penalty may be imposed in addition to forfeiture of the articles. A civil penalty equal to the value of the articles may be imposed under 19 U.S.C. 1595a(b) upon those who are in any way concerned with the unlawful activity.

The civil penalty actions are civil in nature and are governed by the Federal Rules of Civil Procedure.

Before instituting a penalty action, the U.S. Attorney should ascertain whether the evidence is sufficient to sustain the action. If the financial status of the defendant is in doubt, the U.S. Attorney should have Customs furnish a financial report on the defendant.

Limitations of Actions

The limitation on bringing criminal actions under Title 18 is 5 years from the date of the offense. See 18 U.S.C. 3283. The limitation on bringing civil penalty and forfeiture actions is also 5 years but the period runs from the time the violation is discovered. See 19 U.S.C. 1621.

Complaints: Judgment

To avoid unnecessary expenses (storage charges) and depreciation of property, especially in vehicle seizure cases, complaints should be disposed of as expeditiously as the circumstances in the case may permit, without jeopardizing the criminal case or the rights of claimants. If there is a default, a default judgment or decree should be sought promptly.

Where property decreed forfeited has been requested for official use by the General Services Administration, such request should be reflected in the decree, a copy of which must be transmitted immediately to the General Services Administration, Washington, D.C.

The U.S. Attorney should keep the Department currently advised respecting the developments in important criminal, penalty, and forfeiture cases reported to him.

Disposition of Merchandise Forfeited

Forfeited liquor may not be sold but must be disposed of pursuant to 26 U.S.C. 5688. Contraband narcotics are administratively forfeited and disposed of by the seizing agency.

Merchandise forfeited under the customs laws shall be delivered to the district director of customs for sale unless it should be disposed of by the Marshal in order to meet the particular situation or the terms of the decree of forfeiture. The Bureau of Customs has a well established procedure for the sale of merchandise involved in violation of customs laws, and as a result is in a position to obtain the best possible price on public sale. Since the object of the delivery of the property to the customs authorities for sale is to realize better prices, this factor must be taken into consideration in each case.

U.S. Attorneys should, whenever possible, provide in the decree of forfeiture for the delivery of the merchandise to the district director of customs for sale or other appropriate disposition. The decree should take into account the terms of any accepted compromise offer or petition allowed by the Attorney General involving remission or mitigation of forfeiture or other special terms. U.S. Attorneys should be guded by specific requests from competent authority, such as the General Services Administration, the Department of Justice, or the district director of customs as to provisions respecting the disposition of the forfeited property which the court should be asked to include in its decree.

When the property is turned over to Customs, the Marshal should promptly transmit to the district director a statement of all proper charges in connection with the seizure, detention, and delivery of the property. If Customs requests the Marshal to retain the property at the place of storage, the Marshal will comply. Any additional charges after notification of the availability of the merchandise for delivery to Customs shall be charged against the proceeds.

Dependents Assistance Act of 1950

Prosecution for the fraudulent obtaining or receipt of allowances under the Dependents Assistance Act of 1950 should be instituted under 50 U.S.C. 2213(a), effective July 24, 1956, since that statute provides specific penalties for such violations. Specific penalties are not provided, however, for the fraudulent application for such allowances. Such violations should be prosecuted under the general criminal statutes, *viz,* 18 U.S.C. 286, 287, and 1001.

Investigations are made in these cases by the FBI. Complaints to U.S. Attorneys alleging fraud in connection with the obtaining of allowance benefits should be referred to the local office of the FBI for development. Reports of investigation are referred di-

rectly to the U.S. Attorney, copies being furnished to the Department.

Prosecution should be instituted in these cases by the U.S. Attorney without awaiting authority from the Department. Where the only offender is an enlisted man, subject to military jurisdiction, he should not be prosecuted in the civil courts, except in aggravated cases. The facts developed should be referred to appropriate military authorities for courts-martial or other disciplinary action.

The Career Compensation Act (37 U.S.C. 403) provides for increased quarters allowances for officer and enlisted personnel based upon dependency. Cases have been reported involving military personnel who falsely applied for quarters allowances based upon dependency to which they were not entitled under the act. Where the military offenders are on active duty, disciplinary action should be left to appropriate military authorities rather than prosecution of such offenders in civil courts. Prosecution for violations of this section, reported after termination of active military service, should be instituted under 18 U.S.C. 287 and/or 1001.

Fair Labor Standards Act

Investigations of criminal cases arising under 29 U.S.C. 215, 216(a) are conducted by the Wage and Hour Division of the Department of Labor.

Complaints of violation of the Act should be referred to the Administrator of the Wage and Hour Division of the Department of Labor.

Criminal cases, including criminal contempt for violation of injunction decrees, arising under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201–219, particularly Sections 215 and 216 will be referred directly to U.S. Attorneys by the Department of Labor. These cases are deemed an essential part of the administration and enforcement of this beneficial statute, which plays an important role in the economy of the country.

The direct referral procedure covers all criminal cases arising under the above mentioned statute, except those on which the Department of Labor may desire initial examination and review by the Criminal Division. In such cases, the Criminal Division will receive the referral from the Department of Labor and, after review, will transmit the case to the appropriate U.S. Attorney if the facts warrant. (The Department of Labor itself handles the civil cases under the Act (29 U.S.C. 216(c), 217).)

The Department of Labor will furnish the Criminal Division copies of its initial referral letters and of all subsequent correspondence with the U.S. Attorneys in these cases. Copies of all correspondence from U.S. Attorneys to the Labor Department should be furnished to the Criminal Division. The Division will follow developments in these cases and exercise its supervisory jurisdiction.

The Department of Labor will bring to the attention of the Criminal Division any Fair Labor Standards Act case which is deemed unusually important or which may involve unusual issues or problems. Nevertheless, it is requested that the U.S. Attorneys, in their processing of these direct referral cases, bear in mind the need for keeping the Criminal Division informed of major criminal matters and of important questions or developments in criminal cases pending in their offices. The U.S. Attorneys should, of course, feel free to request advice and assistance from the Criminal Division on any problem which may arise. In any event, close cooperation with the regional attorney of the Department of Labor is strongly recommended.

Since Fair Labor Standards Act criminal cases are thoroughly investigated before reference for prosecution and since the overwhelming proportion of these cases are disposed of on pleas of guilty, the Department feels that, except in unusual circumstances, it is desirable to proceed by information. Such cases should not be held for any considerable time in the office of a U.S. Attorney. Prompt action in filing an information not only has the effect of deterring continued violations, but also prevents the case from being stale when it reaches the trial stage, thus enhancing the success of prosecution.

In the trial of these cases it should be borne in mind that the word "wilfully" in the statute does not mean with bad purpose or evil motive. It is sufficient if the act was done knowingly and intentionally, as distinguished from accidentally. *Hertz-Driveurself Stations* v. *United States,* 150 F. 2d 923, 929 (8 Cir. 1945); *Nabob Oil Co.* v. *United States,* 190 F. 2d 478, 479 (10 Cir. 1951), *cert. den.,* 342 U.S. 876.

U.S. Attorneys may call upon the regional attorney of the Department of Labor for the region covering their respective districts for such further investigation or for such assistance in preparing the case for trial as they may deem necessary.

The prosecution of cases under the acts shall be conducted by U.S. Attorneys and their regular assistants. The designation of

special assistants will not be made, except in very unusual cases, in which event it will be necessary that strong justification be made by the U.S. Attorney for such appointment. Where it appears that the Government's interest cannot be served adequately unless a special assistant is appointed, such an appointment will be made. However, it must be understood in any such instance that the control of the litigation must in fact remain in the U.S. Attorney to the same extent and with like responsibility as if assigned to a regular Assistant U.S. Attorney.

These instructions are not intended to prevent full utilization of the services of Labor Department attorneys where necessary for adequate preparation and prosecution of cases under the Act. Labor Department attorneys may appear at the counsel table to give such assistance to the U.S. Attorney as may be possible in the average case. The U.S. Attorneys and their regular assistants will, however, conduct the actual prosecution of the cases.

It is the policy of the Department, in all Fair Labor Standards Act cases where appropriate, that every reasonable effort be made to secure restitution to those employees who have been deprived of their lawful wages by the misconduct of the defendants. In this connection, the court should be urged to make restitution a condition of the sentence imposed following conviction (upon a plea or after trial). In all Fair Labor Standards Act cases involving violations of the minimum wage or overtime provisions, or both, such violations involve conduct which results in a civil liability on the part of the employer, a liability which the Department of Labor could seek civilly to enforce on behalf of the individually aggrieved employees under 29 U.S.C. 216(c). It is believed proper and highly appropriate to urge such restitution at the time of sentencing; see 18 U.S.C. 3651.

It is, of course, the general policy applicable to all criminal cases under the supervisory jurisdiction of the Criminal Division that no indictment or information shall be dismissed as to any one or more defendants without prior authority. See U.S. Attorneys Manual, this Title, under "Dismissals." Thus, with respect to Fair Labor Standards Act cases, as well as other criminal cases, no prosecution may be disposed of on an arrangement or agreement to dismiss as to certain defendants and accept pleas as to others, without the express consent of the Criminal Division. The Division will not approve any request for authorization to dismiss based upon such an arrangement or agreement in the absence of unusual circumstances requiring such action. Particularly, the

Criminal Division will not approve the disposition of a case based upon acceptance of a plea of a corporate defendant and dismissal as to the individual defendants, unless such disposition is based on materially more than an effort to avoid litigation.

Forms of indictments and informations, briefs, and opinions on questions of law which have arisen in previous prosecutions of such cases will be furnished upon request.

False Statements in Applications for Federal Employment (18 U.S.C. 1001)

The applicability of 18 U.S.C. 1001 to the making of false statements in applications for Federal employment, and related personnel documents, is well established. See *United States* v. *De Lorenzo*, 151 F. 2d 122 (2 Cir. 1945). In recent years, however, the number of cases of this type received in the Department has increased considerably. While the Civil Service Commission forms required to be executed by applicants, for example, Forms 171 and 173, contain numerous interrogatories, matters of concern to the Criminal Division usually involve false answers to questions addressed to prior convictions and certain other criminal history, educational background, and employment history. False answers to questions relating to the membership in Communist or other subversive organizations are within the jurisdiction of the Internal Security Division. See also Title 9: False Statements.

Cases involving falsification of applications for Federal employment or similar documents, are received by U.S. Attorneys either by referral from the Department after review in the Criminal Division, or by direct referral from other agencies of the Government or the FBI. Cases of this type received originally in the Department are examined in the Criminal Division and, if the facts indicate the necessity for criminal prosecution, are transmitted to U.S. Attorneys for prosecutive action. It is the Department's policy to transmit to U.S. Attorneys for criminal action cases of this type which appear to involve willful falsification or concealment of facts material to the applicant's employment with the Federal Government, and where these circumstances are present vigorous prosecution is urged.

Clearance with the Department prior to taking action in cases of this type received by U.S. Attorneys directly from other agencies of the Government, or from the FBI, is not required, although

the Department should be promptly informed of the disposition made in each case.

False Reports as to Destruction of or Attempts to Destroy Aircraft, Motor Vehicles, and Facilities

Chapter 2 of Title 18 was added by the Act of July 14, 1956 (70 Stat. 538) and is concerned with the destruction of aircraft and motor vehicles under certain conditions. Section 35 imposes a civil penalty of not more than $1,000 on the conveyance of false information concerning an attempt or alleged attempt to do any act prohibited by Chapter 2 (aircraft and motor vehicles), Chapter 97 (railroads), or Chapter 111 (shipping) of Title 18. The section also makes it a felony to convey such information willfully and maliciously, or with reckless disregard for the safety of human life.

It is pointed out that the false report must involve an attempt or an alleged attempt to do that which, if the report were not false, would be a violation of Chapter 2, Chapter 97, or Chapter 111 of title 18. The essence of the conveyance element is the impression the words spoken would create in the minds of reasonable persons. The civil penalty should be utilized especially where pranksters are involved—where criminal convictions would be difficult to secure. As a matter of practice, the maximum penalty should be sought. (See Department Memo No. 440, dated November 9, 1965).

Cases involving false reports are usually referred directly to the U.S. Attorney by the FBI.

Where the U.S. Attorney is confronted with a case presenting a novel legal, factual, or policy question, he should communicate with the Criminal Division.

False Statement to Federal Investigators

The generality of the language of 18 U.S.C. 1001, prohibiting the willful making of any false, fictitious, or fraudulent statement or representation in any matter within the jurisdiction of any department or agency of the United States, seemingly makes the statute applicable to any false statement knowingly and willfully made to an agent or investigator of the Government including agents of the Federal Bureau of Investigation. In fact, however, there is considerable conflict among the circuits concerning the application of 18 U.S.C. 1001 to cases of this type. While some indictments under this statute have been sustained, see, e.g. *United*

States v. *Adler*, 380 F. 2d 917 (2d Cir. 1967), *cert. den.* 389 U.S. 1009 (1967), others have been thrown out. See *United States* v. *Stark*, 131 F. Supp. 190 (D. Md. 1955); *United States* v. *Levin*, 133 F. Supp. 88 (D. Colo. 1953); *United States* v. *Davey*, 155 F. Supp. 175 (S.D.N.Y. 1957); *Friedman* v. *United States*, 374 F. 2d 363 (8th Cir. 1967). The Department wishes to avoid adding to this list of restrictive precedents. Therefore, caution should be exercised in bringing section 1001 cases based upon false statements or representations made to an investigator of a department or agency.

For this reason, and in order to insure uniformity in the application of this statute, U.S. Attorneys are hereby instructed that, before authorizing the filing of a complaint or presenting any matter to a grand jury relating to a violation of 18 U.S.C. 1001 based upon any false statement or representation, oral or written, volunteered or otherwise, made to any agent or investigator of any department or agency of the Government, permission to so proceed should first be obtained from the appropriate Assistant Attorney General having jurisdiction of the case in which the false statement was made.

Prior approval from the Internal Security Division will continue to be necessary before initiating any prosecution or declining any prosecution under 18 U.S.C. 1001 involving false statements relating to internal security matters. (See Title 9, U.S. Attorneys Manual).

Federal Election Laws

Primary responsibility for the conduct of elections and the determination of the qualifications for voting rests with the several States. There are, however, a number of Federal criminal statutes relating to elections. These statutes prohibit certain election activities, including the following:

Solicitation by anyone of political contributions from persons receiving Federal relief money (18 U.S.C. 604) or from Federal employees in a Federal building (18 U.S.C. 603) or by a Federal employee, including Senators and Representatives, from any other Federal employee (18 U.S.C. 602).

Solicitation, acceptance, or receipt of a bribe to vote or to refrain from voting for or against a candidate for Federal office, except at a primary election (18 U.S.C. 597).

Intimidation of a voter to interfere with his right to vote for candidates for Federal office (18 U.S.C. 594).

Use of official authority by persons employed in connection with any activity financed in part by Federal loans or grants to affect the nomination or election of candidates for Federal office (18 U.S.C. 595).

The promise to any person by a candidate for Federal office of any position or employment in exchange for support of his candidacy (18 U.S.C. 599).

Bribery of a voter by the promise of appointment to a position made possible for any act of Congress (18 U.S.C. 600) or threatening to deprive a voter of employment provided for by Federal relief funds (18 U.S.C. 598, 601).

Furnishing lists for political purposes of the names of persons receiving compensation, employment, or benefits provided for by Federal relief funds (18 U.S.C. 605).

Making of a political contribution by persons or firms, except corporations, entering into certain contracts with the United States and the solicitation of political contributions from such persons or firms (18 U.S.C. 611).

Publication or distribution of anonymous literature relating to or concerning a candidate for nomination or election to Federal office (18 U.S.C. 612).

The contributions during 1 year of an aggregate amount in excess of $5,000 to a candidate for nomination or election to Federal office or a committee or other organization advocating the nomination or election of such a candidate (18 U.S.C. 608).

Purchase of goods or commodities the proceeds of which will benefit a candidate for nomination or election to Federal office or a committee or other organization advocating the nomination or election of such a candidate (18 U.S.C. 608).

Contributions or expenditures by national banks and corporations chartered by authority of Congress in connection with any election; and contributions or expenditures by all other corporations and labor organizations in connection with the nomination or election of candidates for Federal office (18 U.S.C. 610).

Receipt or expenditures by a political committee, defined in section 591, of more than $3 million during any calendar year (18 U.S.C. 609).

Sections 241 and 242 of Title 18 protect the rights of citizens which are secured by the Constitution and laws of the United States, including the right to vote. The Civil Rights Division enforces these sections against deprivations of rights generally. The

Criminal Division is responsible for protection of the right to vote, except in cases involving racial discrimination, which are administered by the Civil Rights Division (see "Title 10").

Federal candidates and political committees are required to file statements and to keep accounts of contributions and expenditures in accordance with the provisions of sections 241–248 of Title 2, United States Code.

Investigation and Prosecution

The Federal Bureau of Investigation conducts preliminary investigations into all complaints involving possible violations of the election laws without the necessity of prior Departmental authorization. If a complaint comes first to a U.S. Attorney, he should refer it promptly to the FBI and advise the Criminal Division. No prosecution under the election laws, including presentation to a grand jury, is to be undertaken without the prior approval of the Criminal Division.

Federal Food, Drug, and Cosmetic Act

The Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301 et seq., is designed to protect the consuming public from the dangers of foods, drugs, devices, and cosmetics which are adulterated or misbranded within the meaning of this act. Such violations are investigated by the Food and Drug Administration of the Department of Health, Education, and Welfare, and handled according to the procedures discussed immediately below. If the violation is one involving a depressant or stimulant drug, the applicable statutory authority is found in the Drug Abuse Control Amendments of 1965, and the proper procedures to be followed are discussed in the section of this Manual dealing with narcotic, dangerous drug, and marihuana violations.

Referral of Cases

The Food and Drug Administration through the Assistant General Counsel, Food, Drug, and Environmental Health Division, Department of Health, Education, and Welfare, refers requests for legal action (criminal, seizure, or injunction) directly to the U.S. Attorney. Certain seizure requests relating to contaminated foods or other inherently dangerous substances may emanate from the Food and Drug Administration field offices.

Procedures upon Referral

Upon receipt of a referral for prosecution or suit from the Assistant General Counsel, U.S. Attorneys should proceed as follows:

A. *Criminal Cases.*—As in all criminal cases the U.S. Attorneys are responsible for determining whether the matter warrants prosecution, and for selecting the proper defendants against whom to proceed. Naturally, consideration is given to the recommendations of the agency, but the final responsibility is that of the U.S. Attorney. Neither intent nor willingness is an element of the offense under this Act; prosecution will lie against all those who have a responsible share in the furtherance of the transactions constituting the offense even though consciousness of wrongdoing may be totally lacking. (*Dotterweich* v. *United States,* 320 U.S. 277 (1943).) In practice, however, only those individuals who can be shown to have had a proximate relationship to the violation should be included as defendants. It should be noted that prosecution of a corporation without naming the responsible individuals is not favored; such individuals should be included as defendants whenever they can be identified and evidence of their participation obtained.

The initial request from the Assistant General Counsel should be examined critically to insure that sufficient evidence is available to support the proposed charges, copies of which will normally accompany the referral. Prosecution should not be commenced unless and until the precise nature of the charge is clearly understood, particularly where medical or other scientific issues are involved. If determination of the issues will depend on the testimony of expert witnesses, the U.S. Attorney should satisfy himself that such testimony will be unequivocal and convincing. If deemed advisable, a summary of testimony which experts could be expected to supply may be requested from the agency. Such summaries, it should be understood, will not consist of verbatim statements by the actual experts who will be available to testify since such witnesses are usually retained only when trial is imminent. The agency's own experts, however, should be able to provide summaries of predictable testimony based upon the information available to them, and should be able to forewarn of the possible existence of contrary opinions.

Generally, criminal prosecution is recommended when other regulatory measures would be inadequate. In every case the U.S. Attorney should be satisfied that criminal prosecution is necessary

to redress the infraction or to deter further violations. It should be noted that whereas a first offense under this act is in most instances a misdemeanor, a subsequent offense committed after conviction has become final is a felony.

Under this statute, before referral of a case for criminal prosecution the prospective defendant is accorded an opportunity to state his views either orally or in writing (21 U.S.C. 335). The agency's referral letter should contain a summary of this statement and this summary should be carefully examined for indications of possible defenses and for possible difficulties concerning the prosecution of the case. Copies of any written communications submitted by the defendant, or of the administrative officer's complete interview report, may be secured from the agency in those cases where it is deemed necessary.

B. *Forfeiture actions.*—Forfeiture actions should be commenced as soon as possible, particularly where continued distribution of the article may threaten the health of the public since seizure may be effected only under the authority of a warrant of arrest in rem [unless the article to be seized is one within the scope of the Drug Abuse Control Amendments of 1965 in which case seizure may precede the filing of the complaint. See separate discussion below]. Where, because of the nature of the article or of the violation, no immediate threat to health is presented, more deliberate consideration may be given to the nature and quantity of the evidence available to support the action. In such instances personal consultation with the Food and Drug Administration representative in the field may be desirable before commencing suit. Where adulteration is charged, e.g., food contaminated by filth, bacteria, or pesticides; drugs which are subpotent or which have not been manufactured in accordance with good manufacturing practices, etc., the action should be filed at once. If the violation involves no immediate threat to the public health and the harm involved is solely of an economic nature the U.S. Attorney should determine whether the agency has exhausted all alternative measures, short of litigation, to effectively remove the article from the channels of commerce.

C. *Injunctions.*—Requests for injunction actions are usually made only when the defendant has repeatedly committed serious violations of the Act and has exhibited a recalcitrant attitude. Where the physical hazard involved is too serious to permit any continuance of the violation a temporary restraining order should

be secured. The recommendations of the agency in this respect should be accorded great weight.

Preparation for Trial

The staff of the Assistant General Counsel, Food, Drug, and Environmental Health Division, Department of Health, Education, and Welfare, is available to assist in the preparation for trial of cases arising under the Federal Food, Drug, and Cosmetic Act. Where pretrial discovery proceedings are undertaken, as in most contested civil cases, the U.S. Attorney will receive prepared interrogatories and/or requests for admissions. Many cases can be disposed of by motions for summary judgment based upon the results of the discovery process. The handling of depositions is primarily the responsibility of the U.S. Attorney. The Criminal Division should be consulted if fulfilling this responsibility would entail travel outside the district, or other substantial inconvenience or difficulty.

When a firm trial date has been set, a trial memorandum including proposed instructions is usually prepared and sent to the U.S. Attorney. It is obvious that the agency must assume the burden of locating expert witnesses willing to testify for the Government; this does not, however, relieve the U.S. Attorney of his responsibility for insuring that such witnesses will be available for trial, and that their testimony will be adequate to support the Government's case. For this purpose, early liaison with the attorney attached to the staff of the Assistant General Counsel is highly desirable to insure that adequate preparation for trial is being undertaken.

Ordinarily the U.S. Attorney should conduct all communication with counsel for the defendant or claimant. However, there may be times when it would be more efficient for the Assistant General Counsel's staff to communicate directly with counsel concerning the more technical aspects of the case, especially where terms of a consent decree providing for the reconditioning or for the relabeling of a seized product must be resolved. The agency should not establish such direct contact unless and until the U.S. Attorney has been advised and has given his consent to that procedure. In any event, the U.S. Attorney must insure that he is kept informed of all developments and is in control of the case.

Trial

Agency counsel will generally be available to assist at trial and such assistance should be freely sought. It must be understood

that agency counsel cannot participate in the actual conduct of the trial unless specially appointed by the Attorney General to do so. This blanket prohibition concerns the making of opening statements, summations, arguments, motions, objections, and the questioning of witnesses. There is no objection however to agency counsel appearing at counsel table to render assistance and to give advice, and such counsel may respond to an inquiry from the court if called upon to furnish information within his special area of competence. These limitations are not intended to prevent full utilization of the services of the agency attorney whose assistance is frequently invaluable, but are presented to clearly delineate the respective areas of responsibility assigned by statute for the handling of litigation (28 U.S.C. 516).

Dismissal Where Goods Not Available

U.S. Attorneys may dismiss condemnation suits without prior authority where they are informed that the products are not available for seizure.

Forms in Seizure Actions

Set out in the Appendix (Forms 5, 6, 7, and 8) are examples of the forms which should be used in connection with the filing of libels of information, claims, consent decrees of condemnation, and bonds. The bond form should be used in all situations where goods are released for salvaging or reconditioning after the entry of a decree of condemnation pursuant to 21 U.S.C. 334(d). In some instances, it will be necessary to alter the forms of decree of condemnation and the complaint in rem to fit the particular circumstances, but an attempt should be made at all times to adhere as closely as possible to the recommended forms.

Forwarding Copies of Pleadings and Complaints

In the event any injunction, in rem complaint, criminal information or indictment forwarded to the U.S. Attorney by the Department of Justice or by the Department of Health, Education, and Welfare is changed in any fashion, or if the pleading is prepared by the U.S. Attorney, a copy of the document as filed together with the date of filing should be forwarded to the Department, the Department of Health, Education and Welfare, and the local station of the Food and Drug Administration. In addition, the

U.S. Attorney should forward to the Department all answers and subsequent pleadings in civil cases, all motions in bar and those attacking the indictment or information in criminal cases, and copies of all correspondence with the Assistant General Counsel, Food, Drug, and Environmental Health Division, Department of Health, Education, and Welfare.

Removal of Forfeiture Actions

The removal of a seizure action to another district for trial is authorized only as provided for in Section 334(a) and 28 U.S.C. 1404(a) has no application to seizure actions. *Clinton Foods, Inc.* v. *United States*, 188 F. 2d 289 (4 Cir. 1951), *cert. den.*, 342 U.S. 825; *Fettig Canning Co.* v. *Steckler*, 188 F. 2d 715 (7 Cir. 1951), *cert. den.*, 341 U.S. 951.

The Department should be notified immediately of all requests or motions made for the removal of seizure actions.

Post-Seizure Samples

Orders authorizing the taking of postseizure samples pursuant to 21 U.S.C. 334(c) should be so drawn as to allow both the Government and the claimant an opportunity to take a like sample at the same time, in the presence of a representative of the Department of Health, Education, and Welfare. Frequently, an attempt is made to obtain a stipulation from a U.S. Attorney that the Government's case will stand or fall on the analytical results of a postseizure sample. Such procedure is not authorized by the Act, and a stipulation to that effect should not be entered into.

Disposition of and Payment for Samples

Samples which U.S. Attorneys have on hand and which have been used in the prosecution of a case have no material value in the opinion of the local officials of the Department of Health, Education, and Welfare, they may be destroyed or such other disposition made of them as the U.S. Attorney deems proper. Where the local officials of the agency believe the samples are of material value, they should be shipped to such officials. If a claimant in whose favor a forfeiture action is resolved demands payment for samples taken for the use of the Government after seizure, and files a claim with the U.S. Marshal, the claim should be transmitted to the Department of Health, Education, and Welfare.

Procedure for Disposing of Condemned Product

The statutory procedure set out in 21 U.S.C. 334(d) is the exclusive method of dealing with any product that is proceeded against by libel for condemnation under the Act, and in every case a decree of condemnation must first be entered before any disposition can be made of the article seized. *In re United States*, 140 F. 2d 19 (5 Cir. 1943).

The person petitioning as owner for the release of the product must appear in the proceeding as claimant and establish his ownership of the goods. The District Court may provide in its discretion, in the decree or by subsequent order after entry of a decree (except with respect to articles which may not, under 21 U.S.C. 344 or 355, be introduced into interstate commerce), for the salvaging of the article by the claimant. The decree or order may provide that the claimant, upon the furnishing of a good and sufficient bond conditioned that the article shall not be sold or disposed of contrary to the provisions of the Act or the laws of any State in which sold, and the payment of costs, may take back the article condemned or some portion thereof and bring it into compliance with the Act, or denature it so that it may be used for animal feed, fertilizer, or other useful purpose, under the supervision of the Department of Health, Education, and Welfare. Costs should include all storage charges incurred by the Government. The bond should be in an amount approximately twice the value of the article or portion thereof which is released for salvaging. The decree or order may direct, if the claimant so requests and such procedure is feasible, that the commodity be destroyed and the containers and cartons turned over to the claimant.

Whether the seized article may be released to the claimant under this section is in the sound discretion of the trial court.

A decree or order may provide that the condemned product be disposed of after it has been denatured under the supervision of the Department of Health, Education, and Welfare. This should not be done, of course, if the cost of the denaturing and sale will exceed the amount to be derived by the Government therefrom. In some instances, the cost may be lessened appreciably by requiring the purchaser, if the condemned product is sold, to denature the product at his own expense under the supervision of the Department of Health, Education, and Welfare.

In all instances, the condemned product should be disposed of as directed in the decree or subsequent order, and this direction

should be specific. For example, the decree or order should not provide that the condemned product be destroyed by the U.S. Marshal or disposed of otherwise pursuant to the Act. If the product is to be destroyed because it cannot be salvaged for any useful purpose, the decree should so state. If the product is to be turned over to a public or charitable institution, the decree should name the institution and the purpose to which the product is to be put. (If necessary an amendment to the decree should be obtained.) In this connection, it should be noted that in no event should the condemned product be turned over gratis to any private individual or concern.

Expert Witnesses

When the services of an expert witness are needed, the U.S. Attorney should communicate by letter or telegram with the Department of Health, Education, and Welfare. The U.S. Attorney should inform the assistant general counsel of that Department by letter or telegram whenever inspectors or other personnel of that Department are needed in any capacity in connection with litigation under the Federal Food, Drug, and Cosmetic Act, instead of issuing subpoenas for them. The fees of expert witnesses are paid by that Department.

Reports on Termination of Cases

The Department should be furnished (and a copy forwarded to the Department of Health, Education, and Welfare and the local station of the Food and Drug Administration) with the name of the claimant or defendant, if any; the plea entered by claimant or defendant; the verdict, decision, or judgment and date thereof; if a criminal case, the recommendation, if any, made by the U.S. Attorney with respect to punishment, and the sentence and date thereof; and if a condemnation action, a copy of the judgment and decree of condemnation and date thereof, together with a statement of the disposition of the property seized. Where a condemnation action has been dismissed because the goods were not available for seizure, a copy of the order of dismissal should likewise be transmitted to the Department of Justice, the Department of Health, Education, and Welfare, and the local station of the Food and Drug Administration.

Keeping Res Intact for Appeal

In the event a trial court decides a condemnation action ad-

versely to the Government and enters an order directing that the product proceeded against be returned to the claimant, the execution of such order must be stayed or the subject matter of the suit will no longer be present and the Government's right of appeal will be lost automatically. Consequently, every step should be taken to keep the goods intact in the possession of the Marshal in the event of a decision adverse to the Government, pending the determination of the Solicitor General with respect to the taking of an appeal. If necessary, a protective notice of appeal should be filed pending such determination.

Federal Trade Commission Act Civil Penalty Cases

Every civil penalty case for violation of a cease and desist order under the Federal Trade Commission Act (15 U.S.C. 45(1)) where foods, drugs, devices, or cosmetics are involved is submitted by the Federal Trade Commission to the Criminal Division for review. If the file appears adequate and the matter warrants action, it is forwarded to the appropriate U.S. Attorney. The U.S. Attorney should promptly furnish the Criminal Division and the Commission copies of all pleadings and advise as to developments, the date on which the complaint was filed, the docket number, the trial date, the position taken by defendant, and any proposed settlement offer that may be received. It is the policy of the Criminal Division not to dispose of these cases without entry of judgment. The Government is entitled to costs as a matter of right, 28 U.S.C. 1918(a).

Firearms

The Gun Conrol Ac of 1968 (P.L. 90–618) is the primary Federal firearms control law. Title I of this Act, embodied in 18 U.S.C. 921–928, concerns commercial transactions in, and transportation and importation of, firearms and ammunition to private individuals, including all mail order sales and interstate sales, subject to the following exceptions: (1) Where the purchase is lawfully made in the State of the purchaser's residence and therefore intrastate in nature; (2) where the sale is consummated in a State immediately contiguous to the purchaser's State of residence and sale and possession accord with laws of the respective States; (3) where a firearm is acquired by bequest or intestate succession; (4) where a firearm is loaned or rented temporarily for sporting purposes; (5) where a nonresident purchases a fire-

arm while engaged in sport shooting in order to replace a lost, stolen, or inoperative weapon. Interstate transactions between federally licensed firearms collectors, dealers, manufacturers, and importers are likewise exempt (18 U.S.C. 922(b)). However, in all commercial transactions permitted by this law, the transferee must submit a sworn statement containing specific information concerning his identity and eligibility to possess. All such sales are subject to a seven-day waiting period prior to delivery where the purchase is not made in person (18 U.S.C. 922(c)).

Under 18 U.S.C. 922 (a), (b) it is unlawful for a person to ship, transport, or receive any firearm or ammunition in interstate or foreign commerce if he is under indictment for, or has been convicted of, a crime punishable by imprisonment for a term exceeding 1 year, is a fugitive from justice, unless or is addicted to narcotics, or is a person who has been adjudicated as a mental defective or committed to a mental institution. Moreover, it is unlawful for any Federal licensee to sell or otherwise dispose of a firearm or ammunition to any such person (18 U.S.C. 922(d)).

The Gun Control Act sets forth additional restrictions on manufacturers, dealers, and importers of firearms and ammunition. Title 18, United States Code 923, provides that no person may engage in such a business unless he has received a license to do so from the Secretary of the Treasury. This provision applies with equal force to enterprises of an intrastate or interstate character. In addition, a separate license category provides for a "collector's license" whereby hobbyists who acquire, hold, or dispose of firearms or ammunition constituting curios or relics only, may exempt themselves from the restrictions imposed on interstate transactions in firearms (18 U.S.C. 923(b)). All licensees are subject to rigorous recordkeeping requirements as to any firearm or ammunition produced, shipped, imported, received, sold, or otherwise disposed of (18 U.S.C. 923(g)). All licensees are specifically prohibited from selling or delivering any firearm or ammunition to any individual who the licensee knows or has reasonable cause to believe is less than eighteen years of age. In addition, no weapon other than a rifle or shotgun may be sold to a person who the licensee knows or has reasonable cause to believe is less than 21 years of age (18 U.S.C. 922(b)(1)). Pursuant to 18 U.S.C. 922(b)(2) it is also unlawful for a licensee to sell or deliver a firearm or ammunition where the purchase or possession of that article by the purchaser would violate any State law or ordinance applicable at the place of delivery, sale, or other disposition. The

Gun Control Act places stringent limits upon the weapons which may be imported into the United States by a licensee (18 U.S.C. 925(d)).

Title I of the Gun Control Act of 1968 places additional restrictions on the transportation of weapons in interstate or foreign commerce by common carrier (18 U.S.C. 922 (c) and (f)), the interstate transportation and sale of destructive devices, machine guns, or sawed-off weapons (18 U.S.C. 922 (a)(4) and (b)(4)), the interstate transportation of a stolen firearm or stolen ammunition or the receipt, sale, concealment or storage of such a weapon which is part of interstate or foreign commerce (18 U.S.C. 922 (i) and (j)).

Title 18, United States Code, Section 924(a), imposes a maximum penalty of $5,000 fine and 5 years' imprisonment on anyone who violates any of the foregoing provisions or who makes a false statement or representation with respect to information required by the statute. Under Section 924(b), a penalty of not more than $10,000 or 10 years' imprisonment, or both, is provided where a person ships, transports, or receives a firearm or ammunition in interstate or foreign commerce with intent to commit therewith an offense punishable by imprisonment for a term exceeding 1 year or with knowledge or reasonable cause to believe that such an offense is to be committed therewith. Section 924(c) provides for a sentence from 1 to 10 years for a first offense, and a sentence of from 5 to 25 years for a subsequent offense, where a person uses a firearm to commit, or carries a firearm unlawfully during the commission of, a Federal felony. In the case of a second conviction the court may not suspend the sentence or give the defendant a probationary sentence. Title 18, United States Code, Section 925(a–c) sets forth certain limited exceptions from the disabilities of the Gun Control Act.

Title II of the Gun Control Act, incorporated in 26 U.S.C. 5801–5873, amends the National Firearms Act of 1934 (Ch. 53 of the Internal Revenue Code). The provisions of the revised National Firearms Act extend only to machine guns, sawed-off rifles and shotguns, mufflers and silencers, so-called "conversion kits" for turning other weapons into machine guns, combinations of machine gun parts, smooth bore pistols and revolvers designed to fire shotgun shells, combination rifles and shotguns and destructive devices such as explosive or incendiary bombs, grenades, mines, rockets, missiles, as well as large caliber weapons including mortars, antitank guns and artillery pieces (26 U.S.C. 5845(a)).

However, antique weapons of this sort are exempt from the provisions of this statute.

The National Firearms Act imposes a special occupational tax on every person engaging in business as an importer, manufacturer, or dealer of the included firearms (26 U.S.C. 5801). A second tax is imposed upon the transfer (26 U.S.C. 5811-5812) or "making" (26 U.S.C. 5821–5822) of a firearm by persons not subject to the special occupational tax. In addition to the payment of that tax, prospective makers or transferors must also secure formal authorization from the Secretary of the Treasury for the contemplated making or transfer.

The revised National Firearms Act establishes a national registry for all firearms covered by its provisions. Title 26, United States Code, Section 5841, makes it incumbent upon each manufacturer, importer, and maker of an included firearm to register each firearm he manufactures, imports or makes. Each firearm transferred must be registered to the transferee by the transferor. All prosecutions involving a failure to comply with these registration provisions or with firearms defined as destructive devices must receive prior authorization by the General Crimes Section, Criminal Division.

Failure to comply with any provision of the National Firearms Act is punishable by not more than $10,000 fine or imprisonment for not more than 10 years, or both (26 U.S.C. 5871).

Title VII of the Omnibus Crime Control and Safe Streets Act of 1968 (P.L. 90-351) is the third major Federal firearms statute. Section 1202(a) of this title prohibits the receipt, possession, or transportation of a firearm in commerce or affecting commerce by felons, persons discharged from the Armed Forces under dishonorable conditions, persons adjuged by a court to be mentally incompetent, persons who have renounced their U.S. citizenship, and aliens unlawfully in the United States. Individuals employed by any of the foregoing are likewise prohibited from receiving, possessing, or transporting a firearm in commerce or affecting commerce in the course of such employment. Violations of this provision are subject to a fine of $10,000 or imprisonment for 2 years, or both. Prisoners entrusted with a firearm by a competent prison authority and persons pardoned by the President or chief executive of a State and expressly authorized to possess a firearm are exempt from the foregoing restrictions. All prosecutions under this statute must be authorized by the General Crimes Section, Criminal Division.

Title 18, United States Code, Section 1715, makes it unlawful to knowingly deposit for mailing or delivery, or knowingly cause to be delivered by mail, any pistol, revolver, or other firearm capable of being concealed on the person. An offense under this statute is punishable by a fine of not more than $1,000 or imprisonment for not more than 2 years, or both.

The responsibility for administering the Gun Control Act of 1968 is lodged with the Secretary of the Treasury. Primary investigative jurisdiction for violations of both the Gun Control Act and title VII of the Omnibus Crime Control and Safe Streets Act rest with the Alcohol and Tobacco Tax Division, Internal Revenue Service. The Post Office Department is charged with responsibility for investigating violations of 18 U.S.C. 1715. In addition, the FBI, the Immigration and Naturalization Service, and the Bureau of Narcotics and Dangerous Drugs exercise investigative jurisdiction over violations of the Federal firearms laws which are ancillary to investigations within their primary jurisdiction. Clearance with the Criminal Division prior to taking action in cases involving firearms violations is required in those instances specified in this Manual or in subsequent notices in the U.S. Attorneys Bulletin.

Desecration of the Flag

Desecration of the flag of the United States, although prohibited by criminal statutes in many States, was made a Federal criminal offense by the act of July 5, 1968 (18 U.S.C. 700). Persons violating this law are subject to a fine of not more than $1,000 or not more than a year in jail, or both. Oral statements are not proscribed but the law prohibits knowingly casting contempt upon the flag of the United States by publicly mutilating, defacing, defiling, burning or trampling upon it. The term "flag" is broadly defined to include any representation by which the average person seeing the same without delibration may believe it to represent the flag, standards, colors, or ensign of the United States.

The legislative history and subsection (c) of the Act show that Congress did not wish to preempt the jurisdiction of the States in this matter. Therefore, where there is concurrent Federal and State jurisdiction, the Department will defer to prosecution by the State unless the desecration takes place on a Federal installation.

The Criminal Division has supervisory responsibility over this statute, the FBI has investigative responsibility. Except in those instances where immediate arrest is necessary to assure appre-

hension of violators or to acquire evidence, prior authorization from the Criminal Division is required before instituting prosecution.

Fugitive Felon Act

Primary Purpose

Though drawn as a penal statute, and therefore permitting prosecution by the Federal Government of its violators, the primary purpose of the Act (18 U.S.C. 1073) is to permit the Federal Government to assist in the location and apprehension of fugitives from State justice. (Department Memo No. 304, Nov. 8, 1961.) It does not supersede nor is it intended to provide an alternative for State extradition proceedings. With certain exceptions, no prior Departmental approval is required to authorize issuance of a complaint under the Act in aid of the States (*United States* v. *McCarthy*, 249 F. Supp. 199 (E.D.N.Y. 1966)), it being contemplated that normally the Federal complaint will be dismissed when the fugitive has been apprehended and turned over to State authorities to await interstate extradition. Under the amendment passed in 1961, the Act applies to all State felonies, including crimes punishable by death, and the fact that the flight may occur prior to institution of State prosecution does not defeat operation of the statute. *Lupino* v. *United States*, 268 F. 2d 799 (8 Cir. 1959), *cert. den.*, 361 U.S. 834 (1959).

Issuance of Federal Complaint in Aid of States

Unlawful Flight to Avoid Prosecution; Prerequisites

No action should be taken to authorize the issuance of a complaint for violation of the Act unless there is probable cause that the fugitive has fled and that his flight was for the purpose of avoiding prosecution. The breadth of the statute as amended in 1961 requires that care be exercised to prevent its application to assist in the enforcement of any statute whose purpose is clearly discriminatory or in the discriminatory application of an otherwise lawful statute. Requests for Federal assistance should be scrutinized carefully to avoid such misuse of the statute. In doubtful instances, the advice of the Criminal Division should be sought.

It should be clear that the State or local authorities are determined to take all necessary steps to secure the return of the fugitive, and that it is their intention to bring him to trial on the State charge for which he is sought. Accordingly, caution should

be exercised to guard against use of the investigative services of the FBI to compel the discharge of civil obligations. Accordingly, requests for Federal assistance in instances of State worthless check violations or of desertion or nonsupport of a wife or child by a husband or parent, should be examined with particular care, and the advice of the Criminal Division should be sought in doubtful instances.

Similarly, care should be exercised to avoid Federal Government involvement in situations which are essentially domestic relations controversies. No complaint should be authorized in cases where a parent is charged with the kidnapping or enticing away of his minor child, without the express prior approval of the Criminal Division. This policy is based on the intent of Congress as expressed in the Federal kidnapping statute, a provision of which specifically excepts its application to the abduction of a minor child by a parent. The Division in rare instances may approve issuance of a complaint in an exceptional child custody situation where the abducting parent, by reason of his mental condition or otherwise, presents a serious threat to the child of physical injury or moral degeneration.

Likewise, since the primary purpose of the Act is to assist the States in locating and apprehending fugitives, a complaint should not be filed in cases in which the location of the fugitive is already known by State authorities.

State prosecution of the fugitive should have been commenced by complaint, warrant, indictment, or information. In this regard, it is suggested that U.S. Attorneys, when authorizing a Federal complaint, secure a certified copy of the State warrant and have the same readily available to deliver to a U.S. Marshal for transmission to the apprehending State when the fugitive is apprehended. Commencement of a State action is theoretically not an absolutely essential prerequisite to the issuance of a Federal complaint under the Act, but prior issuance of a State warrant would seem to be possible in every instance. Where a request by a State for issuance of a Federal complaint does not contain satisfactory evidence of violation of the Act the State should first be requested to supply evidence of the requisite character. The FBI may be requested to make an investigation for the purpose of establishing the jurisdictional facts of apparent flight after the commission of a State felony.

If the fugitive was released on bond, it should be clear that the bond has been forfeited.

Procedure Upon Apprehension

The fugitive should remain in Federal custody or on bail or other conditions of release only so long as is necessary to permit his commitment to the custody of authorities in the State where apprehended. Upon arrest of the fugitive under Federal warrant, he should be taken before the U.S. Commissioner without unnecessary delay in compliance with Federal Rules of Criminal Procedure, Rule 40. Under no circumstances should a Federal officer solicit or accept waiver of interstate extradition by a fugitive in Federal custody or release a fugitive to State authorities for extradition or any other purpose without the approval of the Commissioner.

The requesting State authority should be notified immediately and requested to institute extradition proceedings at once. By the time the fugitive is brought before the Commissioner, State authorities in the State of arrest hould have been contacted and it should have been ascertained whether they are ready and willing to take him into custody to await extradition. Concerning authority of a State to arrest and hold in custody a felon fleeing from another State, see 35 C.J.S., Extradition, Section 12; 18 U.S.C. 3182 and Constitution, Article 4, Section 2; D.C. Code, Sections 23–401 et seq.; Uniform Criminal Extradition Act (enacted in 44 States, the Virgin Islands, and the Canal Zone, but apparently not in Louisiana, Mississippi, Nevada, North Dakota, South Carolina, and Washington). Concerning waiver of extradition, see Uniform Criminal Extradition Act.

Under ordinary circumstances, no useful purpose will be served by the setting of stringent conditions of release on the Federal charge. Where the asylum State authorities are ready to immediately receive the fugitive and hold him to await interstate extradition or under waiver of extradition, and the requesting State is ready and able to extradite him, release of the defendant on his own recognizance or dismissal of the Federal action in the requesting State is justified to expeditiously effect his transfer to asylum State authorities. In this event, the U.S. Attorney in whose district the original Federal complaint was filed should be contacted at once and informed of the circumstances and requested to dismiss the complaint. Prompt communication with the U.S. Attorney in the requesting State is particularly important if the Commissioner refuses to release the fugitive on his own recognizance. This procedure can be expedited if the U.S. Attorney in the initiating district will transmit with the Federal warrant an indication that

he consents to discharge of the defendant and that he will seek dismissal of the Federal action on the conditions that custody of the fugitive will be accepted by State authorities where apprehended and that the requesting State will immediately move to extradite him. A simple notice to the U.S. Attorney in the initiating district will then quickly lead to termination of he Federal proceedings.

Asylum State authorities in some localities refuse to accept custody of a fugitive except upon receipt of a copy of the warrant outstanding in the requesting State. If the State warrant has not yet been received when the fugitive appears before the U.S. Commissioner, pursuant to Federal Rules of Criminal Procedure, Rule 40, for release under 18 U.S.C. 3146 pending receipt of the warrant, the U.S. Attorney should request that stringent conditions of release be imposed, in light of the apparent high likelihood of flight. In these cases, it is highly desirable to forward the State warrant to the asylum State as quickly as possible. If as previously suggested, the U.S. Attorney in the initiating district has already made available to the U.S. Marshal in that district a certified copy of the State warrant, the Marshal when notified of the defendant's apprehension can immediately send to the Marshal in the apprehending district the Federal warrant, together with the certified copy of the State warrant for presentation to asylum State authorities.

If for any reason the demanding State is unwilling to extradite, or if extradition is attempted but fails, a complete statement of all the facts should be forwarded immediately to the Criminal Division and instructions awaited before proceeding further.

Unlawful Flight To Avoid Custody or Confinement After Conviction

This portion of the statute apparently covers inmates of jails or prisons as well as those on conditional liberty, whether probation or parole. The Government must show that flight was for the purpose of avoiding custody or confinement; therefore, the evidence should indicate that the subject knew or believed that his conditional liberty was about to be revoked or was at least in jeopardy. Selective handling by U.S. Attorneys in this regard will obviate indiscriminate use of the Act to locate parolees who have simply failed to report to the parole board or failed to notify the board of a change of address.

Unlawful Flight To Avoid Giving Testimony

No complaint should be authorized under that portion of the statute punishing flight to avoid giving testimony until a State criminal proceeding, to which such testimony relates, has actually been instituted in the State court. See *Durbin* v. *United States*, 221 F. 2d 520 (D.C. Cir., 1954). Before authorizing the filing of a complaint, the U.S. Attorney should be satisfied that there is substantial evidence to indicate that the witness fled in order to avoid giving testimony.

The majority of States have adopted the Uniform Act To Secure the Return of Witnesses From Without the State in Criminal Cases. The State should be required to exhaust existing remedies for securing the return of the witness. If the demanding State is unable to effect the return of the fugitive witness, a complete statement of all the facts should be forwarded to the Department and instructions awaited before proceeding further.

Federal Information or Indictment

The 1961 amendment to the Act incorporated existing administrative practice by requiring approval by the Attorney General or Assistant Attorney General, in writing, before initiation of prosecution for unlawful flight to avoid prosecution, or custody or confinement after conviction, or to avoid giving testimony. Accordingly, under no circumstances should an indictment under the Act be sought nor an information filed nor should removal proceedings under Federal Rules of Criminal Procedure, Rule 40 be instituted without the written approval of the Assistant Attorney General, Criminal Division.

Gambling Devices Act of 1962

Any person who manufactures, repairs, or deals in gambling devices should register with the Attorney General at the Department of Justice Building, Washington, D.C., and keep detailed monthly records, as required by 15 U.S.C. 1173.

The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the FBI are authorized and designated to make seizures of gambling devices under 15 U.S.C. 1177.

Other than the authority granted in the preceding paragraph, U.S. Marshals are authorized and designated as the officers to

perform the various duties with respect to seizures and forfeitures of gambling devices under 15 U.S.C. 1177 as are imposed upon collectors of customs or other persons with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws.

A "dealer" in gambling devices has been judicially interpreted to be one who buys and sells gambling devices in the usual course of trade; one who buys to sell again. In *Smith* v. *McGrath,* 103 F. Supp. 286 (Md. 1952) and *United States* v. 200 *Gambling Devices,* 346 U.S. 441 (1953), the Supreme Court held that the registration and report provisions of the Slot Machine Act of 1951 were not applicable to dealers engaged solely in intrastate commerce. The present Act, therefore, is applicable only to persons engaged in the business of manufacturing, repairing, or dealing with gambling devices in interstate or foreign commerce. However, a person engaged in any degree in manufacturing, repairing, or dealing with such devices in interstate commerce becomes subject to the registration and recordkeeping provisions of the Act as to all gambling devices handled, whether moving in interstate commerce or not. The registration index is maintained by the Organized Crime and Racketeering Section.

This Act amends the Slot Machine Act of 1951, broadening the definition of gambling device with the intent to reach interstate traffic in all mechanical devices designed for gambling, including but not linked to roulette wheel, bingo-type pinball machines, electronic pointmakers, and similar devices. Whenever a gambling device is transported in interstate commerce in violation of any provision of 15 U.S.C. 1171–1178 said device becomes subject to forfeiture. While the interests of justice in a particular case may require that prosecution of the individuals involved be declined, nevertheless forfeiture proceedings should be undertaken in all cases. Where these forfeiture proceedings are successful, the order of the court should instruct the U.S. Marshal to destroy the machines. The same is true of seizures made under the wagering tax and related gambling laws. Should unusual circumstances militate against forfeiture, the U.S. Attorney should consult with the Criminal Division.

Gold Violations (Criminal Prosecutions Involving Violations of Executive Orders and Regulations)

Prosecution under 12 U.S.C. 95a and under 18 U.S.C. 371, where the charge is conspiracy to violate 12 U.S.C. 95a, as well as civil

forfeiture and double penalty actions under 31 U.S.C. 443, may be instituted without prior authorization. The Criminal Division should, however, be promptly advised of the initiation of such actions and be furnished with copies of indictments, complaints, motions, briefs, etc., and of all correspondence with the Treasury Department. Prior authorization must be obtained before bringing charges of conspiracy to violate the Gold Reserve Act, 31 U.S.C. 440–446, and regulations thereunder and/or to defraud the United States of its monetary regulatory functions (with respect to gold).

Investigations

Investigations will be conducted by the Secret Service. Cases will be referred directly by Secret Service field representatives. Whenever possible, the General Counsel of Treasury will furnish a prosecutive recommendation directly to the U.S. Attorney in advance of any steps in the criminal process. In most cases, however, arrests are made by Secret Service agents at the time of discovery of illegally held gold. There is thus no opportunity for a complete legal and policy review of the case prior to apprehension of the suspects. In such cases, Treasury will, upon learning of the arrest, complete its review as rapidly as possible and forward a recommendation and advice to the U.S. Attorney as to how to proceed.

Field representatives of the Secret Service will, as they have in the past and do in cases under other statutes, consult with the U.S. Attorneys during the course of investigations. In the event significant questions of policy or interpretations of statutes or regulations should arise during the investigation stage, as well as after, the Criminal Division should be consulted. Consultation with the Division is encouraged, particularly if there should be disagreement with Treasury recommendations.

Government Reservations, Offenses on

When cases are reported to U.S. Attorneys involving offenses committed on lands occupied by military and naval reservations, forts, arsenals, post offices, etc., U.S. Attorneys should first ascertain whether the Federal Government has acquired exclusive or concurrent jurisdiction over the lands. See paragraph 3 of 18 U.S.C. 7 and the statutes in the Criminal Code applying to crimes committed in "the special Maritime and Territorial jurisdiction in the United States." Under R.S. 355, as amended by the Acts of

February 1 and October 9, 1940 (40 U.S.C. 255), the United States obtains no jurisdiction over acquired lands unless and until it formally accepts jurisdiction. See *Adams* v. *United States,* 319 U.S. 312 (1943). Under a procedure inaugurated after the passage of the Act of February 1, 1940, the Criminal Division receives copies of letters of acceptance from the Federal land acquiring agencies, and transmits one copy of each letter of acceptance to the U.S. Attorney in the district where the land is situated.

With respect to alnds acquired prior to February 1, 1940, there is a presumption that the Federal Government accepted such jurisdiction as was offered by the State law, in the absence of evidence on a contrary intent on the part of the acquiring agency or Congress. *Mason Co.* v. *Tax Comm'n.,* 302 U.S. 186 (1938); *Fort Leavenworth R.R. Co.* v. *Lowe,* 114 U.S. 525 (1885). If the question of jurisdiction over a particular piece of land has not been previously decided judicially, the U.S. Attorney should make appropriate inquiry, usually of the local office of the Federal agency which acquired the land, to satisfy himself that the requisite jurisdiction exists. In case of doubt, the Criminal Division should be consulted before instituting proceedings.

Questions concerning civil or political rights of inhabitants on Government land, such as voting, liability for local licenses and taxes, residence, etc., should be submitted to the Lands Division.

Housing Law Violations

The Department of Housing and Urban Development Act, approved September 9, 1965 (79 Stat. 667), transferred to and vested in the Secretary of the Department of Housing and Urban Development (HUD) as of November 9, 1965, all the functions, powers, and duties of the Housing and Home Finance Agency, the Federal Housing Administration, and the Public Housing Administration. The Department operates under a number of statutory authorities in the fields of housing, urban renewal, and urban and metropolitan development.

A large number of complaints of violations referred to the Department of Justice by HUD result from operations pusuant to the National Housing Act of June 27, 1934, as amended (12 U.S.C. 1791 et seq.) and involve principally Title I, which concerns home improvement insured loans and mortgage loan insurance.

The Act authorizing the Title I program is implemented by Title 24, chapter II, subchapter B, Code of Federal Regulations, 1968,

and provides for the insurance of approved lending institutions against losses they may incur on eligible loans up to 10 percent of the aggregate net amount advanced by the insured lending institutions. The loans obtained from these lending institutions are for the improvement of existing structures and the regulations prescribing other qualifications both for the borrower and lender.

The criminal provisions as originally enacted (12 U.S.C. 1731 (a) to (f)), were repealed by the Act of June 25, 1948, and recodified in 18 U.S.C., 1010 (the specific HUD fraud statute) 493, 657, 709, 1006, 1008, and 1009.

In its application to the Title I home improvement program, the gravamen of Section 1010 is the making or passing, knowingly, of a false loan document with the intent that the loan to be obtained shall be offered to or accepted by HUD for insurance, *Cohen* v. *United States,* 178 F. 2d, 588 (6 Cir. 1949), *cert. den.,* 339 U.S. 920. The general false statement statute, 18 U.S.C. 1001, is not applicable to the prosecution of fraudulent FHA Title I transactions since the entire loan is consummated with nongovernment bodies, private lending institutions, and there is only a possible in futuro submission to HUD in the event of default and claim for loss. *Terry* v. *United States,* 131 F. 2d 40 (8 Cir. 1942). The element of intent may be evidenced by the use of HUD forms, approved by the Bureau of the Budget, such as credit application notes and completion certificates with the printed heading "HUD Title I Completion Certificate," etc. See *Cohen* v. *United States, supra,* and *Terry* v. *United States, supra.* Venue will lie where the documents are submitted to the lending institution or where control was relinquished. *United States* v. *Dolan,* 119 F. Supp. 309 (E.D. N.Y. 1954). Section 1010 penalizes the persons, principally the home improvement salesman, who assist borrowers to obtain home improvement loans where false statements are made or caused to be made in processing the Title I loans. *Ross* v. *United States,* 197 F. 2d 660 (6 Cir. 1952), *cert. den.,* 344 U.S. 832. Prosecutions in Title I cases often include charges of conspiracy to violate Section 1010. *United States* v. *Uram,* 148 F. 2d 187 (2 Cir. 1945). There is a limitation, however, on joining in one conspiracy the several salesmen, homeowners, and dealer merely because an individual, such as the dealer, is the one and sole common denominator. *Kotteakos* v. *United States,* 328 U.S. 750 (1946). *Cf. Blumenthal* v. *United States,* 332 U.S. 539 (1947).

The frauds perpetrated in the Title I program are usually the result of the activity of "confidence" men and swindlers who vic-

timize the homeowner into participating in the criminal act by making false statements as to income, debts, and purpose of loan.

The receipt of commissions or gifts for procuring loans by officers of certain federally insured or supervised banks is proscribed by 18 U.S.C. 215.

Section 709 of Title 18, United States Code, in part, penalizes false advertising by the unauthorized use of the name of the Department of Housing and Urban Development, Housing and Home Finance Agency, Federal Housing Administration, Public Housing Administration, etc., or the letters HUD, HHFA, FHA, PHA, etc., to imply that any of these or other Federal agencies endorses or approves a product, business, or project.

Section 493 of Title 18, United States Code, encompasses the making or passing of forged, altered, or counterfeited notes, bonds, debentures, obligations, etc., of several agencies, Government corporations and banks including the Department of Housing and Urban Development.

The embezzlement, misapplication, or purloining of moneys, funds, securities, etc., by officers, agents, or employees of HUD is penalized by 18 U.S.C. 657.

The making of false entries and reports by officers, agents, or employees of HUD is a violation within the purview of 18 U.S.C. 1006.

The mortgage insurance programs of HUD under the National Housing Act, as amended, affecting both individual homes and multi-family rental housing give rise to false statements and material and wilful concealments in violation of 18 U.S.C. 1001 and 1010. The general false statement statute, 18 U.S.C. 1001, is applicable here because the specific false statement statute, 18 U.S.C. 1010 does not include concealment within its coverage. In the mortgage insurance program, the gist of the usual violations of Section 1010 is the uttering and making of false statements for the purpose of influencing in "any way" the action of HUD. In the multifamily rental projects, the false statements or concealments may be found in the application for insurance, prevailing wage certificate (Sec. 212, National Housing Act), mortgagor's certificate of outstanding obligations, undisclosed construction contracts, rent increase applications as well as in other documents and correspondence directed to cause HUD to act.

The Federal Bureau of Investigation has primary jurisdiction for the investigation of possible violations of Federal criminal statutes arising in connection with the operations of the Federal

Housing Administration of the Department of Housing and Urban Development, including allegations of violations of 18 U.S.C. 1010. However, the FBI will not assume jurisdiction of any matters previously investigated by HUD to any substantial extent. Where HUD has not conducted any investigation or only nominal investigation, the FBI will initiate full investigation. Whenever a matter has been substantially investigated by HUD, U.S. Attorneys should address their request for additional investigation to the Director, Inspection Division, Department of Housing and Urban Development, Washington 25, D.C.

The Housing Assistance Administration of the Department of Housing and Urban Development (formerly the Public Housing Administration and the U.S. Housing Authority), among its other programs, assists local housing authorities in low-rental public housing projects by annual contributions. The filing of false reports by officials of the local housing authority or the willful failure by such officials or employees to disclose conflicting interests or benefits are in violation of 18 U.S.C. 1012. *Blum* v. *United States*, 212 F. 2d 907 (5 Cir. 1954).

The making of a false report for the purpose of influencing the actions of the Federal Home Loan Bank Board is a violation of 18 U.S.C. 1014.

Immigration and Naturalization Cases

Cases of illegal entry into the United States in violation of 8 U.S.C. 1325, notwithstanding the provisions of Section 1329, should be prosecuted in the district where the alien actually entered or attempted to enter, and not in the district where found. See the Sixth Amendment to the Federal Constitution. However, any alien who enters the United States after exclusion or deportation in violation of 8 U.S.C. 1326, may be prosecuted in the district where he is apprehended, even though the entry was made through another district, if the indictment is based on the "at any time found" clause in section 1326.

In the ordinary case involving an alien subject to criminal prosecution under 8 U.S.C. 1326, where the place of reentry is known and can be proved, the prosecution should be brought in the district where the reentry occurred. The "found" provision of the statute may be invoked where: (1) the place of reentry and hence venue cannot be established; (2) the alien is found in the United

States at a location far removed from the place of reentry; or (3) prosecution at the place of reentry is otherwise impracticable or inadvisable. Where it is known that the illegal reentry took place more than 5 years previously, so that prosecution for the entry itself is barred by the statute of limitations, the "found" provision should not be used without prior authorization from the Criminal Division.

In cases where the removal of an alien charged with illegal entry is desired, the U.S. Attorney for the district where the offense has been committed must advise the Department fully of all the facts in the case and await instructions before proceeding by information or indictment against the person whose removal is desired.

Report should be made to the Department of the outcome of all civil proceedings and important prosecutions arising under the immigration and nationality laws, except naturalization proceedings. In all cases in which the decision is adverse to the Government, except criminal cases in which no appeal is allowed by law, copies of the pleadings and other documents, except insofar as previously supplied to the Department, shall be promptly submitted along with a recommendation as to appeals. See also Title 6, Appeals.

Regional counsel of the Immigration and Naturalization Service are charged with the responsibility of submitting directly to the Department recommendations on behalf of the Service as to appeals to the Court of Appeals from decisions adverse to the Government. In order that they may promptly discharge this responsibility, U.S. Attorneys should immediately advise the appropriate district director of such decisions. The district director, in turn, has the responsibility under Service procedures of notifying the regional counsel. This procedure does not apply with respect to Court of Appeals decisions or district court decisions which are appealable directly to the Supreme Court. In such cases the Service's recommendations as to appeal or certiorari are made to the Department by the General Counsel in Washington. In addition to the procedures outlined above, U.S. Attorneys should advise the district directors of all other decisions in litigation affecting the Service.

No suit shall be instituted by the U.S. Attorney to revoke naturalization under 8 U.S.C. 1451 until so directed by the Department. Notwithstanding that under 8 U.S.C. 1421(a) jurisdiction may lies in various courts of the States, all such actions shall be filed

in the Federal district courts. There is no objection to the payment of the expenses of filing in State courts certified copies of judgments in accordance with 8 U.S.C. 1451(h).

In all cases involving the revocation of naturalization, service may be had upon absentees from the United States or the judicial district in which the defendant last had his residence by publication or by any other method permitted by the laws of the State or place where the suit is brought. If the State statute permits service upon absentees by registered mail only, no publication is necessary. If service can only be effected by publication, the publication must be in strict compliance with the State statute. A consent and waiver shall not be deemed to dispense with the requirements of service, unless the consent was obtained subsequent to the institution of the action and may be treated as a confession of judgment. It is not necessary to obtain prior approval of the expense of publication where it is done pursuant to court order, either special or standing.

Impersonation and Protection of the Uniform

Impersonation of Federal officers or employees impairs the integrity and prestige of the Government service and, accordingly, should be vigorously prosecuted under 18 U.S.C. 912 or 913.

Section 912 states two different offenses. The first is to impersonate a Federal officer or employee and act as such. The second is to impersonate a Federal officer and obtain a thing of value. Recent court cases such as *Honea* v. *United States*, 344 F. 2d 798 (5th Cir. 1965) and *United States* v. *Guthrie*, 387 F. 2d 569 (4th Cir. 1967), indicate that the courts are requiring that the indictment charge an intent to defraud as an element of the second offense in Section 912. Consequently, you should include such a charge in indictments for the second offense, i.e., obtaining a thing of value. See the suggested indictment for the second offense (revised June 1, 1967) in the "Guides for Drafting Indictments," prepared by the Criminal Division.

It is to be further noted that both offenses require that the person pretend to be a Federal officer or employee "acting under authority of the United States, department or agency or officer thereof." This causes no problem for prosecutions under the first offense in Section 912. However, in regard to the second offense where the impersonator obtains a thing of value, the courts have held that in order to violate Section 912 the impersonator must

pretend not only that he is an employee of the United States but also that he is acting under Federal authority. See, *United States* v. *Grewe,* 242 F. Supp. 826 (W.D. Mo., 1965) ; *United States* v. *Martin,* No. 31902–CD (S.D. Calif., July 15, 1963) ; *United States* v. *York,* 202 F. Supp. 275 (E.D. Va., 1962) The courts believed this interpretation was necessary if the required pretense of "acting under the authority of the United States" and also the words "in such pretended character" were not to be read out of the statute.

Consequently, it is the policy of the Department, based upon the above cited cases, that prosecution under the second part of 18 U.S.C. 912 should be sought where the subject, in addition to impersonating a Federal officer or employee, pretends to be acting under color of authority to obtain the thing of value. Prosecution should also be considered where the subject expressly or implicitly suggests that the valuable thing demanded or obtained was necessary for the performance of his official or authorized duty. See, *United States* v. *Grewe, supra.*

If a civilian wears a military uniform unlawfully, prosecution should normally be initiated under 18 U.S.C. 702 unless the subject goes no further than to attempt to impress a female acquaintance. If a member of the Armed Forces commits such offense, prosecution should normally be left to the military or naval authorities, but in the event prosecution is declined by the military or naval authorities, advice should be requested in unusual cases from the Criminal Division. If, however, the offense is committed by a member of the Armed Forces outside of a military installation, the crime should be prosecuted in the civil courts (as provided for in the memorandum of understanding between the Departments of Justice and Defense) unless the military authorities believe the crime involves special factors relating to the administration and discipline of the Armed Forces or unless the crime was committed while on organized maneuvers.

Indian Liquor Law Violations

The principal statutes involved are 18 U.S.C. 1151 (defining Indian country) ; 18 U.S.C. 1154 and 1156 (penalizing the introduction into or possession of intoxicating liquor in Indian country and the sale thereof to Indians) ; 18 U.S.C. 1161 (eliminating the application of 18 U.S.C. 1154, 1156, 3113, 3488, and 3618 to areas outside of Indian country and to acts or transactions within Indian

country where same are in conformity with both the State law and tribal ordinances of the area); 18 U.S.C. 3113, 3618 and 3619 (forfeiture provisions), and 18 U.S.C. 1152 (general applicability of U.S. laws).

Investigation

Investigations and reports of violations are made by Indian agents under jurisdiction of the Commissioner of Indian Affairs, Department of the Interior. The cases usually are reported directly to the U.S. Attorney for prosecution, no copy of the report coming to the Department. However, occasionally an important or novel case may be submitted to the Department for consideration and reference to the U.S. Attorney.

Classes of Indians Covered

The Indians to whom the sale of liquor is prohibited within Indian country are: Indians to whom allotments of land have been made while title to such land is held in trust by the Government; Indian wards of the Government under charge of any Indian superintendent or agent; and Indians, including mixed bloods, over whom the Government, through its departments, exercises guardianship or control.

Prosecution

The enactment of H.R. 1055, 83rd Congress, 1st session (P.L. 277), amending Chapter 53 of Title 18, United States Code, by adding a new section, eliminated several offenses under the Indian liquor laws. Since August 15, 1953, sales of liquor to Indians covered by 18 U.S.C. 1154 outside of Indian country are no longer prohibited or penalized. However, the acts proscribed by Sections 1154, 1156, 3113, 3488, and 3618 of Title 18, United States Code, are still punishable under these sections if committed within Indian country, unless they are permitted both by the laws of the State in which they are committed and the ordinances of the tribe having jurisdiction over such area. Such ordinances to be effective must have been duly published in the Federal Register.

Before instituting any criminal prosecution in the Federal courts for violations of these sections, it will be necessary to determine whether the acts of transactions are also prohibited by either

the State laws or tribal ordinances. However, it should be noted that the enactment of 18 U.S.C. 1161 does not in any way affect any liability which has been or hereafter may be incurred under the internal revenue laws with respect to the manufacture of and traffic in liquor.

Seizures: Forfeitures

Liquor and other property, mostly vehicles, used in violation of the law may be seized and forfeited. Such liquor may not be sold but must be disposed of in accordance with 26 U.S.C. 5682. Forfeitures are consummated through complaints, which pursuant to 28 U.S.C. 2461(b) should conform as near as may be to proceedings in admiralty. Such actions also may be brought pursuant to the internal revenue laws if a violation of such laws also is involved. Forfeitures of vehicles under the Indian liquor laws may not be compromised or remitted administratively, but may be remitted by the courts in accordance with 18 U.S.C. 3619.

Where property decreed forfeited has been requested for official use by the General Services Administration such request should be reflected in the decree, a copy of which must be transmitted immediately to the General Services Administration, Washington, D.C.

Internal Revenue and Related Liquor Laws

The internal revenue laws respecting liquor are found principally within 26 U.S.C. 5001–5693. Some of these sections relate entirely to liquor (its taxation, manufacture, occupation, and distribution from the revenue standpoint as well as the criminal, civil penalty, and forfeiture provisions). Others also concern internal revenue taxes on other articles and occupations, and include seizure and forfeiture provisions, etc., applicable to internal revenue laws generally. Related statutes are 27 U.S.C. 201–212 (Federal Alcohol Administration Act); 27 U.S.C. 121–122 (interstate commerce laws); 18 U.S.C. 1261–62 and 3615 (protection of the dry States); 18 U.S.C. 1263–1265 (labeling packages, etc., of liquor shipped). Still other sections of the internal revenue laws and of the general laws of the United States, as well as certain provisions of the customs laws, particularly 19 U.S.C. 1613 and 1618 as provided in 26 U.S.C. 7327, as to remissions of forfeiture, are applicable. See elsewhere in the U.S. Attorneys Manual as to Indian liquor laws.

Investigations

Violations of such laws primarily are investigated by agents of the Alcohol and Tobacco Tax Division, Treasury Department, and generally are reported for prosecution directly to the U.S. Attorneys by that Division. In rare instances involving important or novel cases such reports may be submitted to the Department for consideration and reference by it to the U.S. Attorneys for action. Otherwise no copies of violation reports are received in the Department, except those involving conspiracies and Federal Alcohol Administration Act violations. The receipt of any of such reports from the Alcohol and Tobacco Tax Division by the U.S. Attorney with an appropriate request therein for prosecution or suit, by delegation constitutes the authority required by 26 U.S.C. 7401 to commence action. If such authority is questioned the Department should be contacted immediately.

Cases may be adopted by the Alcohol and Tobacco Tax Division and reported to the U.S. Attorney for prosecution. However, evidence illegally obtained by State officers is not admissible. See *Elkins* v. *United States*, 364 U.S. 206 (1960).

Limitation of Actions

The limitation on bringing indictment or filing criminal informations for both substantive and conspiracy offenses is either 3 or 6 years, depending on whether there was fraud, etc., involved. See 26 U.S.C. 6531. Limitations do not run during the time the offender is absent from the district where the offense was committed. Suits to enforce fines, penalties, and forfeitures must be brought within 5 years of the time the claim accrued. See 28 U.S.C. 2462. Property seized under any revenue law may not be replevied. See 28 U.S.C. 2463. In the case of an adverse judgment a certificate of reasonable cause for the seizure should be sought pursuant to 28 U.S.C. 2465.

Prosecution

The emphasis is on prosecutions of illicit distillers, large scale traffickers in nontaxpaid liquor, including diverters of industrial alcohol, and the principals involved in appreciable and willful frauds on the revenue. Special attention is given to the prosecution of conspiracy cases, particularly those involving criminal syndicates or racketeers operating extensively. The primary aim is to protect the revenue on liquor. However, wholesale liquor dealers

and others who transport or conspire to ship large quantities of taxpaid liquor into dry areas through false practices entailing Federal liquor law violations should be prosecuted vigorously. Such violations usually are of 26 U.S.C. 5621, 5681, 5686(6), 5691, 6065, 7011, 7272, 7273, 7206–7207; 18 U.S.C. 371 or 27 U.S.C. 203.

In minor cases where the U.S. Attorney believes the defendants will be adequately punished under State laws, he may turn such cases over to the appropriate State authorities for such disposition. In other minor cases where the U.S. Attorney considers prosecution is not warranted and he is unable to dispose of the cases by way of compromise he may return them to the Alcohol and Tobacco Tax Division for disposition.

Seized Property

Liquor and other personal property, mostly vehicles, used in the violation of the law may be seized and referred to U.S. Attorneys for proceedings to forfeit, 26 U.S.C. 7301, 7302. This occurs where the appraised value of the property exceeds $2,500 or a claim and a cost bond are filed. Property of less value, unless the claim and bond are filed, is disposed of by advertisement and sale by the Alcohol and Tobacco Tax Division pursuant to 26 U.S.C. 7325. Seizures of real estate used as distillery premises may also be referred to the U.S. Attorney for complaints. However, complaints against realty in some instances may be inadvisable. They should be brought only after consideration of the extent and value of the property subject to forfeiture, exclusive of the interest therein of persons who had no knowledge that the distillery was on their property, in which event such interest is not forfeitable. Unless forfeitures of either personalty or realty are remitted or compromised by the Department in accordance with the law, or the U.S. Attorney declines prosecution because of the insufficiency of the evidence and so advises the seizing agency, the forfeitures should be consummated through the filing of complaints, a copy of which should be transmitted to the Department. The proof in such cases is by a preponderance of the evidence. Pursuant to 28 U.S.C. 2461 the proceedings should conform as near as may be to those in admiralty. They should be brought in the district where the property is found. See 28 U.S.C. 1395(b). See Disposition of Seized Property, on following page.

Compromises: Remission of Forfeitures

It is the general policy not to compromise criminal liability in cases involving the manufacture of untaxpaid liquor or the traf-

ficking in such liquor, especially where the tax fraud is substantial. However, there may be rare instances where such action would be appropriate.

After reference of seized property to the U.S. Attorney for complaint, the Department may entertain offers in compromise or petitions seeking remissions of forfeitures as to all types of seized property. See Executive Order 6166 (5 U.S.C. 1964 ed. following 124–132 and 5 U.S.C. 1967 ed. following 901). Action may be taken by the Department on petitions respecting vehicles seized under the internal revenue liquor laws until the entry of a decree of forfeiture. Thereafter, only as to vehicles so seized, the courts have exclusive jurisdiction to remit or mitigate forfeitures pursuant to 18 U.S.C. 3617. If a petition is filed with the court the field office of the Alcohol and Tobacco Tax Division should be requested to investigate and report respecting the claims of the petitioners. Unless the petitioner has clearly complied with all statutory prerequisites set forth in subsection (b) the petition should be opposed vigorously. The burden is on the petitioner to show such compliance pursuant to subsections (b) (1) and (2), and as to (b) (3) if the contract was with a person having a record or reputation for liquor law violations. The courts are not authorized to remit forfeitures in respect to other types of property seized either under the internal revenue laws, or, except as to Indian liquor law violations (18 U.S.C. 3619), property seized under any other laws of the United States. See the reasoning in *United States* v. *One 1941 Plymouth Sedan, etc.*, 153 F. 2d 19 (10 Cir. 1946); *United States* v. *Grambling*, 180 F. 2d 498 (5 Cir. 1950); *United States* v. *Andrade*, 181 F. 2d 42 (9 Cir. 1950). As to compromises and remissions of forfeiture see pertinent paragraphs of the U.S. Attorneys Manual.

Disposition of Seized Property

To avoid unnecessary expenses (storage charges) and depreciation of property, especially in vehicle seizure cases, complaints should be disposed of as expeditiously as the circumstances in the case may permit, without jeopardizing the criminal case or the rights of claimants. If there is a default, default judgment or decree should be sought promptly.

Forfeited liquor may not be sold but must be disposed of in accordance with 26 U.S.C. 5688. The disposition of forfeited real estate in accordance with 26 U.S.C. 7506 is by the Commissioner of Internal Revenue. The General Services Administration may

make application for any forfeited property for official use of a designated agency pursuant to 40 U.S.C. 304. If a request has been made by the General Services Administration for a vehicle subject to forfeiture under the internal revenue laws relating to liquor, that agency should be notified immediately of the filing with the court of any petitions seeking a remission or mitigation of forfeiture of a lien, giving the amount claimed, and should be requested to advise whether, in the event of allowance of the lien by the court, it is willing to assume payment in order to acquire the vehicle or whether its request has been withdrawn.

The U.S. Attorney should keep the Department currently advised respecting the developments in important criminal and forfeiture cases reported to him for prosecution. He should advise the Department promptly of any adverse decision either as to remission of forfeiture or as to forfeiture and should preserve the res pending determination of the question on appeal by the Solicitor General.

Kidnapping

U.S. Attorneys should give special attention to cases involving violation of the Federal kidnapping statute (18 U.S.C. 1201, 1202). The death penalty provision in the kidnapping statute, 18 U.S.C. 1201(a)(1), was declared unconstitutional in *United States* v. *Jackson*, 390 U.S. 570 (1968). The *Jackson* case held, however, that the death penalty "provision is severable from the remainder of the statute" and the unconstitutionality of that clause did not affect the remainder of the statute.

Charges against a defendant being held for a Federal kidnapping offense should not be dismissed without specific authority from the Department. Important details relating to kidnapping cases should be reported promptly to the Department.

Prosecutions under this statute should be instituted in the District where the kidnapping occurred unless circumstances of a particular case indicate that it would be more expedient to institute prosecution in another district. Conflicts or requests for a transfer of venue should be referred to the Criminal Division for resolution.

Labor-Management Reporting and Disclosure Act of 1959

The Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 401–531) contains a number of criminal provisions.

Pursuant to a memorandum of understanding entered into between the Secretary of Labor and the Attorney General, on February 16, 1960, investigative jurisdiction over the offenses has been placed in the Department of Labor and the Federal Bureau of Investigation.

The offenses investigated by the Bureau of Labor-Management Reports, Department of Labor are:

Section 209, 29 U.S.C 439. Relating to willful violations of the reporting section of Title II, false statements of material facts, failure to disclose material facts, or false entries in reports required by the Title or willful concealment, withholding or destruction of books, records, reports, or statements required to be kept.

29 U.S.C. 461, subsection (c). Relating to willful violations of the section requiring reports of subordinate organizations in Trusteeship, and

Subsection (d). Relating to false statements of material facts, or failure to disclose material facts in trusteeship reports and false entries or concealment, withholding or destruction of documents, books, records, reports, or statements on which the required report is based.

29 U.S.C. 463(b). Relating to (1) the counting of votes of delegates from an organization in trusteeship, unless such delegates were chosen by secret ballot at an election in which all members in good standing were entitled to participate, or (2) transfer of the funds of the trusteed organization except normal per capita taxes and assessments.

29 U.S.C. 502. Relating to willful violations of the bonding requirements of the Act.

29 U.S.C. 503, subsection (a). Relating to loans to officers or employees of the organization resulting in a total indebtedness to the organization in excess of $2,000, and

Subsection (b). Relating to the payment by a labor organization of the fines of an officer or employee of the organization.

When a complaint alleges a violation of any of these sections it should be referred to the local office of the Bureau of Labor Management Reports, Department of Labor. Cases investigated by compliance officers of the Bureau of Labor-Management Re-

ports, are processed through the Department of Labor regional counsel. Except in extraordinary situations U.S. Attorneys should not accept such cases for prosecutive determination except upon the recommendation of the said regional counsel. Extraordinary cases, which for some reason require immediate action, should be accepted directly from the Bureau of Labor-Management Reports only upon specific authorization of the Organized Crime and Racketeering Section.

The offenses investigated by the Federal Bureau of Investigation are:

> 29 U.S.C. 501(c). Relating to embezzlement, theft, or unlawful and willful abstraction or conversion of the funds or property of a labor organization of which the subject is an officer or employee.
>
> 29 U.S.C. 503(b). Relating to the payment by an employer of the fine of any officer or employee of a labor organization.
>
> 29 U.S.C. 504. Relating to the prohibition against persons convicted of certain crimes holding union office within 5 years of the date of their conviction or the termination of their imprisonment.
>
> 29 U.S.C. 522. Relating to the prohibition against picketing for the purpose of personal enrichment of any individual (except for bona fide employee benefits).
>
> 29 U.S.C. 530. Relating to the deprivation of any member of a labor organization of any of the rights guaranteed by the Act by force, violence, or threats of force and violence.

Where a Labor Department investigation, conducted to discover whether a reporting or recordkeeping violation had occurred, simultaneously develops an embezzlement based upon the same basic factual situation, a reinvestigation by the FBI involving the reinterviewing of witnesses and a reexamination of records would appear to result in unnecessary expense and duplication of function. This situation could also lead to practical difficulties in the trial of cases particularly with regard to compliance with 18 U.S.C. 3500, which requires production of statements made by prosecution witnesses to Government agents. There also could be problems relative to admissions or confessions by an accused.

This problem is one that can vary depending upon the facts of a given case and the stage of a particular investigation. It should, therefore, be determined by the U.S. Attorney what is the best

method of achieving successful completion of the case and at the same time avoiding unnecessary expense and duplication of function. For example, if the parallel embezzlement case is substantially completed as a result of the reporting and disclosure investigation, the Department of Labor should follow the investigation to completion. On the other hand, if fresh investigation which is not parallel to a reporting and disclosure violation is necessary, the FBI should be assigned to the matter.

Certain practices have been adopted in the enforcement of those sections investigated by this Department. It is recommended that these practices be followed by U.S. Attorneys in enforcement of the Act. The practices are as follows:

29 U.S.C. 504. Since the underlying purpose of the legislaplies only to the funds of a labor organization, the funds of a trust established in conformance with 29 U.S.C. 186(c) (5) would not come within this definition. See *Lewis* v. *Benedict Coal Co.*, 361 U.S. 459 (1960).

29 U.S.C. 502. Because of serious problems inherent in this section no prosecution should be initiated without prior submission of the case for review by the Criminal Division.

29 U.S.C. 504. Since the underlying purpose of the legislation was to eliminate undesirable persons from the labor movement and was directed more toward compliance than enforcement and because of the requirement that the violation be wilful, a procedure of notification has been adopted when it is learned that a person is in violation. The person in violation, as well as the chief executive officer of his local organization and the international organization, if any, is notified of the violation and advised that prosecution will be initiated unless the relationship is terminated. This procedure has resulted in a very satisfactory record of compliance.

In any matter which is a violation of this Act as well as a violation of State or local law the U.S. Attorney is authorized to determine, after investigation, whether the matter should be referred to local authorities for prosecution or whether it warrants Federal prosecution. This situation will occur most frequently in violations of Section 501(c), embezzlement, theft, or conversion of the funds of a labor organization. When such matters are referred to local authorities the Federal Bureau of Investigation should be advised of the referral and requested to determine the status of

the local prosecution 90 days after referral. In the event local authorities fail to take any action upon such a referral within 90 days the U.S. Attorney should then initiate Federal prosecution.

The Criminal Division should be notified immediately upon receipt of any complaint involving a labor organization, or an official thereof, appearing to be subject to racketeer influence.

This procedure is not applicable to persons who are or have been members of the Communist party, the prosecution of whom is under the supervision of the Internal Security Division.

Master Key Act

The Act of October 12, 1968 (P.L. 90–560; 82 Stat. 997) provides for new section 4010 of Title 39, United States Code, which proscribes the mailing of master keys for motor vehicles and advertisements for their sale. The Act also provides a fine of not more than $1,000 or imprisonment of not more than 1 year, or both, for violation of Section 4010. This penalty is embodied in new Section 1716A of Title 18, United States Code.

Under Section 4010(a), nonmailable matter includes any motor vehicle master key, any pattern, impression, or mold from which a motor vehicle master key may be made, and any advertisement for the sale of any such key, pattern, impression, or mold. Subsection (b) of Section 4010 authorizes the Postmaster General to make such exemptions from the provisions of subsection (a) as he deems necessary. U.S. Attorneys will be promptly informed when the exceptions are published.

Investigations of violations of the law will be conducted by the Post Office Department. Correspondence regarding prosecutions should be addressed to the Criminal Division.

Military Medals and Insignia

As a matter of practice, the wife, mother, or sweetheart of a person awarded a military medal should be warned to refrain from wearing the medal rather than be criminally prosecuted for the first violative wearing. On the other hand, unscrupulous dealers in military medals should be vigorously prosecuted.

Narcotic, Dangerous Drug and Marihuana Violations

The principal narcotic and marihuana statutes involved are: 18 U.S.C. 1403, 1407; 21 U.S.C. 171–185 (Narcotic Drugs Import-

Export Act) ; 21 U.S.C. 188 et seq. (Opium Poppy Seed Act) ; 26 U.S.C. 4701–4706, 4721–4725, 4731–4736; 4771–4775, 6302,, 6671–6672, 7201–7203, 7301, 7343 (Harrison Narcotic Act) ; 26 U.S.C. 4741–4756, 4761–4775, 7491 (Marihuana Tax Act). In addition there are general provisions applicable to both the Harrison Narcotic Act and the Marihuana Tax Act: 26 U.S.C. 6001, 6065, 6071, 6081, 6091, 7237, and 7301. The Federal Food, Drug and Cosmetic Act was amended in 1965 and 1968 to cover dangerous drugs and provides, inter alia, criminal sanctions for the illegal manufacture, sale, and possession of depressant and stimulant drugs. The acts prohibited are set forth in 21 U.S.C. 331 and the penalties imposed are contained in Section 333 of that title.

Reporting

The Bureau of Narcotics and Dangerous Drugs primarily is charged with the enforcement of these laws although the Bureau of Customs has jurisdiction in the case of smuggling. The Bureau of Narcotics and Dangerous Drugs, which is a component of the Department of Justice, was created as of April 8, 1968, pursuant to Reorganization Plan No. 1, 1968, which transferred to the Attorney General the functions of the Secretary of the Treasury and Secretary of Health, Education, and Welfare, which were administered through or with respect to the Bureau of Narcotics and Bureau of Drug Abuse Control. Violations are reported for prosecution directly to the U.S. Attorney by the Regional Director of the Bureau of Narcotics and Dangerous Drugs or, where appropriate, the Collector of Customs. The Department receives copies of investigative reports.

Prosecution

Narcotic and dangerous drug law violators who traffic in such drugs should be vigorously prosecuted. The principal object of enforcement is to eliminate or curtail the sources of supply and to prosecute the importers, dealers, and traffickers in illicit narcotics and drugs. The emphasis should be on prosecutions of the sellers or purveyors, particularly those who deal in large quantities or with minors, and not the mere addict possessors. Addicts should be dealt with under the Narcotic Addict Rehabilitation Act of 1966 which is discussed later in this section or applicable State law. In prosecutions for serious offenses by traffickers in heroin and opium two counts may be charged, one under the internal

revenue laws, 26 U.S.C. 4704, and one under the Import and Export Act, 21 U.S.C. 174.

In prosecutions for violations of the dangerous drug provisions it should be remembered that the Congress did not intend that these statutes be used in cases where possession is patently for personal use or where it is clear that distribution was made on a limited, casual, noncommercial basis. Where there is a serious question as to whether the available evidence warrants charging the felony count, it may be necessary to utilize the misdemeanor count, possession other than for sale, delivery, or other disposal to another (21 U.S.C. 331(q)(3)(B)). However, as previously indicated, charges under this provision should be reserved for those cases in which there is reason to believe (aside from the legal proof available) that the prospective defendant is engaged in a commercial distribution of drugs or is at least making drugs available whether commercially or otherwise, to a number of persons on a substantial or regular basis. Where an indictment is returned charging both felony and misdemeanor counts appropriate instructions should be given to the jury by the court with respect to the lesser included offense. In similar instances, where a defendant indicates a desire to plead to the misdemeanor count, prior authorization to dismiss the felony count should be obtained from the Criminal Division.

The Supreme Court in *Leary* v. *United States*, 395 U.S. 6 (1969), and its companion case, *United States* v. *Covington*, 395 U.S. 57 (1969, held that invocation of the Fifth Amendment privilege against self-incrimination is a valid defense to a charge under 26 U.S.C. 4744(a), and also struck down the "knowledge" presumption of 21 U.S.C. 176a. Therefore, in cases pending on May 19, 1969, involving 21 U.S.C. 176a, unless there is direct or circumstantial evidence that the defendant knew that the marihuana had been illegally imported, dismissal should be sought and no new cases should be brought without independent evidence of knowledge. Furthermore, pending cases under 26 U.S.C. 4744(a) should be dismissed and referred to local authorities if the defendant asserts his privilege; pleas of guilty may be accepted if the defendant is advised of the defense and a complete record is established to show an affirmative waiver. No cases should be brought under 26 U.S.C. 4744(a), but prosecution may be considered under 26 U.S.C. 4742, 26 U.S.C. 4755(b), or 18 U.S.C. 1403, if the facts warrant. If possession is the only evidence available, the case should be referred to local authorities. However,

a guilty plea under 26 U.S.C. 4744(a) may be accepted if stated in writing to the U.S. Attorney, acknowledging awareness of the Fifth Amendment privilege and specifically waiving it.

In dealing with motions relating to convictions prior to *Leary* and *Covington,* the following procedure should be observed: In motions under 28 U.S.C. 2255 to vacate convictions under 26 U.S.C. 4744, the Government may argue that the claim of self-incrimination is not timely, citing *Covington.* If a movant has been convicted by the court or jury after trial of violating 26 U.S.C. 4744, the Government should take the position that *Leary* should not be applied retroactively, citing *Graham* v. *United States,* 407 F. 2d 1313 (6th Cir., 1969). But see also *United States* v. *Mills,* 406 F. 2d 1100 (4th Cir., 1969). With regard to direct appeals from conviction under 21 U.S.C. 176a, *Leary* will not apply retroactively if there is proof of importation and knowledge independent of the presumption and no instruction on the presumption was given. If there is such independent proof and an instruction on the presumption was given, *Leary* would apply and the Government should seek a remand, unless the independent evidence is overwhelming, in which case the Government should argue that there was no prejudice. As far as collateral challenges under 28 U.S.C. 2255 to Section 176a convictions are concerned, arguments that *Leary* is not retroactive are strengthened by language in *Kaufman* v. *United States,* 394 U.S. 217 (1960) and *Stovall* v. *Dennis,* 388 U.S. 293 at 297 (1967).

Finally, it should be argued that *Leary* and *Covington* do not apply to conditions under the narcotics statutes (21 U.S.C. 174, 26 U.S.C. 4704, and 26 U.S.C. 4705). These statutes regulate a lawful industry and are restricted to lawful dealers. Accordingly, there is no substantial risk of self-incrimination in compliance with these statutes. Furthermore the presumption contained in 21 U.S.C. 174 relates to narcotics which can have no domestic origin, and the presumption therefore is rational and constitutional. It is requested, however, that prosecution of narcotic offenses be made under 26 U.S.C. 4704 or 4705 and not under 21 U.S.C. 174, unless there is some proof that the defendant was aware of the unlawful importation.

Prosecutions for minor offenses which are considered to be local in character may well be and often are left to the State or local authorities.

Compromises

It is the policy of the Department not to compromise criminal liability in narcotic or dangerous drug cases. However, compromises of and petitions seeking remission of forfeiture of property seized in such cases, usually vehicles, may be considered.

Mandatory Penalties Under Narcotic Control Act of 1956

Public Law 728, 84th Congress (Narcotic Control Act of 1956), amends 21 U.S.C. 174 (Sec. 2(c), Narcotic Drugs Import and Export Act) and the criminal penalty provisions of the internal revenue laws respecting narcotics and marihuana (26 U.S.C. 7237). The revised 21 U.S.C. 174 fixes mandatory minimum and maximum prison terms of from 5 to 20 years for first offenses; 10 to 40 years for second and subsequent offenses. It also provides for a discretionary fine of not more than $20,000. However, where the defendant was over 18 years of age, the drug involved was heroin and the person to whom the heroin was supplied was under 18 years of age at the time that the offense was committed, the mandatory minimum penalty is not less than 10 years and the maximum term of life imprisonment may be imposed, except that the jury, in its discretion, may direct a penalty of death, but see *United States* v. *Jackson*, 390 U.S. 574 (1968). Under 26 U.S.C. 7237, unless otherwise noted, violations of the internal revenue provisions relating to narcotics and marihuana carry prison terms of 2 to 10 years for a first offense; 5 to 20 years for a second offense and 10 to 40 years for subsequent offenses. A fine of not more than $20,000 may also be imposed for each offense. The penalty for violation of 26 U.S.C. 4705(a) (sale of narcotics without written order) and of 26 U.S.C. 4742(a) (sale of marihuana without written order) for a first offense is 5 to 20 years and for subsequent offenses 10 to 40 years. A fine of not more than $20,000 may also be imposed for each offense. The minimum penalties provided are mandatory in each instance.

The mandatory minimum and maximum terms for a violation of 26 U.S.C. 4705(a) and 26 U.S.C. 4742(a) or conspiracy to violate those sections where the offender was over 18 years of age and the person to whom the drugs were supplied was under 18 years of age at the time of the commission of the offense is 10 to 40 years and in addition a fine of not more than $20,000 may be imposed.

Imposition or execution of sentence may not be suspended nor may probation be granted to anyone convicted of any offense under 21 U.S.C. 174, 176a, 176b, and 26 U.S.C. 4705(a) and 4742(a). Suspension of sentence or probation is not otherwise precluded as to first offenders. Second or subsequent offenders under the Harrison Narcotic Act (26 U.S.C. 4701 et seq.) are precluded from suspension of sentence or probation. The Act provides that a second or subsequent offender is one who has previously been convicted of any offense the penalty for which is provided in 26 U.S.C. 7237(a), 7237(b), 21 U.S.C. 174, 176a, 176b, 184a, or were provided in the antecedents of any of those sections, and former 26 U.S.C. (1939 ed.) 2557(b)(1) or 2596. These penalties apply to conspiracies as well as to the substantive offenses.

Such penalties apply to all violations committed subsequent to the effective date of Public Law 728, July 19, 1956, but not to those committed prior thereto, as otherwise they would be ex post facto. However, previous convictions for any of the violations specified in 26 U.S.C. 7237(c), irrespective of whether such violations occurred before or after July 19, 1956, constitute prior convictions requiring mandatory prison terms for second or subsequent offenders, when sentence is imposed for a violation committed after July 19, 1956. *United States* v. *Troy,* 273 F. 2d 625 (2 Cir. 1960). Nevertheless, both the prior conviction and the violation upon which it was based must have occurred prior to the date of the violation for which sentence is to be imposed to be considered a previous conviction requiring the mandatory sentence provided for second and subsequent offenders.

A U.S. Attorney having reliable information that a person convicted of a violation occurring after July 19, 1956, previously has been convicted must file an information with the court setting forth such prior conviction or convictions. In so proceeding, unless there is other competent proof thereof, the U.S. Attorney previously should have obtained a certified record of such prior conviction or convictions.

At the time sentence is imposed upon a conviction or plea of guilty the court's attention should be invited to the provisions of the above penalty statute. If the sentence is not imposed in accordance with the provisions of the Narcotic Control Act of 1956 the Department should be advised immediately. Such sentence seemingly may be corrected. See *Enzor* v. *United States,* 262 F. 2d 172 (5 Cir. 1958).

Narcotic Addict Rehabilitation Act of 1966

The Narcotic Addict Rehabilitation Act, P.L. 89–793, recognizes the fact that nacotic addicts, including Federal offenders, are medical problems and should receive treatment rather than mere punishment. This statute establishes several different but related types of commitment procedures, all of which contain both institutional treatment and aftercare provisions. Under Title I, 28 U.S.C. 2901–2906, certain narcotic addicts charged with an offense against the United States may be eligible for civil commitment in lieu of criminal prosecution. If the court finds the addicts proper subjects for rehabilitation they are committed to the custody of the Surgeon General for a period not exceeding 36 months. The pending criminal charge is held in abeyance during treatment and is dismissed if the patient successfully completes the program. However, the prosecution is resumed if the patient is unsuccessful in the rehabilitation program. Title II, 18 U.S.C. 4251–4255, allows certain addicts convicted of violating a Federal criminal statute to be sentenced for treatment. The U.S. Attorney should advise the court if he has reason to believe that a convicted defendant is a narcotic addict. A convicted addict sentenced under Title II is committed to the custody of the Attorney General for an indeterminite sentence not to exceed 10 years. However, the length of the sentence shall not exceed the maximum sentence that could otherwise have been imposed by law. Title III, 42 U.S.C. 3411–3426, is concerned with the voluntary and involuntary civil commitment of addicts who are not charged with or convicted for any State or Federal criminal offense. The statute provides for a diagnostic examination which is followed by a judicial hearing. If the court finds the patient to be a narcotic addict who is likely to be rehabilitated through treatment, it must commit him to the institutional custody of the Surgeon General.

For a detailed description of the procedures for commitment under the Narcotic Addict Rehabilitation Act, the U.S. Attorney may consult the NARA Handbook, a separate publication.

Drug Forfeitures

Depressant or stimulant drugs (21 U.S.C. 321(v)) with respect to which a prohibited act has occurred (21 U.S.C. 331 (p) and (q)) may be seized under 21 U.S.C. 334(a)(2). This would include, inter alia, the failure of drug producers and wholesalers to register as required by 21 U.S.C. 360 and the unlawful manufacture, sale, and possession of the said drug contrary to the pro-

visions of 21 U.S.C. 360(a). The keeping of records and making them available for inspection by the Bureau of Narcotics and Dangerous Drugs are also required under 21 U.S.C. 360(a).

In many instances, however, termination of the illegal activity can be achieved without resorting to legal proceedings. In these cases the regional or district office of the Bureau of Narcotics and Dangerous Drugs will supply the U.S. Attorney with a copy of its investigative report and request that a letter be transmitted by him to the offending firm or individual cautioning that continuing failure to comply with the law will result in criminal and/or civil action being taken. The suggested form for such letter is as follows:

DEAR .....:

Information has been received by this office from the Bureau of Narcotics and Dangerous Drugs concering a recent investigation made of the stimulant and depressant drugs in your possession.

The investigation disclosed that certain prohibited acts within the meaning of 21 U.S.C. (section) have occurred with respect to such drugs in that you have

(list prohibited acts)

You are advised that these activities could result in criminal prosecution pursuant to 21 U.S.C. 333 and seizure of the drugs in question as provided for in section 334 of that title. Consideration has been given to the reported violations on your part, and it has been concluded that in the circumstances legal action, either criminal or civil, will not be taken at this time. You are urged, therefore, to advise immediately with the ..... Office of the Bureau of Narcotics and Dangerous Drugs to bring your stock of controlled drugs into compliance with the provisions of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 331, et seq.) under the direction of an agent of that office.

Should your future conduct indicate a continuing failure to comply with the procedures imposed by law which govern the handling of stimplant and depressant drugs, the decision as to whether to institute legal action will be reexamined in light of such developments.

Sincerely,

U.S. Attorney.

If the defendant fails to contest the seizure and does not reply or interpose a claim against the complaint for forfeiture, a default decree for condemnation and destruction should be obtained with instructions that the drugs in question be destroyed by the U.S. Marshal. Where the defendant consents to a decree of condemnation and is willing to comply with the statutory requirements, the drugs may be returned to him under certain conditions. The decree should specify that the defendant will pay court costs and storage

charges, will post a bond to abide by the decree, will bring his drugs into compliance with the law and will pay certain man-hour costs for supervision of the compliance process by the Bureau of Narcotics and Dangerous Drugs.

Supervision of forfeiture actions is the responsibility of the Narcotic and Dangerous Drug Section of the Criminal Division. Authorization must come from this section before a complaint for forfeiture may be filed. This section should be furnished copies of all pleadings and be kept currently advised of all developments in these cases. All correspondence in these cases should be with the Narcotic and Dangerous Drug Section.

Examples of forms for a complaint for forfeiture, default decree of condemnation and destruction, and consent decree of condemnation are set out in the appendix.

National Motor Vehicle Theft Act

Violations of the National Motor Vehicle Theft Act (Dyer Act), as amended (18 U.S.C. 2311-2313) are presented directly to the U.S. Attorney by the FBI. To achieve uniform application of the statute in all judicial districts and to keep Dyer Act prosecutions in proper perspective with other prosecutions, the following guidelines should be followed in determining whether a stolen car report is to be investigated and prosecution instituted:

1. Organized ring cases and multi-theft operations should be investigated and prosecuted.

2. Individual theft cases involving exceptional circumstances should be investigated with the provision that when local authorities indicate a willingness to prosecute, the U.S. Attorney should defer to such prosecution. In determining whether "exceptional circumstances" justifying Federal prosecution are present, the following examples may be considered illustrative but not exhaustive:

(a) The stolen vehicle is used in the commission of a separate felony for which punishment less than for the Dyer Act would be expected from local courts.

(b) The stolen vehicle is demolished, sold, stripped or grossly misused.

(c) An individual steals more than one vehicle in such a manner as to form a pattern of conduct.

3. Individual theft cases should not be prosecuted in Federal

courts, regardless of local prosecutive decisions, in the following instances:

(a) Cases involving joy-riding.

(b) Cases in which the individual to be charged is 21 years of age or older and has not previously been convicted of a felony in *any* jurisdiction.

(c) Cases in which the individual to be charged is less than 21 years of age and cannot be defined as a recidivist. A "recidivist" for purposes of this policy is a person under 21 who has on at least two prior occasions been arrested for motor vehicle thefts and on one or more occasions has been subjected to institutional incarceration for motor vehicle theft or other offenses.

Within the meaning of the statute the word "stolen" should not be construed in a technical sense of common law larceny. What is required is a felonious taking or conversion of a vehicle of another for one's own use without right regardless how the party taking the car may originally have come into possession of it. *United States* v. *Turley,* 352 U.S. 407 (1957). However, in situations where both title and possession to the car intentionally pass, the courts have held that the car is not "stolen" within the purview of the Act. *Hite* v. *United States,* 168 F. 2d 973 (10th Cir. 1948); *United States* v. *O'Carter,* 91 F. Supp. 544 (S.D. Iowa C.D. 1949); also *Loney* v. *United States,* 151 F. 2d 1 (10th Cir. 1945).

Venue

Prosecutions brought under this Act should be instituted in the district into which the stolen motor vehicle was last brought unless by reason of unusual circumstances it is inexpedient to institute prosecution in that district. In the event unusual circumstances exist, the U.S. Attorney in the district into which the motor vehicle was last brought should contact the U.S. Attorney in the district from which the car was originally *taken,* advise him of the facts in the case and of the unusual circumstances, and request him to institute prosecution. This action should be promptly reported to the Criminal Division.

With reference to persons who by definition herein are considered to be recidivists, if the theft occurred in the place of residence of a recidivist and local authorities in the place of apprehension will not institute local charges, Federal proceedings should be instituted at the place of theft. Every effort should then be made to persuade local authorities in that jurisdiction

to institute prosecution. In the event that local prosecution is commenced, the Federal charge should be *dismissed*.

Prosecutions under 18 U.S.C. 2313 (receiving and concealing, selling, etc.) should be instituted only in the district in which those violations occur.

If there are any questions, U.S. Attorneys may consult with the General Crimes Section of the Criminal Division.

National Stolen Property Act

With regard to forged, falsely made, altered, or counterfeited securities under 18 U.S.C. 2314, the Department's position is that forgery is primarily within the purview of State law and should be prosecuted by State authorities where feasible, even though the requisites of Federal jurisdiction under the act are present. However, Federal prosecution is recommended where particularly appropriate, as where the broad scope of defendant's activity dictates use of Federal investigative facilities or appears to render inadequate the punishment imposable under State law, or where it is desirable that the charge be brought in conjunction with other Federal charges, or where successful State prosecution appears precluded or the State fails or refuses to entertain prosecution.

The following situations have been held not to constitute violation of that portion of the Act dealing with falsely made or forged securities:

(1) Where a check is drawn by the maker in his own name on a bank in which he has no funds or no account. *United States* v. *Melvin,* 316 F. 2d 647 (7 Cir. 1963). Insufficient funds check cases are exclusively within the province of State laws.

(2) Where a fictitious name is used by the drawer, but it is the name by which he is generally known or by which he is known to the payee, and in drawing the check in this manner he does not intend to falsify his identity. *United States* v. *Gallagher,* 94 F. Supp. 640 (W.D. Pa. 1950); *United States* v. *Greever,* 116 F. Supp. 755 (D.C. 1953).

(3) Where the signature itself shows the signer is acting in the capacity of agent or trustee. 41 ALR 229; *Gilbert* v. *United States,* 370 U.S. 650 (1962).

(4) Where a validly executed instrument contains a forged endorsement. *Prussian* v. *United States,* 282 U.S. 675 (1931); *Streett* v. *United States,* 331 F. 2d 151 (8 Cir. 1964). The latter case held that the countersignature on a travelers check is, in

effect, a first endorsement and that a travelers check issued for value to a purchaser does not thereafter become a forged security by reason of forgery of the purchaser's countersignature.

Forgery within Section 2314 comprehends falsity in the execution or making of a writing rather than falsity of any facts set forth in the writing (*United States* v. *Staats,* 49 U.S. 40 (1851) ; *United States* v. *Davis,* 231 U.S. 183 (1914) and the essence of forgery is said to be the making with intent that the writing be received as the act of one other than the party signing it (41 ALR 231). There is forgery where a signature is presented as the signature of an existing person other than that of the actual signer (*United States* v. *Briggs,* 54 F. Supp. 731 (D.C. 1944)), or where the signature is presented as that of another who is actually fictitious. *Kreuter* v. *United States,* 201 F. 2d 33 (10 Cir. 1952). Drawing a check as maker in a fictitious name is forgery where the maker creates a fictional person with characteristics, personality, and a semblance of identity, and fraudulently uses the fictitious name to impersonate the fictional person. *Edge* v. *United States,* 270 F. 2d 837 (5 Cir. 1959; *cf. Cunningham* v. *United States,* 272 F. 2d 791 (4 Cir. 1959). Forgery of the initials or symbol of an issuing agent upon a money order makes the instrument a forged security. *United States* v. *Nelson,* 273 F. 2d 459 (7 Cir. 1960) ; *United States* v. *Garfinkel,* 285 F. 2d 548 (7 Cir. 1960). It is forgery to impersonate another by the signature even though persons have the same name. *White* v. *Van Horn,* 159 U.S. 3, 17 (1894) ; *United States* v. *National City Bank,* 28 F. Supp. 144 (S.D.N.Y. 1930). Common law forgery included fraudulently altering a genuinely executed instrument or filing thereon without authority or contrary to authority. *United States* v. *Wilkins,* 213 F. Supp. 332 (S.D.N.Y. 1963) ; *Selvidge* v. *United States,* 290 F. 2d 894 (10 Cir. 1961), 87 ALR 1169.

Each of the terms "falsely made," "forged," "altered," or "counterfeited" in Section 2314 apparently constitutes a distinct means or method of violating the act. "Falsely made," defined in *Pines* v. *United States,* 123 F. 2d 825 (8 Cir. 1941), has been distinguished from "forged" in that case and in *Stinson* v. *United States,* 316 F. 2d 554 (5 Cir. 1936). Cases indicating that the words "falsely made" and "forged" in Section 2314 are homogeneous and are to be synonymously construed to denote forgery (*Wright* v. *United States,* 172 F. 2d 310 (9 Cir. 1949) ; *Marteney* v. *United States,* 216 F. 2d 760 (10 Cir. 1954) ; *Selvidge* v. *United States,* 290 F. 2d 894 (10 Cir. 1961)) may be construed to relate to the spurious or

fictitious making of an instrument as contrasted with the genuine making of an instrument containing false statements of fact.

The Department is of the view that an instrument such as a travelers check stolen in blank and never validly issued for value, although bearing the maker's true signature, may be prosecuted under Section 2314 on the basis that the term "falsely made" includes the issuance of utterance of such an instrument other than for value and without authority and with fraudulent intent, or alternatively on the basis that forgery includes the filling of blanks fraudulently and without authority and with fraudulent intent, or alternatively on the basis that forgery includes the filling of blanks fraudulently and without authority. *Castle* v. *United States,* 287 F. 2d 657 (5 Cir. 1961), remanded for resentencing 368 U.S. 13. We regard as distinguishable the facts in *Streett* v. *United States,* 331 F. 2d 151 (8 Cir. 1964), wherein a travelers check, validly issued for value to a purchaser who signed his name in the purchaser's signature blank and subsequently stolen by a thief who forged the purchaser's "countersignature," was held not to be a forged security but rather a valid security bearing a forged endorsement.

With respect to interstate transportation of securities of the value of $5,000 stolen, converted, or taken by fraud, the statute is violated by transportation of travelers checks aggregating $5,000 in face value which are stolen and transported in blank (*United States* v. *Petti,* 168 F. 2d 221 (2 Cir. 1948) ; *Peoples Savings Bank* v. *American Surety Co.,* 15 F. Supp. 911 (W.D. Mich. 1936) or which are stolen or converted subsequent to issuance to a purchaser. *United States v. Klein,* 306 F. 2d 13 (2 Cir. 1962).

The Department takes the position that a stolen or fraudulently obtained credit card is not a security nor a tool or thing fitted to be used in falsely making or counterfeiting a security within the meaning of the statute, and that a charge slip executed by means of or in connection with a credit card so obtained is not a security within Section 2314.

Cases involving violation of this statute are investigated by the F.B.I. and reports are submitted directly to U.S. Attorneys.

Obstruction of Justice

The Criminal Division exercises general supervision over prosecutions for violation of 18 U.S.C. 1503, commonly called the obstruction of justice statute, except when such violation arises

in connection with prosecution under a criminal statute within the purview of the Internal Security Division.

Perjury

Prosecutions for perury under 18 U.S.C. 1621 have recently presented some difficult questions. A statement is not properly the subject of prosecution where the false testimony is not material to the issue presented. The test of materiality of false testimony is whether the testimony has the natural tendency to influence, impede, or dissuade the investigating body from pursuing its investigation. *United States* v. *Moran,* 194 F. 2d 623 (2 Cir. 1952), *cert. den.,* 343 U.S. 965. An indictment drawn in the alternative is defective unless the prosecutor alleges which of two inconsistent sworn statements was false. *United States* v. *Buckner,* 118 F. 2d 468 (2 Cir. 1941). As to the quantum of proof necessary, the general rule is that the uncorroborated testimony of one witness is not enough as a matter of law to prove the crime of prejury. There must be either two witnesses, or one witness and corroboration by other independent evidence. *United States* v. *Remington,* 191 F. 2d 246 (2 Cir. 1951), *cert. den.,* 343 U.S. 907; *United States* v. *Hiss,* 185 F. 2d 822 (2 Cir. 1950), *cert. den.,* 340 U.S. 948. See also *United States* v. *Seeley,* 180 F. 2d 837 (3 Cir. 1950), *cert. den.,* 339 U.S. 97[illegible].

Postal Violations

If a U.S. Attorney has reasonable grounds to believe that nonmailable matter is or is about to be in the mails and proposes to secure a search warrant for such matter he should proceed as follows:

(*a*) Give notice to the Post Office inspector in charge of the division embracing the district in which such mail is or is expected to be;

(*b*) Upon receipt of notice from the postmaster that the suspected mail has been located he should, within 48 hours, while such mail is held, obtain and have served a search warrant and take such mail into his possession;

(*c*) If it is determined that there has been a violation of law he should immediately take the necessary prosecutive action in accordance with instructions, and if the law has not been violated the mail should be promptly restored to the postmaster;

(*d*) A record must be kept of all mail matter taken from the postmaster under search warrant. This record should show:

1. A description of the suspected mail, including the names and addresses of the sender, if any is shown and the grounds for believing that the mail contained nonmailable matter.

2. The date the Post Office inspector in charge was notified.

3. The exact time when the mail was received in the particular post office concerned and when notification was received from the postmaster that said mail was in his possession.

4. A copy of the search warrant and its supporting papers, when it was applied for, when issued, and when executed.

5. A description of the contents of the mail matter seized.

6. A statement of the action taken thereafter with regard to the mail matter. If the mail matter was restored to the postmaster as not mailed in violation of law, the statement should show the date of restoration. If the mail matter was retained as mailed in violation of law, the statement should show the subsequent action taken.

In any case where material is submitted to the U.S. Attorney's office for clearance before mailing, extreme care should be exercised in expressing any sort of informal opinion regarding the placing of such material in the U.S. mail.

In cases where Federal prosecution for the unlawful importation, transportation or sale of obscene literature is not possible under 18 U.S.C. 1461, 1462, or 1465 because the obscene literature was not transported by mail or transported interstate by express or other common carrier, proper cooperation with State and local authorities should be extended.

Mail Fraud

Title 18, United States Code, Section 1341. All complaints involving the use of the mails to defraud, whether interstate or intrastate, are investigated by the Post Office Department. If securities are involved the complaint should also be submitted to the Securities and Exchange Commission. Reports submitted to U.S. Attorneys by the Post Office inspector of the district need not be forwarded to this Department as arrangements have been made for copies thereof to be transmitted by the Chief Inspector.

U.S. Attorneys should not undertake prosecution under this statute unless complaints have been investigated and official reports thereof submitted by the investigating agencies.

Ordinarily prosecutions should not be undertaken if the scheme employed consists of some isolated transaction between individuals, in which case the parties should be left to settle their differences by civil or criminal litigation in State courts. On the other hand, if the scheme is in its nature directed at defrauding a class of persons, or the general public, through the use of the U.S. mails serious consideration should be given to prosecution under this statute.

Persons making complaints at U.S. Attorneys' offices of violations of this statute should be referred to the local Post Office inspector in charge. If the complaint relates to fraud in the sale of securities through instrumentalities of interstate commerce, the person complaining should be referred to the nearest regional office of the Securities and Exchange Commission.

In case the U.S. Attorneys are in doubt as to matters of policy, the matter should be taken up with the Department. Mail fraud prosecutions are considered of major importance, and the Criminal Division will be glad to furnish assistance to U.S. Attorneys in appropriate cases.

Cases under this statute usually are referred directly to U. S. Attorneys by Post Office inspectors and by the Regional Administrator of the Securities and Exchange Commission. Occasionally, however, investigations by the FBI, notably in bankruptcy and fraud against the Government matters, disclose violations of the mail fraud statute. A copy of the report of the investigation is forwarded to the Department by these agencies and at the same time the report is furnished to the U.S. Attorney. The Department should be currently advised of all developments after the case is received in the office of the U.S. Attorney.

The elements of a mail fraud violation are: (1) a scheme to defraud; and (2) the use of the mails in furtherance of such scheme. *Pereira* v. *United States,* 347 U.S. 1 (1954). An intent to defraud is indispensible to successful prosecution. *Beck* v. *United States,* 305 F. 2d 595, 599 (10 Cir. 1962) ; *United States* v. *Durland,* 161 U.S. 306, 313 (1896). Direct proof of willful intent is not necessary, but can be inferred from the activities of the parties involved. *Henderson* v. *United States,* 202 F. 2d 400 (6 Cir. 1953) ; *Bertin* v. *United States,* 254 F. Supp. 937 (Md., 1966).

A scheme to defraud may involve a plan to obtain money or property by means of false and fraudulent representations knowingly made and calculated to deceive persons of ordinary prudence. *United States* v. *Painter,* 314 F. 2d 939 (4 Cir. 1963) ; it encom-

passes false representations as to future intentions, as well as existing facts. *Durland* v. *United States, supra.* The Government need not prove all representations alleged in a mail fraud indictment, but is required to prove one or more, or a sufficient number of the representations to show that the scheme was actually set up and that the defendant intentionally acted in some way to further its operation with knowledge that it included the making of falsifications. *Schaefer* v. *United States,* 265 F. 2d 750, 753 (8 Cir., 1959).

A scheme to defraud may be actionable even though no actual misrepresentations are made. *Henderson* v. *United States, supra. Silverman* v. *United States,* 213 F. 2d 405 (5 Cir. 1954); *Linden* v. *United States,* 254 F. 2d 560 (4 Cir. 1958); *Phillips* v. *United States,* 356 F. 2d 297 (9 Cir. 1965). The deception need not be premised on the verbalized words alone. The arrangement of the words, or the circumstances in which they are used may convey the false and deceptive appearance. *Gusow* v. *United States,* 347 F. 2d 755, 756 (10 Cir. 1965).

Where a scheme and artifice to defraud is shared by two or more, it becomes a conspiracy; the rules of evidence are the same as where a conspiracy is charged. *Blue* v. *United States,* 138 F. 2d 351, 358 (6 Cir. 1943); *Isaacs* v. *United States,* 301 F. 2d 706, 725 (8 Cir. 1962). Each participant in a scheme to defraud is responsible for the use of the mails in furtherance of the scheme, *Isaacs* v. *United States, supra,* and where one of the schemers uses the mails in furtherance of the scheme, all defendants who are partners in the scheme at that time are responsible for the mailing. *Steiner* v. *United States,* 134 F. 2d 931 (5 Cir. 1943). It is not necessary that the scheme contemplates the use of the mails as an essential element. If the use of the mails is reasonably foreseeable, the schemer is bound. *Pereira* v. *United States, supra.* The mailed matter need not disclose on its face a fraudulent representation or purpose, but need only have some relation to the scheme. *Durland* v. *United States, supra.* The mailing can be by anyone and it is not necessary that a defendant use the mails. *Miam* v. *United States,* 322 F. 2d 104, 107 (5 Cir. 1963). However, the mailing must be in execution of the scheme, and a mailing after the scheme has reached fruition does not violate the statute. *Kann* v. *United States,* 323 U.S. 88 (1944). Each mailing constitutes a separate offense. *Badders* v. *United States,* 240 U.S. 391 (1916).

An excellent dissertation on mail fraud law is contained in the

"Manual of Jury Instructions in Federal Criminal Cases," part II, chapter XVI, "Mail Fraud Offenses," adopted by the Seventh Circuit Judicial Conference Committee on Jury Instructions as reported in 36 Federal Rules Decisions 600, et seq.

Purchase and Sale of Public Office

Investigations for violations of 18 U.S.C. 210 and 211 will be conducted by the FBI and initiated by formal request from the Criminal Division. The U.S. Attorney should consult the Criminal Division before taking or declining to take any action in these matters, and should inform the Criminal Division of his reasons for recommending particular action.

Railroad Unemployment Insurance Act and Railroad Retirement Act

The Railroad Unemployment Insurance Act, 45 U.S.C. 359(a), provides for prosecution in cases where false claims are knowingly made for the purpose of causing unemployment insurance benefits to be paid.

The penal provisions of the Railroad Retirement Act, as amended, 45 U.S.C. 228 (m), punishes the filing of false or fraudulent statements or claims for the purpose of securing retirement and other benefits.

Investigations in all cases arising under the above-mentioned acts are conducted by the Railroad Retirement Board through its regional offices.

Railroad Retirement Board regional directors refer all cases involving alleged violations of the Railroad Unemployment Insurance Act directly to appropriate U.S. Attorneys.

The Chairman of the Railroad Retirement Board will refer all cases involving alleged violations of the Railroad Retirement Act directly to appropriate U.S. Attorneys and furnish notice of that action to the Department.

Communications relative to cases so referred, as requests for further investigation by the referring agency, arranging for the attendance of, or information as to witnesses, etc., should be transmitted directly from the U.S. Attorney to the referral agency. While the Department desires that the decisions as to prosecution in these cases made by the U.S. Attorneys to be final, advice should be sought from the Crminal Division in regard to policy, novel questions of law, or other problems of a similar nature.

Irrespective of the fact that the amount of each false claim is small, vigorous prosecution should be undertaken in those cases wherein a claimant knowingly intended to defraud the Government. It is recognized that defendants in many of these cases are aged or disabled or people in such distress that their plight ordinarily creates a considerable feeling of compassion and sympathy. Nevertheless, if undeterred, widespread fraud in these cases can sap and undermine the entire retirement system.

The offenses proscribed by the penalty provisions of each Act are misdemeanors. Accordingly, prosecution should be instituted by way of information unless, in an exceptional case, it is deemed advisable that the matter be considered by a grand jury.

Railway Labor Act (Railroads and Airlines)

Investigation of all cases arising under the criminal provisions of 45 U.S.C. 152 and 181 will be conducted by the FBI.

Complaints of violations should be cleared by U.S. Attorneys through the Criminal Division. The statute presents many difficult questions and it is desirable that there be a uniform and consistent enforcement policy throughout the country. If, following a report to the Department, any particular complaint appears to deserve a full investigation, the Criminal Division will make the necessary arrangements with the FBI.

Any civil suits arising under the act will continue to be handled by the Antitrust Division.

Securities Act, Securities Exchange Act, and Investment Advisers Act

Except for cases involving novel questions of law or other factors of such importance that they should first be brought to the attention of the Department, all violations of the Securities Act of 1933, as amended (15 U.S.C. 77a, et seq.), the Securities Exchange Act of 1934, as amended (15 U.S.C. 78a, et seq.), and the Investment Advisers Act of 1940, as amended (15 U.S.C. 80b–1, et seq.), will be referred directly to U.S. Attorneys by the Securities and Exchange Commission. Copies of the investigative reports, however, will be sent to the Department where they will be fully considered. Because the Department considers such cases of great importance, it will keep in close touch with U.S. Attorneys concerning them. Such cases should be handled as expeditiously as possible

and the Department should be kept advised of all action taken with respect to them.

Prosecutions for violations of the above acts may be instituted without first obtaining authority from the Department in those cases where the violations are brought to the attention of the U.S. Attorneys by the Securities and Exchange Commission. Where such notification is made by any agency or department, or any source, other than the Commission, no prosecutions for securities violations should be instituted without first obtaining authority from the Department.

Cases in which the U.S. Attorney disagrees with the recommendations of the Commission as to the institution of prosecution, or the grounds of prosecution, or the persons to be prosecuted, should be referred to the Department with a full statement of the reasons for disagreement.

Securities Act of 1933

The preamble of the Securities Act of 1933 states that it is an Act "to provide full and fair disclosure of the character of securities sold to interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes." This Act as amended embraces both civil and criminal liabilities as to persons and corporations connected with the issuance, underwriting and sale of securities.

Title 15, United States Code, Section 77x, the penalty provision, expressly requires a violation to be "willful" before criminal liability attaches. The Department's primary concern is with criminal violations, since there are administrative and civil court proceedings by the Securities and Exchange Commission for violations not committed willfully and knowingly, and civil actions by aggrieved investors. Section 77x makes it a crime willfully to violate "any of the provisions of this subchapter, or the rules and regulations promulgated by the Commission." It also contains a specific provision with respect to false representations and omissions of material facts willfully made in registration statements. Therefore, the statute embraces numerous separate criminal offenses which fall into two general groups as follows:

Violations of Fraud and Registration Provisions

Major violations under the Act fall under Section 17 of the Act (15 U.S.C. 77q) which contains the fraud provisions of the statute

and which has been the basis for numerous court decisions interpreting the statute and affecting its scope and operations. Section 77q is similar to the language of the mail fraud statute but, insofar as it pertains to the fraudulent sale of securities, does not impliedly repeal provisions of the mail fraud statute. *Edwards* v. *United States,* 312 U.S. 473 (1941); *United States* v. *Rollnick,* 91 F. 2d 911 (2 Cir. 1937). The Act has been held constitutional, *S.E.C.* v. *Jones,* 85 F. 2d 17 (2 Cir. 1936), *cert. den.,* 299 U.S. 581; *Bogy* v. *United States,* 96 F. 2d 734 (6 Cir. 1938), *cert. den.,* 305 U.S. 608; *Coplin* v. *United States,* 88 F. 2d 652 (9 Cir. 1937), *cert. den.,* 301 U.S. 703; *Davis* v. *S.E.C.,* 109 F. 2d 6 (7 Cir. 1940), *cert. den.,* 309 U.S. 687.

To constitute a violation of section 77q(a), it must be willful (15 U.S.C. 77x), *Stone* v. *United States* reversed on other grounds), 113 F. 2d 70 (6 Cir. 1940); there must be an offer or sale, *Bogy* v. *United States, supra.,* of a security, *S.E.C.* v. *Joiner Corp.,* 320 U.S. 344 (5 Cir. 1943), *Atherton* v. *United States,* 128 F. 2d 463 (9 Cir. 1942), *United States* v. *Riedel,* 126 F. 2d 81 (7 Cir. 1942), within the meaning of 15 U.S.C. 77b(3); there must be a use of the mails, *Kopald-Quinn and Co.* v. *United States,* 101 F. 2d 628 (5 Cir. 1939), or any means or instruments of transportation or communication in interstate commerce, *Coplin* v. *United States, supra; Kelling* v. *United States,* 193 F. 2d 299 (10 Cir. 1951); *Little* v. *United States,* 331 F. 2d 287 (8 Cir. 1964), *cert. den.,* 379 U.S. 83[illegible]; there must be an employment of a device, scheme, or artifice to defraud, or the employment of other practices set out in paragraphs 2 and 3 of 15 U.S.C. 77q(a), *Holmes* v. *United States,* 134 F. 2d 125 (8 Cir. 1943), *cert. den.,* 319 U.S. 776. It should be emphasized that no securities are exempt from the provisions of this fraud section.

Section 77q(b) is particularly designed to meet the evils of the "tipster sheet" as well as articles in newspapers and periodicals that purport to give an unbiased opinion, which opinions in reality are bought and paid for. House Report No. 85, 73d Congress, First Session, page 24. Unlike Section 77q(a), a scheme or artifice to defraud is not an element of this offense.

Title 15, United States Code, Section 77e(a)(1) and (2) makes it unlawful to do the acts defined therein unless a registration statement is "in effect." This refers to a registration statement filed with the Securities and Exchange Commission. *Kaufman* v. *United States,* 163 F. 2d 404 (6 Cir. 1947), *cert. den.,* 333 U.S. 857; *Jones* v. *S.E.C.,* 298 U.S. 1 (1933); *S.E.C.* v. *Chinese Consol.*

Assoc., 120 F. 2d 738 (2 Cir. 1941), *cert. den.*, 314 U.S. 618. The elements of this violation are the use of the mails or means or instruments of transportation or communication in interstate commerce, a sale (which includes attempts or offers to sell), and the fact that a registration statement is not in effect, which would include a situation where the effectiveness of the registration statement has been suspended or where it has been revoked. See Section 77h.

The use of the mails to send a confirmation to a buyer has been held to satisfy the jurisdictional requirements of Section 77e. *United States* v. *Kane*, 243 F. Supp. 746 (S.D.N.Y. 1965); *United States* v. *Hughes*, 195 F. Supp. 795. See also *McDaniel* v. *United States*, 343 F. 2d 785 (S.D.N.Y. 1965), *cert. den.*, 382 U.S. 826 (foreseeable use of mails by defendant's broker), *Roe* v. *United States*, 316 F. 2d 617 (5 Cir. 1963) (lulling doctrine); *Lennerth* v. *Mendenhall*, 234 F. Supp. 59 (N.D. Ohio 1964) (remission of the proceeds of sale to seller).

Title 15, United States Code, Section 77e(b)(1) makes it unlawful to use the mails or means of interstate commerce to transport a prospectus which fails to meet the requirements of 15 U.S.C. 77j which provides the information required to be included in the prospectus. Likewise, under Section 77e(b)(2), it is unlawful to transport a security unless preceded or accompanied by a prospectus meeting the same requirements. Certain securities and transactions, as set forth in Sections 77c and 77d, are exempt from the provisions of Section 77e. Section 77q, however, still is applicable to such securities and transactions. Section 77x contains the special provision pertaining to false statements and omissions in registration statements. The false statements and the omissions must be willful and each must be of a material fact. The statute does not define "materiality" and in the case of making any untrue statement of a material fact, the question becomes one of law or of fact, or a mixed question of both. *United States* v. *Shindler*, 173 F. Supp. 393 (S.D.N.Y. 1959).

Violations of Rules and Regulations

The Commission has been given both general and specific rule-making power which must be confined to the field covered by the statute. Under this particular statute, the Commission's rules and regulations are primarily concerned with questions of exemption from registration and with the material that is required to be

filed with it. Consequently, these rules become pertinent in connection with criminal prosecutions for the most part only when violation of Section 77e, hereinbefore referred to, or a false filing, is involved.

Securities Exchange Act of 1934

The Securities Exchange Act of 1934, as amended (15 U.S.C. 78a, et seq.), designed to prevent inequitable and unfair practices on securities exchanges and in the over-the-counter markets, and to regulate such exchanges and markets, became effective July 1, 1934, with certain sections becoming effective as enumerated in Sections 78hh and 78hh–1. Subsequently, on June 25, 1938 important amendments were made to Sections 78o, 78q, 78s and 78ff. Section 78o and 78ff were again amended on August 20, 1964.

As to criminal liability, the provisions of the Act may be classified into three general groups:

(1) Absolute and unqualified prohibitions; i.e., statutory provisions prohibiting the doing of certain acts under all cirucmstances. (Secs. 78e, 78h(d), 78 i(a) 1–5, 78k(b), 78o(a) and (d), 78o(c) (1) and (2), 78p(c), 78t(b) and (c), 78u(c), 78x(c), and 78z.)

(2) Prohibitions involving promulgation of rules and regulations; i.e., stautory provisions referring in general terms to the prohibitions of certain acts, the extent and details of such prohibitions to be determined by the rules and regulations of the Securities and Exchange Commission and the Federal Reserve Board (78g(c), 78h(a) (b), and (c), 78i(a)(6), 78i(b) and (c), 78j(a)(b), 78k(a), 78n(a)(b), 78o(c)(3), 78w(a), and 78dd (a)).

(3) Affirmative requirements; i.e., stautory provisions requiring the doing of certain acts, some of which are absolute as in section 78p(a). Other requirements are generally indicated and subject to specification by rules and regulations (78l, 78m, and 78q(a)(b)).

The general penalty provision is found in section 78ff. Section 78ff(a) punishes (1) "willful" violations of the act and the rules and regulations thereunder, and (2) the "willfully and knowingly" making of false or misleading statements in applications, etc., required by the act to be field.

The principal sections of this statute under which criminal prosecutions have arisen are Section 78i (manipulation), Section

78o(a) (failure to register by broker-dealer), Section 78o(c) (fraud by broker-dealer), Section 78j(b) (fraud or manipulation in connection with the purchase or sale of securities), Section 78h(c) (improper hypothecation of customer's securities), Section 78q(a) (keeping of books and statements and filing of reports), and Section 78ff (making of false statements in documents filed). It should be noted that under Section 78ff the offender may escape imprisonment as distinguished from fine, for violation of a rule or regulation, if he proves that he had no knowledge of such rule or regulation. Of course, if the rule or regulation is in terms of fraud (see Rules X10B–5 and X15C1–2), it would be most difficult for a defendant to convince a jury that he did not know that the Commission had promulgated the rule; the burden of proof on this issue would be on the defendant. In a memorandum opinion in *United States* v. *Lilley* (S.D. Tex., October 2, 1968), it was held that, if a defendant admits that he knew securities fraud was a violation of law, he cannot rely on the fact that he did not have knowledge of a specific rule or regulation. The court stated that it was the intent of Congress to charge every man with knowledge of the statutes prescribed in the Securities Acts, although it did not intend that a person could be imprisoned for a rule or regulation of which he had no knowledge.

Immunity

Section 78u(d) grants immunity to anyone compelled to testify after having claimed his privilege against self-incrimination in a proceeding instituted by the Commission.

Investment Advisers Act of 1940

The Investment Advisers Act of 1940 (15 U.S.C. 80b–1, et seq.), has for its purpose supervision and control of the operations of investment advisers by the Securities and Exchange Commission. The act prohibits any investment broker from making use of the mails or any means or instrumentality of interstate commerce in connection with his business unless registered with the Securities and Exchange Commission. The act further provides rules governing registration, as well as the denial or suspension thereof.

Title II, Section 206, of the Act (15 U.S.C. 80b–6) prohibits, among other things, transactions by registered investment advisers through the use of the mails or any means or instrumentality of interstate commerce, directly or indirectly, to employ any

scheme or artifice to defraud the client or to indulge in any practice or transaction which operates as a fraud upon any client or prospective client. This section also requires full disclosure by the investments adviser to a client, either in the purchase or sale of any security, of the capacity in which the investment adviser acted.

Penal provisions for the making of material misstatements, unlawful representations, or other violations of the act are provided in 15 U.S.C. 80b–17.

Selective Service Act of 1967; Universal Military Training and Service Act, as Amended

The importance of effective enforcement of the act cannot be overemphasized in connection with the preparedness program in which this Nation is engaged. While every effort should be made to secure compliance with the provisions of this law and to maintain intact the availability for service of those individuals having obligations to discharge, willful violators must, of course, be prosecuted vigorously.

Closing Cases

In order to prevent a willful violator from escaping both punishment and service, great care should be taken in making final determination as to whether a case should be closed. Should there exist doubtful or unusual cases, the Criminal Division will be glad to be of assistance upon request.

U.S. Attorneys are authorized to close files involving fictitious and false registrations if the investigation and other available information disclose that the registrant's identity cannot be established. Where a defendant is inducted, the indictment may be dismissed without prior approval from the Criminal Division. Nevertheless, U.S.A. Form 900 should be submitted to that effect to enable us to complete our records. This authorization does not include cases in which indictments have been secured, and no blanket authority is given to recommend dismissal of indictments in such cases. In any case in which it is deemed advisable to dismiss, the usual procedure of securing prior approval of the Department should be followed.

Second Delinquency

Delinquency cases involving subjects who have been convicted

and have served sentences for a previous refusal to comply with their obligations under the Act present certain questions of law and policy. Although the U.S. Attorney is authorized to decline prosecution, the facts in such cases should be reported to the Criminal Division before second prosecutions are instituted.

Source Material

Since practically all Selective Service cases involve various regulatory provisions not found in the Act, it is important that the necessary source material be kept available. It is also well to remember that cases may require the application of regulatory provisions that have since been amended. Whenever there exists any uncertainty as to the applicable provisions, the Criminal Division is prepared to furnish you with the necessary information and citations. The regulations may be found in Title 32, C.F.R., 1600 et seq.

Mental Incompetents

Special effort should be made to prevent the conviction of mental incompetents under the Selective Service Act. Persons in this category have frequently pleaded guilty to such charges and their mental status has not been discovered until their examination by the Bureau of Prisons' physicians.

Investigations

As a general rule, investigations should not be discontinued before the facts have been developed sufficiently to disclose the presence or absence of a willful violation, even though the subject may not presently be eligible for induction. Thus, a delinquency case should not be closed merely because the delinquent is 26 years of age or older, if the delinquency occurred when the registrant was in an age group subject to call for induction.

Prosecutions

Prosecutions for aiding and abetting, counseling evasion, or refusal of a selective service duty, and nonpossession of draft cards must not be instituted without prior authorization from the Criminal Division.

Appeals

In view of the Department's responsibility for enforcement, which is closely associated with the administration of the Act, it

is important that the Department be kept fully advised of all appeals. The U.S. Attorneys should inform the Criminal Division as soon as possible when an appeal is taken and set out the issues that will be involved. Thereafter, copies of the transcript and appellant's brief should be forwarded to the Criminal Division as soon as available. What further action is to be taken by the Department will depend on the issues involved in the individual cases. In some instances it will be advisable to consult with National Headquarters of Selective Service. In certain important cases, the Criminal Division will want to review the U.S. Attorney's brief before it is printed or collaborate in its preparation. In other cases, the Criminal Division will merely submit any suggestions or new authorities which may be available. Of course, in many cases there will be no necessity for the Criminal Division to take any action. Nevertheless, in order to assure adequate and uniform treatment of many new issues that are presented, it is necessary for the Department to be advised of the facts in all appeal cases.

Habeas Corpus

If inductees attempt to obtain release from the Armed Forces by means of writs of habeas corpus, the U.S. Attorney will represent the respondents. It is important that the Criminal Division be advised at once of the filing of such a writ and of the facts involved, in view of the importance of the decisions in such cases to the administration of the Act. The Criminal Division handles all habeas corpus cases where the petitioner seeks release based on a claim of conscientious objection.

Cooperation With Selective Service

In the interest of close cooperation with the Selective Service System in cases of unusual importance, the Director of Selective Service has been assured that the U.S. Attorneys will respond fully to the requests of and cooperate with the Selective Service System in the utilization of aid offered by it in the preparation and presentation of cases involving the Universal Military Training and Service Act. The complexities and ramifications of the regulations of the Selective Service System and the Department of Defense pursuant to this Act make such cooperation essential.

Because of the heavy caseload resulting from prosecutions for violation of the Act, as well as habeas corpus proceedings and civil suits against officers and employees of the Selective Service System and of the military establishments, the Director of the Selec-

tive Service System has advised that he will make available to U.S. Attorneys brief digests of current cases involving the selective service law, as well as points and authorities which may be useful in types of cases which are currently prevalent. Field attorneys are available to assist you in any way you deem appropriate. It is understood, of course, that such a working arrangement will not alter the primary responsibility of U.S. Attorneys in the handling of these cases. Similarly, the Secretary of Defense will make available to the U.S. Attorneys in extraordinary cases involving the military establishments a member of the Judge Advocate General's Corps to assist and be associated with them in the preparation and presentation of these cases.

Depositions: Subpenas

Attention is directed to the fact that in several recent cases the delinquent, who claimed to be a conscientious objector, has either secured or attempted to secure, pursuant to rule 17, Federal Rules of Criminal Procedure, an order to take the depositions of the members of the Presidential Appeal Board, Selective Service System, or has served upon these officials or the special agent in charge of the local office of the FBI, or the Deputy Attorney General, or the U.S. Attorney's office, a subpena duces tecum with a view to securing files concerning the delinquent. U.S. Attorneys are requested to report such attempts to the Department immediately. Instructions in each case will then be issued.

Registrars

It is believed that a substantial number of convictions for failure of conscientious and religious objectors to register would be obviated if the U.S. Attorneys were designated as registrars under the Universal Military Training and Service Act to register persons who had refused to submit themselves for registration. Under the provisions of Section 1642.31 of the Universal Military Training and Service Act, it appears that there is sufficient authority for U.S. Attorneys or their assistants to act as such special registrars.

Additional authority for this action may be found in 28 U.S.C. 507. Therefore, in pending religious objector cases in which prosecution has been instituted, U.S. Attorneys and their assistants are authorized and directed to register any and all such defendants at any time during the course of the prosecution when the registrant either agrees to register or to furnish the information

necessary to complete such registration. If and when such registration is effected, proper steps should then be taken to secure the dismissal of the action. Every effort should be made to obtain registration of men in this category whenever possible.

Important Decisions

The following is a list of important decisions involving the administration and enforcement of the Military Selective Service Act.

Constitutionality. Selective draft law cases, 245 U.S. 366 (1918).

Venue. United States v. *Anderson,* 328 U.S. 699 (1946); *Johnston* v. *United States,* 351 U.S. 215 (1956).

Conscientious objection. Seeger v. *United States,* 380 U.S. 163 (1968).

Counseling evasion or refusal of duties. Warren v. *United States,* 177 F. 2d 596 (10 Cir. 1949); *Garay* v. *United States,* 178 F. 2d 38 (6 Cir. 1949); *United States* v. *Miller,* 233 F. 2d 171 (2 Cir. 1956); *Keegan* v. *United States,* 325 U.S. 478 (1945).

Scope of judicial review. Estep v. *United States,* 327 U.S. 114 (1946); *Eagles* v. *Samuels,* 329 U.S. 304 (1947); *Cox* v. *United States,* 332 U.S. 442 (1947); *Falbo* v. *United States,* 320 U.S. 549 (1944).

Ministerial claim. Dickinson v. *United States,* 346 U.S. 389 (1954).

Draft card burning. United States v. *O'Brien,* 391 U.S. 367 (1968).

Habeas corpus. Hammond v. *Lenfest,* 398 F. 2d 705 (2 Cir. 1968); *Brown* v. *McNamara,* 387 F. 2d 150 (3 Cir. 1967).

Exhaustion doctrine. McKart v. *United States,* 395 U.S. 185 (1969).

Smokey Bear Act

Matters involving possible violations of 18 U.S.C. 711 should be sent directly to the Criminal Division for review. Cases which warrant prosecution will then be referred by the Criminal Division to the appropriate United States Attorney.

Soldiers' and Sailors' Civil Relief Act Violations

The Soldiers' and Sailors' Civil Relief Act of 1940, as amended (50 U.S.C. App. 501 et seq.) is designed to protect servicemen

from various financial and legal difficulties stemming from their military service. Its protections apply to "persons in military service," i.e., all persons on extended active military duty; see 50 U.S.C. 511(1). Creditors, landlords, and others having business dealings with servicemen are affected by the act's provisions relating, inter alia, to evictions, installment purchases, mortgage foreclosures, termination of leases, taxation, and limitations on interest rates. Many of the protective provisions (e.g., those relating to interest limitations, installment purchases, mortgage foreclosures, and termination of leases) apply only to obligations incurred before entry into service. Generally, the act prohibits enforcement of civil liabilities against servicemen other than through a court of competent jurisdiction. A court may stay the enforcement of an obligation if it appears that a serviceman's ability to meet it is materially impaired by reason of his military service (50 U.S.C. App. 521, 523).

Only a few activities are made criminal (misdemeanors) by the Soldiers' and Sailors' Civil Relief Act. Prosecution will lie when the Act's provisions relating to the filing of false military affidavits (50 U.S.C. App. 520(2)), unauthorized evictions (50 U.S.C. App. 530(3)), installment purchase repossessions (50 U.S.C. App. 531(2)), mortgage foreclosures (50 U.S.C. App. 532(4)), termination of leases (50 U.S.C. App. 534(3)), and life insurance (50 U.S.C. App. [illegible]) have been violated.

Generally, the factors to be considered in determining whether to institute prosecution under the Soldiers' and Sailors' Civil Relief Act are: Whether the offense was committed in ignorance or misunderstanding of the Act's provisions; whether there are circumstances indicating malevolence, personal animosity, etc., on the violator's part; whether the serviceman and his family have suffered substantial harm; whether restitution has been made or offered; and whether the serviceman seems to have entered into the obligation only or primarily in anticipation of entry into service (see 50 U.S.C. App. 580). Ordinarily, when aggravating circumstances are not present and an offer of restitution has been made, prosecution need not be instituted.

The question of whether a given violation should be prosecuted is left to the discretion of the U.S. Attorneys. However, if a case presents unusual factual and legal problems, U.S. Attorneys should consult the Administrative Regulations Section of the Criminal Division.

Strikebreakers, Transporting

Investigation of all cases arising under 18 U.S.C. 1231 will be conducted by the FBI.

Complaints of violations should be cleared by U.S. Attorneys through the Criminal Division. If, following a report to the Department, any particular complaint appears to deserve a full investigation, the Criminal Division will arrange for it with the FBI.

Transportation

Common Carrier Rates and Economic Regulations (Interstate Commerce Commission)

The Interstate Commerce Commission (including the regional attorneys thereof) may refer directly to the appropriate U.S. Attorneys criminal cases arising under the Interstate Commerce Act, 49 U.S.C. 1 et seq. (including the Elkins Act, 49 U.S.C. 41 et seq.) involving unauthorized operations by carriers and illegal rates, concessions, rebates, etc. Communications relative to such matters as additional investigation by the Commission, arranging for the attendance of or information as to witnesses etc., should be transmitted directly from the U.S. Attorney to the agency. Advice should be sought from the Criminal Division in regard to policy, novel questions of law, or other factors of such importance as to merit the attention of the Department.

Federal Aviation Act

The Federal Aviation Administration of the Department of Transportation, including the regional attorneys thereof, will refer directly to the appropriate U.S. Attorneys cases involving violations of the civil penalty provisions of the Federal Aviation Act of 1958 (49 U.S.C. 1471).

U.S. Attorneys are authorized to effect settlement of the civil penalties provided in 49 U.S.C. 1471 without the prior approval of the Criminal Division in those instances where the amount of the compromise is acceptable to the Federal Aviation Administration. If the U.S. Attorney believes that a compromise settlement should be effected in an amount less than is acceptable to the Administration, the matter should be submitted to the Criminal Division for decision. Such compromise settlements may be made without filing suit or at any other time before a judgment is obtained, in which event the settlement need not be

reduced to a judgment unless the U.S. Attorney deems that advisable. In addition to the principal amount, the settlement should include any costs to which the Government is entitled.

U.S. Attorneys should make a determination on the merits as to the action called for, irrespective of the small amount which in some instances may be acceptable to the Administration as a compromise settlement of the civil penalty involved. Such an action is not one to collect a trivial specific amount claimed by the Government as due and owing to it, but rather is an action to impose a penalty for violation of a Federal statute. When a suit is instituted, the full amount or the penalty should be sought.

Although the clerk may enter a defendant's default pursuant to Rule 55(a), Federal Rules of Civil Procedure, he may not enter a judgment by default under Rule 55(b) (1), Federal Rules of Civil Procedure, since the civil penalty is not "a sum certain" or one "which can by computation be made certain." Therefore, judgment by default should be entered only by the court. Rule 55(b) (2), Federal Rules of Civil Procedure.

Motor Carrier Safety (Federal Highway Administration)

The Federal Highway Administration of the Department of Transportation investigates and refers directly to the U.S. Attorneys criminal cases involving violations of the Motor Carrier Safety Regulations (49 C.F.R., pts. 390-397) promulgated Part II of the Interstate Commerce Act (49 U.S.C. 304) and violations of the Explosives and Other Dangerous Articles Act (18 U.S.C. 831–837) involving motor carriers. The U.S. Attorney should advise the Federal Highway Administration of all significant developments in the case with copies furnished to the Criminal Division.

A vigorous enforcement program is followed in regard to offenses which endanger the public on the highways.

Railroad Safety (Federal Railroad Administration)

The Federal Railroad Administration of the Department of Transportation administers the railroad and pipeline safety statutes. These laws are the Safety Appliance Acts (45 U.S.C. 1–16), the Locomotive Inspection Act (45 U.S.C. 22–34), the Accident Reports Act (45 U.S.C. 38–43), the Hours of Service Act (45 U.S.C. 61–64), the Signal Inspection Law (49 U.S.C. 26), and the Explosives and Other Dangerous Articles Act (18 U.S.C. 831-837). The Accident Reports Act and the Explosives and Other Dangerous Articles Act are criminal; the others are civil. The FRA

will refer all cases directly to the appropriate U.S. Attorney, except cases involving novel questions of law. The U.S. Attorney should advise the Chief Counsel of all significant developments in the case, including the filing of the information or complaint, the docket number, the arraignment, the trial date, the position taken by the railroad, the proposed settlement of the case, etc. Copies of such correspondence should be furnished to the Criminal Division when significant or unusual developments or matters are involved. The Criminal Division should, of course, be promptly notified of adverse decisions and of cases where an appeal is taken by defendant.

Most of these cases are concluded without trial, but if a trial seems to be necessary, the Chief Counsel of the FRA should be informed as far in advance as possible of the date of trial. The inspectors and one of the attorneys on the Chief Counsel's staff will report to the U.S. Attorney and, subject to his directions, will assemble the evidence to be adduced (much of which must generally be obtained from the defendant's records and notes of the inspectors) and perform such other duties incident to the preparation of the case for trial as the U.S. Attorney desires. The FRA inspectors need not be subpenaed as witnesses. Arrangements for their appearance should be made through the Chief Counsel. The Chief Counsel will also assist the U.S. Attorney in securing the appearance of other principal witnesses. The assistance of FRA attorneys, who are thoroughly familiar with this Act, the regulations promulgated by the FRA pursuant thereto and court decisions arising thereunder, and are well informed with respect to railroad records and practices, will be valuable in presenting contested cases, involving as they do technical matters related to railroad operations and practices. Trial of the case must, however, be conducted by the U.S. Attorney or one of his assistants. In the discretion of the U.S. Attorney, the facts may be agreed upon, stipulated with the defendant's attorneys, and submitted to the court for decision. However, the proposed stipulation should first be submitted to the Chief Counsel of the FRA for his advice.

Criminal Provisions

The Explosive and Other Dangerous Articles Act (18 U.S.C. 831–37) provides that any person who knowingly commits a violation of any provision of the act or any regulation promulgated thereunder shall be subject to the imposition of a fine of not more

than $1,000 or imprisoned not more than 1 year or both. However, the penalties are substantially greater for violations knowingly committed which result in death or bodily injury.

The Accident Reports Act makes it a misdemeanor for a railroad to fail to submit the required report of an accident within the time provided.

Civil Penalty Provisions

Under the Federal Claims Collection Act (31 U.S.C. 951–953) and regulations promulgated thereunder (4 CFR 101–105), the FRA is authorized to collect and compromise administratively civil penalties and forfeitures arising from violations of railroad safety statutes.

Occasionally, it will be necessary to refer claims arising under the Safety Appliance Acts (45 U.S.C. 1–16), the Locomotive Inspection Act (45 U.S.C. 22–34), the Hours of Service Act (45 U.S.C. 61–64), and the Signal Inspection Law (49 U.S.C. 26) to the appropriate U.S. Attorney when such claims cannot be disposed of under the applicable standards of the Federal Claims Collection Act (4 CFR 101–105). Since three written demands, at 30–day intervals, must normally be made upon a debtor pursuant to a requirement contained in 4 CFR 102.2, Hours of Service Act cases, in which the violation will expire due to the short statutory limitation of 1 year (45 U.S.C. 63) within 90 days will necessarily be referred to the U.S. Attorney.

Due to the mandatory nature of these Acts and the absolute duties which they impose upon carriers, the Department regards the penalties, although recoverable in civil proceedings, as not being merely civil obligations but penal sanctions, and accordingly does not accept compromise settlements of less than the full statutory penalty on each count with costs, to which the Government is entitled as a matter of right, 28 U.S.C. 1918(a).

Twenty-Eight Hour Law

The Office of the Solicitor of the Department of Agriculture will refer direct to the appropriate U.S. Attorneys cases involving violations of the Twenty-Eight Hour Law (45 U.S.C. 71, et seq.), except those which involve novel questions of law or policy. The Office of the Solicitor will submit to the U.S. Attorney a copy of each report made by Agriculture's inspectors relating to the case, one copy each of every letter forwarded to and received from

the carrier, and an original and two copies of a proposed form of complaint. In addition, the transmittal letter will recommend the amount of the penalty which Agriculture believes should be exacted. U.S. Attorneys may assume that the Criminal Division approves the amount of the penalty recommended by the Department of Agriculture unless advised to the contrary. Cases involving novel questions of law or policy will be submitted to the Criminal Division.

No case shall be settled except upon the basis of the entry of a judgment. Every judgment in favor of the Government must be in an amount not less than the statutory minimum penalty of $100 for each violation, in addition to costs to which the Government is entitled.

In construing the Twenty-Eight Hour Law the courts have held that the word "knowingly" means simply "with knowledge of the facts," and that a carrier knowingly violates the statute when, with knowledge of how long animals have been confined without rest, feed, and water, it prolongs the confinement beyond the statutory limit. *St. Louis-S.F.R. Co.* v. *United States,* 169 Fed. 69 (8 Cir. 1909); *St. Joseph S.Y. Co.* v. *United States,* 187 Fed. 105 (8 Cir. 1913); *United States* v. *Illinois Central R. Co.,* 303 U.S. 239 (1938). They have construed the word "wilfully" under the act to mean "intentionally," "purposely," or "voluntarily." *United States* v. *Union Pacific R. Co.,* 169 Fed. 65 (8 Cir. 1909); *United States* v. *New York C. and H. R. R. Co.,* 165 Fed. 833 (1 Cir 1908); *United States* v. *Atchison T. & S. F. R. Co.,* 166 Fed. 160 (N.D. Ill. 1908). A knowing confinement becomes willful also, when it was due to a cause which could have been anticipated or avoided by the exercise of due diligence and foresight. *Boston & M.R.R.* v. *United States,* 117 F. 2d 428 (1 Cir. 1941); *United States* v. *Atlantic C.L.R. Co.,* 173 Fed. 764 (4 Cir. 1909). The burden of proof that the overconfinement was not due to such a cause is upon the carrier. *Boston & M.R.R.* v. *United States, supra; New York C. & H.R.R. Co.* v. *United States, supra; United States* v. *Atchison T. & S.F.R. Co., supra; Chicago & NW.R. Co.* v. *United States,* 246 U.S. 512 (1918).

Where animals are loaded on a train at different times, a separate penalty accrues when the statutory period for the animals first loaded expires, and separate penalties accrue as the statutory period expires with respect to the animals loaded at later periods. *Baltimore & Ohio Southwestern Railways Company* v. *United States,* 220 U.S. 94 (1911).

Wagering Tax and Related Gambling Laws

The laws relating to wagering are found principally within 26 U.S.C. 4401–4405, 4411–4413, 4421–4423, 4461–4463.

As a result of the Supreme Court's decision in *Marchetti* v. *United States*, 390 U.S. 39 (1968), and *Grosso* v. *United States*, 390 U.S. 62 (1968), a defendant charged with failure to register and pay the occupational wagering tax or failure to pay the wagering excise tax has been afforded a valid fifth amendment defense to such charges and may not be convicted thereunder in the face of his assertion of his privilege against self-incrimination. It should be noted that the court was careful not to declare the wagering tax statutes unconstitutional, and the civil tax liability of one engaged in the business of wagering has not, therefore, been extinguished.

Some initial guidance as to the handling of pending cases under the wagering tax laws was provided in Criminal Division Memorandum No. 564, dated March 20, 1968, and since that time a number of problems have arisen final resolution of which has not yet occurred. For example, the validity of civil forfeitures based on failure to pay the wagering tax is presently a matter of conflict among the circuits, although the Department has taken the position that such forfeitures are proper and has petitioned the Supreme Court to grant certiorari in the case of *United States* v. *United States Coin and Currency in the Amount of $8,674.00* (*Angelini*), 393 F. 2d 499 (7 Cir. 1968), which took the opposite view, and has not opposed the petition for certiorari in *United States* v. *One 1965 Buick, et al.* (*Dean*), 392 F. 2d 672 (6 Cir. 1968), aff on pet. for reh., 397 F. 2d 782, which was decided in favor of the Government.

Also presently in litigation is the question of the use to be made of evidence seized under warrants issued before January 29, 1968, based on affidavits alleging violation of the wagering tax laws. The Department has taken the position that such evidence may, assuming that the warrant and search were otherwise proper, be used either as the basis for prosecution under other Federal penal statutes, or may be turned over to local law enforcement agencies where appropriate to do so.

The Department has also taken the position that prosecutions based on the filing of false registrations (Form 11–C's) or false tax returns (Form 730's) continue to be valid under the theory of *Dennis* v. *United States* 384 U.S. 855 (1966). It is anticipated

that this issue will be resolved by the Supreme Court as the result of an appeal taken from the dismissal of an indictment under 18 U.S.C. 1001 in *United States* v. *Knox, No.* 675, October Term, 1968.

White Slave Traffic Act

The White Slave Traffic Act (also known as the Mann Act, 18 U.S.C. 2421, et seq.) spells out several offenses including the offense knowingly to transport any woman or girl in interstate or foreign commerce or in the District of Columbia or in any territory or possession of the United States for the purpose of prostitution or debauchery, or for any other immoral purpose. Cases under the Act are investigated by the Federal Bureau of Investigation and are referred directly by that Bureau to the U.S. Attorneys.

It is the general policy of the Department to limit application of the Act to persons engaged in commercial prostitution activities, even though the element of commercialism is not a legal requirement under those cases decided to date. Therefore, prosecution of persons who are not now engaged in commercial prostitution enterprises as panderers, operators of houses of prostitution, or call girl operations, and those who act for or in association with such persons, should not be instituted without prior approval of the Criminal Division. In the event that it is concluded by the U.S. Attorney that a noncommercial case warrants prosecution, a report detailing the elements of aggravation believed to warrant an exception to the above-noted general policy should be forwarded to the Division.

Conspiracy cases against women or girls the transportation of whom is the substantive offense involved, or cases depending on such persons as coconspirators (i.e., where not more than one person other than such "victim" can be proved a conspirator), also should not be instituted without prior approval of the Criminal Division.