

TITLE 2
CRIMINAL DIVISION

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TITLE 2: CRIMINAL DIVISION
PROCEDURE
GENERAL

Criminal and Judicial Codes

The Federal Criminal Code was revised, codified, and enacted into positive law by Section 1 of the Act of June 25, 1948 (P. L. 772, 80th Cong., 2d Sess., 62 Stat. 684) as Title 18 U. S. C., entitled "Crimes and Criminal Procedure". Section 21 of that Act preserves any then existing rights or liabilities under the schedule of laws repealed by that Section. By another Act of June 25, 1948 (P. L. 773, Sec. 1, 62 Stat. 869), at the same session of Congress, the Judicial Code of the United States was also revised, codified, and enacted into positive law as Title 28 U. S. C., entitled "Judiciary and Judicial Procedure". Section 39 of that Act contains a schedule of repealed laws, with a like preservation of existing rights or liabilities thereunder. These new Titles 18 and 28 of the United States Code both became effective on September 1, 1948.

Criminal Division Bulletin

The inaugural issue of the United States Attorneys Bulletin on August 7, 1953 (Volume 1, No. 1) ended the separate publication of the Criminal Division Bulletin, which has now merged in the new Bulletin covering all the Divisions of the Department of Justice.

The last issue of the Criminal Division Bulletin dated July 27, 1953, was Volume 12, No. 12 for the Part I material dealing with substantive criminal law, and Volume 8, No. 12 for Part II, entitled "Federal Rules of Criminal Procedure" which commenced with the Bulletin issue of February 25, 1946, approximately one month before the new procedural rules went into effect on March 21, 1946. Part II covered procedural developments, successive court interpretations of the rules, and related changes in Department policy. Both these services to the United States Attorneys and the Division staff will be continued through the medium of the United States Attorneys Bulletin in which the rules material will appear as an appendix, separately paged. The material on the rules should be filed as heretofore in a separate binder under each rule number for ready access.

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INVESTIGATIONS

Investigations and fact finding inquiries having to do with litigation handled by the Department and the United States Attorneys are performed by the FBI or by one of the other numerous investigative units attached to other agencies of the Government.

The various field offices of the FBI are in a position to advise attorneys in the field as to what agency of the Government is charged with the responsibility of originating, investigating and developing cases in a particular field. It is important that attorneys respect the different spheres of jurisdiction of the numerous investigative units and that they not request one agency to perform or assist in performing investigative activity which is assigned to another unit or agency. Attorneys are likewise advised not to become involved in disputes or differences between two or more investigative agencies as to which has jurisdiction of a particular violation. Since relations between this Department and other departments of the Government are handled by the Deputy Attorney General, such differences should be brought to the attention of this official of the Department.

While investigation of the facts of a case is part of the preparation of a case, attorneys should recognize the clear division of jurisdiction and responsibility in this respect and refrain from the conduct of investigations which are the prime function of public investigative units. This separability of function does not, of course, preclude an attorney from the interview and examination of witnesses in advance of the formal presentation or institution of proceedings. Attorneys in the field should not attempt to supervise investigations or investigative personnel in the ordinary sense but should feel free to make suggestions as to the direction, scope and emphasis of investigative activity, and as to the priority and importance of a case in relation to other matters being handled at the same time.

REFERRAL PROCEDURES

Cases Directly Referred to United States Attorneys

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

Accident Reports Act.

Agricultural Lending Agencies.

Agricultural Marketing Agreement Act of 1937 (7 U. S. C. 601, et seq.).

Agricultural Marketing Act of 1946 (7 U. S. C. 1621, et seq.).

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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).

Anti-gambling 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 Exchange 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, 18 U.S.C. 831, Transportation of.

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 discriminations).

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.

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 Seamen'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).

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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).
Violations 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. 1379(i)).
White Slave Traffic Act (18 U.S.C. 2421, et seq.).
Workmen's Compensation and related compensation statutes administered by the United States Bureau of Employees' Compensation, Department of Labor.

Delegation of Authority With Respect to Criminal Prosecutions Involving Marketing Quota Penalty Cases

There is delegated to United States Attorneys authority to handle criminal aspects of marketing quota penalty cases upon direct reference from the Attorney in Charge of the local office of the General Counsel of the Department of Agriculture.

Matters Covered. This delegation of authority applies only to criminal violations in connection with the provisions of the Agricultural Adjustment Act of 1938, as amended (7 U. S. C. 1311-1376), where the gross amount involved does not exceed \$5,000.

Authorization to Proceed. The above matters will be referred directly to United States Attorneys by the General Counsel's local Attorney in Charge having jurisdiction. United States Attorneys

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are authorized to decline or initiate, as in their judgment is the proper course. United States Attorneys are, of course, urged to obtain the advice and assistance of the Criminal Division whenever it might be helpful.

Correspondence With the Department of Justice. Letters to the Department concerning any of these matters should be directed to the attention of the Assistant Attorney General, Criminal Division and with such letters copies of all pertinent correspondence and other documents including the indictment or information if any, since the Department will not otherwise maintain files on these matters in Washington.

Correspondence With the Department of Agriculture. Correspondence concerning additional factual details, requests for investigation, documents, witnesses, and similar matters, should be addressed directly to the General Counsel's Attorney in Charge originating the matter. However, only United States Attorneys and their duly appointed assistants are authorized to exercise any control what-

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soever over the handling of such matters referred for action, and the entire responsibility for the manner in which such matters are handled rests with the United States Attorney.

Closing of the Prosecution

United States 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 United States Attorney without prosecution, the United States Attorney's files should reflect the action taken and the reasons therefor. If an indictment or information is to be dismissed, the instructions under "Authorization for Dismissal", this title should be followed.

Appeals

Existing instructions with reference to criminal appeals shall govern the appeals in these cases.

AUTHORIZING PROSECUTION

Prosecution, except in certain cases investigated by the Federal Alcohol and Tobacco Tax Unit, Treasury Department, should not be instituted in any district without the express authorization of the United States 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 United States 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 United States 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 a first-hand 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

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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 witnesses, and the strength and weaknesses of the case as a whole.

Specific Authorization Before Prosecution

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

- Anti-gambling statutes (18 U.S.C. 1084, 1952 and 1953). All proposed indictments should be sent to the Criminal Division for approval prior to return of indictment, accompanied by a memorandum outlining the views of the United States Attorney regarding the proposed prosecution.
- Antiracketeering, 18 U.S.C. 1951, cases *not* involving the use or threat of force or violence (see p. 59).
- Civil Rights Act of 1960, violations of Act arising out of labor disputes or statutes assigned to Criminal Division (see pp. 61-62).
- Contempt of Congress, 2 U.S.C. 194. If time permits matter should not be presented to grand jury until Criminal Division has had opportunity to communicate with U.S. Attorney (see p. 64.1 and T. 9, p. 2).
- Copyright law, 17 U.S.C. 104 and 105 (see p. 63).
- Federal Election Laws.
- Immigration and Naturalization Cases: Before proceeding by information or indictment against alien whose removal is desired on an illegal entry charge (see p. 77).
- Kickback statute, 18 U.S.C. 874 (see p. 84.1).
- 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 appear to be subject to racketeer influence.
- Purchase and Sale of Public Office, 18 U.S.C. 214, 215. Department should be notified of intention to file information or present to grand jury any case under Act (see p. 64.1).
- Railway Labor Act (railroads and airlines), 45 U.S.C. 152 and 181 (see p. 95).
- Securities Act, Securities Exchange Act and Investment Advisers Act of 1940, as amended (15 U.S.C. 77a et seq.; 15 U.S.C. 78a

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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 (see p. 96.1).

Selective Service Act of 1948, as amended; Universal Military Training and Service Act, as amended, 50 U.S.C. (App.) 462, second delinquency cases involving subjects who have been previously prosecuted under the Act and have served sentences (see p. 101).

Strikebreakers statute, 18 U.S.C. 1231 (see pp. 105-106).

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

STATUTE OF LIMITATIONS

Section 3282 of Title 18 U. S. C., as amended on September 1, 1954, extends from 3 to 5 years the period of limitations applicable to general criminal offenses. Indictments may be found and informations instituted within 5 years after the commission of such offenses. The amendment applies to offenses committed subsequent to the date of enactment as well as those committed prior thereto, if prosecution is not barred by any provision of law in effect prior to such date.

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 (1954 ed.); violations 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

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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 one 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 five 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".

COMPLAINTS

The complaint is a statement of the essential facts constituting the offense with which the person whose arrest is sought is charged, made for the purpose of obtaining a warrant for the arrest of such person. It is one of the legally accepted modes of instituting a criminal proceeding. *United States v. Kilpatrick*, 16 Fed. 765, 769; *United States v. Simon*, 248 Fed. 980. The complaint must be made upon oath before any justice or judge of the United States, any United States Commissioner, or any judicial officer named in 18 U. S. C. 3041. See Rule 3, Fed. Rules Crim. Proc. The accused must be informed of the nature of the accusation (U. S. Const. Amend. VI). *United States v. Cruikshank*, 92 U. S. 542. Complaints made by private citizens must be approved by a United States Attorney (18 U. S. C. 3045), before the arrest warrant issues for internal revenue law violations.

Ordinarily, a complaint for the arrest of a person believed to be guilty of an offense against the United States should be presented to a United States Commissioner, if one is conveniently near. However, an agent or representative of the Department or of any other branch of the Government service should not be required to travel a considerable distance in order to present a complaint to a Commissioner when

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one of the State officials enumerated in the statute (18 U. S. C. 3041) is near at hand and available. Under such circumstances the complaint should be presented to one of such state or local officials, but when a warrant of arrest is so obtained and is served by a local peace officer the person arrested should be turned over to the United States Marshal at the earliest possible time. The provisions of Rule 5 (a), Fed. Rules Crim. Proc., require that when a person who has been arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

ARRESTS**Warrant of Arrest**

Arrests will ordinarily be made pursuant to a warrant issued by a United States Commissioner or other judicial officer designated in 18 U. S. C. 3041, upon the filing of a verified complaint or information (based upon supporting affidavit of probable cause), or upon the return of an indictment. Warrants of arrest should be secured as soon as possible after the defendant's identity has been established, unless peculiar conditions make such a course inadvisable.

Officers to Whom Directed

Warrants must be directed to state or federal officers empowered to make arrests for the violation of law charged to have been committed by the accused. (Rules 4 (a) and 9 (a).) Federal officers having general power to arrest for any violation of federal statutes are United States Marshals and their deputies, 18 U. S. C. 3053, and Special Agents of the FBI, 18 U. S. C. 3052. In most instances warrants will be directed to one or both of those officers. Certain other federal officers and agents are empowered to execute warrants of arrest and to make arrests for violations of specific federal statutes which it is their duty to enforce.

Contents of Warrant

The content of the warrant is specified in Rules 4 (b) (1) and 9 (b) (1). See also Form No. 12 included in Appendix of Forms to Rules volume in 18 U. S. C. A.

Description in Warrant

When warrants are sent to the United States Marshal for service or to other districts in the United States, a description of the person wanted should accompany the warrant if possible. Very often there

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are two or more persons of the same name in the community and lack of a description results in confusion. The description should include information concerning the race, height, weight, age or any unusual mark or identification of the person wanted. John Doe warrants must contain a sufficient description of the person to be apprehended to enable him to be identified with reasonable certainty.

Procedure on Arrest

Under Rules 4 (c) (2) and 9 (c) (1) the original warrant has efficacy throughout the United States, and an arrest may be made under its authority even though the arresting officer does not have physical possession of the warrant. (Rules 4 (c) (3) and 9 (c) (1).) However, the arresting officer is required to inform the defendant of the nature of the offense and of the fact that a warrant has been issued and to exhibit it to the defendant, upon his request, without unnecessary delay. These provisions have created a uniform Federal practice in respect to the making of arrests without physical possession of the warrant.

Reissuance: Separate Warrants

Rules 4 (c) (4) and 9 (c) (2) permit a warrant returned unexecuted or a summons unserved to be kept alive and reissued as long as the complaint is pending. The practice of issuing more than one warrant or summons upon a single complaint is now made uniform by Rules 4 (a) and 9 (a). Where there are several defendants, it is frequently desirable from a practical standpoint that a separate warrant be issued for each defendant in order to facilitate arrest and return, especially if the defendants are apprehended at different times and places.

Summons: Corporate Defendants

Both Rule 4 and Rule 9 contain provisions permitting the use of a summons in place of a warrant. Except as to corporate defendants such procedure is new to federal criminal practice. Often there is no need to arrest persons charged with petty offenses or technical violations of law. It has been customary, in some localities, for the United States 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 United States Attorney. (Rule 4 (a).) However, where the

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proceeding is founded upon an indictment or information the summons may be issued either by direction of the court or upon request of the United States Attorney. (Rule 9 (a).) The summons may be served by any person authorized to serve a summons in a civil action.

Service on Corporation

Where the defendant is a 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 United States Commissioner or the nearest judicial officer having jurisdiction under 18 U. S. C. 3041, for a hearing, commitment, or bail. (Rule 5.)

Mere unlawful detention before presentment to a committing magistrate, however, standing alone and without more, does not invalidate a confession made during its continuance, *unless the detention produced the disclosure*. *Pierce v. United States*, 197 F. 2d 189 (C. A. D. C.), analyzing the *McNabb* (318 U. S. 332), *Mitchell* (322 U. S. 65), *Upshaw* (335 U. S. 410), and *Carignan* (342 U. S. 36) decisions of the United States Supreme Court.

Rule 5 makes no change in the statutory law of arrest without a warrant, as distinguished from arrest without the physical possession of a warrant already issued. See 18 U. S. C. 3050, 3052, 3053 and 3653. *Carroll v. United States*, 267 U. S. 132.

Fugitives

Where a public indictment has been returned against a defendant in a criminal case or where a defendant in such a case has actually become a fugitive from justice, the occasion may arise when such defendant may contact the United States Attorney for the purpose of surrendering himself in answer to the indictment or to serve his sentence as the case may be. In any such instance, the United States

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Examination" (pp. 9-11); and "Binding Over and Discharge" (pp. 11-12) are informative as to the approved practice for conducting a preliminary hearing.

"Unnecessary Delay": Decisions on

Rule 5 (a), Fed. Rules Crim. Proc., provides that accused persons, upon arrest, shall be taken by the arresting officer "without unnecessary delay" before the committing magistrate. The reason for this rule is "to abolish unlawful detention". *United States v. Carignan*, 342 U. S. 36, at 44-45.

The question of whether or not delay is necessary and the period of time during which such a delay would be deemed not unreasonable will depend upon the circumstances of each case. The words "without unnecessary delay" as used in Rule 5 (a) do not require that arrested persons be taken before a United States Commissioner except during the latter's regular office hours. *Symons v. United States*, 178 F. 2d 615.

In approving this rule Congress did not intend to exclude entirely judicial consideration and review of the reasonableness of a delay in preliminary hearing. *Haines v. United States*, 188 F. 2d 546, cert. denied 342 U. S. 888.

The importance of a speedy preliminary hearing is further emphasized by the so-called "*McNabb* rule" (*McNabb v. United States*, 318 U. S. 332) whereby the Supreme Court has enforced, while restricting its application, a judicially created federal rule of evidence affecting confessions and admissions apart from their voluntary character, which is the constitutional test of the admissibility of such statements in criminal trials.

As restated in *Upshaw v. United States*, 335 U. S. 410 at 413, under the *McNabb* rule a confession is inadmissible "if made during illegal detention due to failure promptly to carry a prisoner before a committing magistrate, * * *." But in *United States v. Mitchell*, 322 U. S. 65, the Supreme Court had earlier modified the *McNabb* rule by holding that subsequent illegal detention did not render inadmissible prior confession volunteered promptly when taken into custody by the police. In its latest pronouncement on this subject, *United States v. Carignan*, 342 U. S. 36, the Supreme Court has further clarified the uncertainty resulting from the *Upshaw* decision, by declining to extend application of the *McNabb* rule, which is based upon illegal detention, to situations where a prisoner in the lawful custody of police officers under a Commissioner's commitment upon a criminal

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charge, confessed while so detained to the commission of another criminal offense for which he was subsequently tried and convicted.

In its most recent application of the *McNabb* doctrine, *Andrew Mallory v. United States*, 354 U.S. 449, the Supreme Court unanimously interpreted Rule 5(a) to require that a person be arraigned before a judicial officer "as quickly as possible so that he may be advised of his rights and so that the issue of probable cause may be promptly determined"; that while the arrested person may be "booked" by the police, "he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt"; that the duty of arraignment without unnecessary delay does not call for mechanical or automatic obedience since "circumstances may justify a brief delay between arrest and arraignment, as for instance, where the story volunteered by the accused is susceptible of quick verification through third parties. But the delay must not be of a nature to give opportunity for the extraction of a confession"; that provisions related to Rule 5(a) "contemplate a procedure that allows arresting officers little more leeway than the interval between arrest and the ordinary administrative steps required to bring a suspect before the nearest available magistrate." While not perfectly clear, the *Mallory* rule seems to be this: After a person is arrested, the federal officers must proceed without unnecessary delay to arraign him before the nearest available magistrate, but this duty does not call for mechanical or automatic arraignment. Thus, necessary or permissible delay may be incurred in order to "book" the suspect, or to check on a story volunteered by him which is susceptible of quick verification through third parties. The decisive criterion is: delay in arraignment is unnecessary when due to a process of inquiry that lends itself to eliciting damaging admissions from the prisoner. Any admission obtained during a period of unnecessary delay is not admissible in evidence. Although the court left no doubt that unlawful delay evokes exclusion, what constitutes "unnecessary delay" was left unsettled.

The burden of interpreting the Mallory decision has fallen principally upon the Court of Appeals for the District of Columbia. In determining the legality or illegality of delay under Rule 5(a), this Court concentrated its attention upon police purpose, justifying circumstances, the accessibility of committing officers, and the maximum time permitted the police regardless of the individual situation. In nearly every case, a combination of these elements has been present, hence it is difficult to assess the weight which the Court attaches to

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any one of them. In *Metoyer v. United States*, 250 F. 2d 30 (C.A. D.C., 1957), the Court countenanced a three and a half hour detention which served principally to allow transcription of the accused's oral confession voluntarily given when police confronted him. In *Milton Mallory*, 259 F. 2d 796 (C.A. D.C., 1958), the accused, a nephew of Andrew Mallory, was arrested while intoxicated at 8:00 in the evening and jailed. The next morning, after ten minutes of questioning he admitted the crime, signed a confession after being warned of his right to remain silent and was arraigned at noon. The majority in holding the confession admissible found the delay justified because of the late hour of arrest, defendant's drunken condition, the need to verify the victim's story and the absence of prolonged or intensive questioning. In *Trilling v. United States*, 260 F. 2d 677 (C.A. D.C., 1958), the majority opinion emphasized the "circumstances" element of the *Mallory* rule. In *Heideman v. United States*, 259 F. 2d 943 (C.A. D.C., 1958), cert. den., 359 U.S. 959, the Court considered the critical issue of how much interrogation is permissible in the absence of other collateral considerations such as circumstances justifying delay and accessibility of the magistrate and was of the opinion that questioning becomes unlawful only when it constitutes "grilling" or continues beyond the brief period allowable for routine administrative action. The Court found that, since there is less likely to be "unnecessary delay" in a short-time interval than there is if a longer period elapses, judicial evaluation of whether the "delay" was necessary must be on the basis of all the circumstances. In *Porter v. United States*, 258 F. 2d 685 (C.A. D.C., 1959), cert. denied 360 U.S. 906, the Court after stating that "the prisoner must be taken before any reasonably accessible magistrate without unnecessary delay" pointed out that "until there is an opportunity to reach such an official the Supreme Court has not held reasonable questioning without more of prisoners must cease." The Court concluded that each case depends upon its own facts as to what is or is not unnecessary delay.

While the *McNabb-Mallory* rule is not pertinent to proceedings at the preliminary hearing proper, it does provide an exclusionary test at any subsequent trial in addition to the constitutional guarantees against coerced confessions. The defendant has the burden of showing that the delay in bringing him before the Commissioner or other judicial officer was unnecessary, but the Government must make affirmative proof that admissions or confessions made while in custody and before such appearance were voluntary. *United States v. Leviton*, 193 F. 2d 848, 854, cert. denied 343 U. S. 946; *United States v. Walker*, 176 F. 2d 564, cert. denied 338 U. S. 891.

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Pleas Abolished

Pleas by an accused person when first brought before a Commissioner are excluded, as a plea of guilty at this stage has no legal status or function except to serve as a waiver of preliminary examination. *Wood v. United States*, 128 F. 2d 265, 271-272. Rule 5 (c) expressly provides for a waiver of examination, thus eliminating the necessity for a provision as to plea.

Right to Counsel

The right to have counsel assigned does not apply to proceedings before a committing magistrate, although an accused person is entitled to be represented by counsel of his own choosing at a preliminary hearing, and should be so advised. *Setser v. Welch*, 159 F. 2d 703, cert. denied 331 U. S. 840; *Council v. Clemmer*, 177 F. 2d 22.

GRAND JURY

18 U. S. C. 3321 and 28 U. S. C. 1861-1865, 1867 deal with grand juries, as does Rule 6, Fed. Rules Crim. Proc. The Rule makes no provision in relation to the *method* (qualifications, exemptions, apportionment) as distinguished from the *time*, of summoning and selecting grand jurors so that the statutory provisions must be complied with.

Manner of Drawing

The requirements of 28 U. S. C. 1864 relating to the manner of drawing grand jurors should be strictly observed, and United States Attorneys are requested to call the matter to the attention of the clerks, jury commissioners and other interested officials in order that any irregularity may be avoided.

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INDICTMENT AND INFORMATION

The use, nature and contents of the indictment and the information are covered by Rule 7, Fed. Rules Crim. Proc. Prosecution should be by information, where the offense is not capital or infamous or where prosecution by indictment is waived, unless in an exceptional case it is considered important that the matter be considered by a grand jury.

Waiver of Prosecution by Indictment

Rule 7 (b) permits a defendant charged with an offense punishable by imprisonment for over one 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, C. A. D. C.), 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. A defendant who waives prosecution by indictment may defend a noncapital felony information against him and stand trial exactly the same as if he had waited for a grand jury to indict him. 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. 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 United States Attorney in the district of arrest to the United States 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 (C. A. 7). The term "open court" means waiver in the courtroom with the court in session and the judge presiding. Waiver before a United States 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

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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.

Departmental Assistance; Furnishing Copy

In all cases of moment involving any novel, difficult or doubtful question of criminal pleading, whenever possible, a draft of the proposed indictment should be submitted to the Department seasonably in advance of presentation to the grand jury, for examination and suggestion, together with a brief statement of facts not appearing upon the face of the indictment, or probable deficiencies in the proof. The return of indictments in important criminal cases should be reported promptly and a copy of the indictment furnished when practicable.

Warrant Based on Information

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 means a sworn statement by the United States Attorney, or by one conversant with the facts, in a supporting affidavit that there exists probable cause for filing the information charging a federal offense. Under Rule 9 (a) the United States Attorney may on his own initiative (Rule 7 (a)) institute a criminal proceeding merely by signing an information which his oath of office is sufficient to support. But to obtain issuance of a warrant of arrest, the Fourth Amendment to the United States Constitution (which provides that no warrant shall issue without probable cause supported by oath or affirmation) and Rule 9 (a) require that probable cause be established upon the oath of someone having knowledge of the facts.

Reindictment

Statutory provisions permit the return of a new indictment whenever the original indictment 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 term of the court. The new indictment may be returned not later than the end of the next succeeding regular term of court, following the term 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).

TITLE 2: CRIMINAL DIVISION**RULE 20 TRANSFERS****Procedure**

Rule 20, Fed. Rules Crim. Proc. provides that a defendant may state in writing that he wishes to plead guilty or nolo contendere, to waive trial in the district in which the indictment or information is pending and to consent to disposition of the case in the district in which he was arrested, subject to the approval of the United States Attorney for each district. (See Form 11, Appendix.)

By saving the time and expense of removal proceedings and travel to the district where the offense was committed, in cases in which the defendant does not desire to contest the accusation against him, Rule 20 provides a very functional device. However, where the defendant is not aware of this provision, the benefit of the Rule will be lost. It is, therefore, important that every accused, arrested in a district other than that in which the offense was committed, be informed of Rule 20 so that he may have an opportunity to request a transfer if he so desires.

Advising Defendant of Rule Procedure

The United States Attorney should ascertain that every defendant 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 United States Attorney, or by a United States Commissioner. The Marshal or other arresting officer should inform the United States Attorney whenever he takes into custody a defendant who is wanted in another district. 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 United States Attorneys must consent. Note, however, that special considerations apply to the use of Rule 20 in cases involving juveniles. (See Title 2, p. 16.1.)

Action by United States Attorneys

If a defendant who is arrested or who appears in response to a summons in another district is willing to consent, under Rule 20, to a transfer of the charges and to agree to plead guilty and thus dispose of his case in the arresting jurisdiction, the necessary consents are exchanged and filed with the court clerk in the district of origin. That

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clerk then 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 necessary factor in Rule 20 transfers and all such transfers should be processed as expeditiously as possible. The use of air mail is suggested as an adjunct of such promptness.

Since the defendant agrees to plead guilty and signs his waiver and consent prior to seeing a copy of the indictment or information against him, he is permitted to rescind his plea without adverse consequences. His statement of desire to plead guilty may not be used against him at any time—whether or not he was represented by counsel at the time it was made. Should the defendant change his mind and plead not guilty or the court decline to accept his plea of guilty (*Singleton v. Clemmer*, 166 F. 2d 963), 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 United States 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 United States Attorney in the district of origin. Should the latter request that his file be returned after sentence has been imposed, that request should be complied with. Correspondence between the attorneys can usually effect this exchange of material. The originating United States Attorney should advise the Marshal of his district as to the disposition made of the arrest warrant and the case as well.

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

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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 that court for disposition of the pending charge in accordance with the provisions of Rule 20, the court must have acquired jurisdiction of the case by transfer. To that end, the following procedures are suggested.

If a prisoner, personally or through an attorney, desires a Rule 20 transfer, the first thing to determine, if he is confined in a State penitentiary, is whether the State authorities will surrender him temporarily under a writ *ad prosequendum* to the United States Marshal for appearance before the Federal court. If the State authorities refuse to surrender the prisoner for that purpose, the matter is ended. The heads of Federal institutions are under general instructions to honor all writs issuing from the Federal district courts and served upon them by the appropriate United States Marshal, who will assume custody of the prisoner under the writ.

If the State authorities are agreeable or confinement is in a Federal prison, the prisoner's 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 United States 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 for the purposes of Rule 20 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

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offense on the pending indictment or information. The United States 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 completion of the procedures prescribed by the rule, i. e., the filing of the defendant's statement and the United States 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.

Utilization of Rules 7 (b) and 20 Together

When a warrant of arrest issues upon a complaint, and is executed in another district, Rules 7 (b) and 20 may be utilized together. Under this procedure, the defendant signs a written statement of his desire to plead guilty, a written waiver of trial in the district in which the warrant was issued, and a written consent to be tried in the district of arrest. Each of these items, along with the written consents of both concerned United States Attorneys, plus an information or an indictment, is then filed with the clerk of the court of the district in which the warrant was issued—along with a request that the papers in the proceeding be transmitted to the clerk of the court of the district of arrest. Once the papers are thus transmitted, if an information has been filed where the defendant is entitled to an indictment, the defendant may waive indictment in open court, and a prosecution may then continue on the basis of the information.

Disposal Under Rule 20 of Charges to Which the Defendant Is Not Willing to Plead Guilty

Where a defendant is willing to plead guilty to only part of the charges pending against him, the Rule may be used only if the remaining charges are dismissed. Under this procedure, the defendant should sign a statement of desire to plead guilty to all pending charges,

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the case should be transferred on that basis, and the defendant should then plead guilty only to those charges to which he is in fact willing to plead guilty. The other charges should then be dismissed. This procedure should not be adopted without the approval of the United States Attorney for the district in which the charges were initially pending.

Disposal Under Rule 20 of Federal Charges Pending in Several Districts

It sometimes occurs that a defendant arrested in one district upon a Federal charge pending in another district is also wanted in still other districts for violations therein committed 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 (C. A. 8), certiorari denied, 340 U. S. 921.

While the defendant in such a situation 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.

A defendant released on bail should be permitted to go to another district and invoke Rule 20 only under exceptional circumstances—in the interest of justice.

Rule 20 Transfer: Juveniles

Note that due process standards of criminal procedure are applicable to all proceedings against juveniles. The amendment to Rule 20 (d)

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specifies some of these due process requirements. The juvenile must consent in writing before the court to be proceeded against as a juvenile in the district of arrest; he must be represented by counsel; and the court must apprise him of his rights including the right to trial in the district in which he is alleged to have committed the act of delinquency. The court must also advise him of the sentencing possibilities under the Act, and both the court and the United States Attorney must approve of the transfer. See *Juvenile Procedure; Due Process Requirements*, Title 2, p. 28.1 for further specification of due process requirements.

REMOVALS**Arrest in Nearby District**

Rule 40, Fed. Rules Crim. Proc., entitled "Commitment to Another District; Removal" effected an important reform by eliminating in subdivision (a) 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 Rule requires that a 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. It is clear therefore 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 dis-

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trict 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* however but merely a preliminary hearing, identical to those afforded to defendants arrested in the same district where the crime is committed, 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 United States Commissioner or judge of the district court, but the warrant of removal may issue only by order of the judge. The removal procedure authorized under this Rule is distinguished from statutory extradition proceedings. *United States v. Godwin*, 191 F. 2d 932.

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 the Department has taken the position that such a warrant is still a warrant of arrest under the original indictment or information under Rule 9, F.R. Cr. P. Therefore, when rearrested in a distant district, the defendant under the embracing language of Rule 40 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 obtaining a warrant of removal. See *MacNeil v. Gray*, 158 F. Supp. 16 (D. Mass., 1957).

Arrest of Escaped Prisoner: An escaped prisoner is not entitled to a removal hearing before being returned to prison. The Court of Appeals for the Fifth Circuit in *Rush v. United States*, 290 F. 2d 709 (1961), held that the provisions of Rules 5 and 40 of the Federal Rules of Criminal Procedure may not be availed of by a prisoner in escape status (Rule 54(b)(5), *Mullican v. United States*, 252 F. 2d 398 (C.A. 5, 1958)).

TITLE 2: CRIMINAL DIVISION**Cooperation Between United States 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 United States Attorney in the district where the charges are pending. The warrant of arrest should be forwarded through the office of the local United States Marshal to the Marshal of the district where service is to be made. Cooperation between the offices of the United States Marshal and the United States Attorney in both districts is essential. The United States 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 United States 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 United States Attorney, the United States 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.

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. *Singleton v. Botkin*, 5 FRD 173; *Hemans v. Matthews*, 6 FRD 3, aff'd 158 F. 2d 9. But if prosecution is by *information or complaint*, a certified copy thereof must be produced and proof made of probable cause for 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 in accordance with Rule 46, may be had if a warrant of removal issues (Rule 40 (b) (3)).

Appeal

An order of removal is not appealable. *Meltzer v. United States*, 188 F. 2d 916.

TITLE 2: CRIMINAL DIVISION**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 United States district court for the purpose of requiring him to enter a plea. Except in cases of petty offenses triable before United States Commissioners, appearances of defendants before United States Commissioners or other judicial officers after arrest are not regarded as arraignments.

Procedure on Arraignment

The procedure to be followed in arraigning a defendant is governed by Rules 10 and 43, Fed. Rules Crim. Proc. Where the defendant is a natural person charged with offenses which constitute 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 one 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. 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.

TITLE 2: CRIMINAL DIVISION**Contact With Judge**

Government counsel should neither participate in nor request investigating agents to participate in private conferences with the judge concerning a criminal case prior to the entry of a plea of guilty or the return of a verdict by the jury unless the defendant or counsel representing him is present.

Right to Counsel

The constitutional right of representation by counsel exists not only when a defendant stands trial, but also at the time of arraignment and in connection with his plea as well as at sentence. *Johnson v. Zerbst*, 304 U. S. 458. When a defendant appears in court without an attorney to represent him, Rule 44 requires the court to advise him of his right to counsel and to appoint such an attorney unless the defendant expressly states that he wishes to proceed without an attorney or is able to obtain counsel. *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. Johnston*, 312 U. S. 275; *Cherrie v. United States*, 184 F. 2d 384.

In any case in which the defendant has not retained counsel, unless he has expressly stated that he wishes to conduct his own defense, the United States Attorney is requested to bring the matter to the attention of the court, in order that the defendant may have the assistance of counsel.

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 that 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.)

TITLE 2: CRIMINAL DIVISION**Pleas**

Rule 11, Fed. Rules Crim. Proc., relates to the entering of pleas by the defendant. 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. The court may refuse to accept a plea of guilty or nolo contendere. Under Rule 11 a plea of guilty cannot be accepted by the court without a determination that it 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, 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.

Nolo Contendere

United States 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 reviewed and approved by the Assistant Attorney General responsible or by the Office of the Attorney General. (Memo No. 42, August 25, 1953.)

Assignment of Cases

With the consent of the judge, a definite number of cases should be assigned for trial each day during the time allowed for the transaction of criminal business. Such assignments should be made with particular reference to the attendance of witnesses, in order that they may be examined and discharged at the earliest possible opportunity.

Trial Instructions: Furnishing Copy

Whenever a court's instructions to the jury in a criminal case have been carefully worked out, a copy should be submitted to the Department, provided authority has been granted for reporting the case, or the court has prepared written instructions in advance and is willing to furnish a copy.

Alternate Jurors

Whenever a jury trial is likely to be protracted, the United States Attorney should suggest to the court the desirability of calling and impanelling one or two alternate jurors (Fed. Rules Crim. Proc., Rule 24 (c) ; Fed. Rules Civ. Proc., Rule 47 (b)).

Recommendations Re Death Penalty

United States Attorneys are instructed not to recommend the death penalty without first obtaining the approval of the Attorney General.

TITLE 2: CRIMINAL DIVISION

DISMISSALS

Except as specifically set forth below, United States Attorneys should not dismiss a case, criminal or civil, within the supervisory responsibilities of the Criminal Division until after they have received authority from the Department of Justice.

Dismissal Without Prior Authorization

United States Attorneys need not obtain authority to dismiss cases supervised by the Criminal Division in the following situations:

- (a) where the defendant is dead;
- (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 United States 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 United States 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 United States 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;

TITLE 2: CRIMINAL DIVISION

(h) where libel suits have been instituted under the Federal Food, Drug and Cosmetic Act and the United States 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 United States Attorney this course is advisable. United States Attorneys must satisfy themselves that the conditions upon which dismissals are authorized have been complied with.

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TITLE 2: CRIMINAL DIVISION

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 guilty individual defendants as well as of the corporate entity. Conviction of the responsible natural person often is much more effective and meaningful than conviction of the related corporation only, since the fine paid by the corporation may be tantamount to no more than a business expense whereas convictions of the responsible, guilty individuals make effective the terms of the program and statute in question.

Dismissal of "Fugitive" Cases.—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. In this connection, it should be noted that 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.

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 United States Attorney handling the case 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 United States 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 United States 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 co-defendants against whom all counts are still outstanding.

TITLE 2: CRIMINAL DIVISION

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 United States Attorney for his action. In smaller offices and those in which there is no division of personnel into sections the Assistant United States Attorney handling the case should submit the form in quadruplicate to the United States Attorney for his action.

The United States Attorney's approval of dismissal should be indicated where prior authorization from the Criminal Division is not required, or the United States 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 United States Attorney's case file, and the original and two copies should be forwarded to the Assistant Attorney General in charge of the Criminal Division. When the dismissal is approved by the Criminal Division in those instances where its prior approval is required, one appropriately signed copy will be returned to the United States Attorney. In those instances where prior authorization from the Criminal Division is not required, no copy of the form need be returned to the United States 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.

If the space allowed on the face of the form is for any purpose inadequate, the reverse side of the form should be used instead of using a separate sheet which might become detached.

This procedure is designed to preserve a short form record for the files of the United States 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.

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Motion for Leave to Dismiss Indictment or Information

In requesting leave of court to dismiss an indictment or information the reason should be given. 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 to 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. (Appendix, Form 2).

Dismissal of Complaints

United States Attorneys are not required to obtain prior authorization from the Department to dismiss complaints made under Rule 3, Fed. Rules Crim. Proc., 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 United States Attorneys, subject only to the requirements of Rule 48 (a), Fed. Rules Crim. Proc., as applied in their respective districts.

Rule 48 (a) provides in part that the Attorney General or the United States 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 United States 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.

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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 United States 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 United States Courts, on the basis of the control exercised over complaints by the United States commissioners under Rule 4 (a) and (c) and Rule 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 exercise 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 United States Attorney must be governed by the district court's interpretation of Rule 48 (a) in that respect.

Care should also be taken that the United States Marshal of the district is promptly informed by the United States 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.

TITLE 2: CRIMINAL DIVISION***Return of Warrant or Summons Upon Complaint***

Whenever a criminal action or case, in which a warrant or summons is outstanding, is dismissed or closed, the United States Attorney will prepare Form No. USA-19 in duplicate and forward both copies to the marshal. The marshal will retain the original of Form No. USA-19 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 the 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.

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 United States 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.

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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 pre-trial custody, including custody under a conviction which was reversed for a new trial. As to sentences imposed before September 20, 1966, 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-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

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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 maximum sentence of imprisonment prescribed by law. The report must be furnished to the court by the Director of the 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 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 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. Or, the court may fix the maximum term of imprisonment

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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 (C. A. 10, 1939); *Vanover v. Cox*, 136 F. 2d 442 (C. A. 8, 1943); *Gunton v. Squier*, 185 F. 2d 470 (C. A. 9, 1950), and *Strewl v. McGrath*, 191 F. 2d 347 (D. C. Cir. 1951), cert. den. 343 U. S. 906. 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 titled "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 180 days after its imposition, or within 180 days after receipt of mandate affirming the judgment or dismissing an appeal, or within 180 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.

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**COLLECTION OF CRIMINAL FINES AND
FORFEITED BAIL BONDS**

The imposition of a fine in a criminal case does not terminate the United States Attorney's connection with the case. It is of utmost importance that unpaid fines should not be overlooked and that constant efforts be made to enforce collection. Similarly, prompt and vigorous action is required in the collection of forfeited bail bonds.

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 "OFFICE OF THE PARDON ATTORNEY", Title 7, at page 22.

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 the Pardon Attorney. Fines, or judgments taken as a result of fines, do not draw interest. (*Pierce v. United States*, 255 U.S. 398, 405; *United States v. Jacob Schmidt Brewing Co.*, 254 Fed. 714.) They abate with the deaths of fine debtors whose estates cannot be charged therewith. (*United States v. Mitchell*, 163 Fed. 1014, aff'd 173 Fed. 254; *United States v. Jacob Schmidt Brewing Co.*, 254 Fed. 714; *Dyar v. United States*, 186 Fed. 614. They are not dischargeable by bankruptcy. (Collier on Bankruptcy, 14th ed., Vol. 1, p. 1596; *Parker v. United States*, 153 F. 2d 66; *In re Thomashefsky*, 51 F. 2d 1040.) 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.

United States Attorneys should take jurisdiction over the collection of fine judgments entered in OPA and other cases arising under war agencies, and over the handling of appearance bond forfeitures in such cases, whether or not such fine or forfeiture judgments have already been entered or are entered hereafter.

Investigations.—An important part of this work is the conducting of investigations for the following purposes:

- (a) To learn, before sentence, the ability of an accused to pay a fine.
- (b) To ascertain whether a proposed poor convict, seeking release as such, is entitled to such release under the statute.

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Procedures with respect to the investigation of judgment debtors generally are discussed under Title 3, Procedures in Aid of Collection.

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), Fed. Rules Crim. Proc., 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 proper cases. The above provision for “any appropriate order to restrain the defendant from dissipating his assets” should receive the careful attention of all United States Attorneys.

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; *United States v. Widen*, 38 F. 2d 517; *United States v. Werner*, 47 F. 2d 351.)

Installment Payments: Garnishment.—Fine debtors who are execution proof should be encouraged to pay in installments in the event payment is not immediately possible. If defendants are gainfully employed, but refuse to make voluntary payments, garnishment proceedings may be instituted where such proceedings are permitted.

Probation: Fine Commitment.—Where defendant is sentenced to a fine and imprisonment and is placed on probation, the United States 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.)

Committed Fines and Costs.—To compel payment of a fine, or fine and costs, included in a judgment the court may direct that the defendant stand committed until payment of the fine, or fine and costs, or until he is otherwise discharged as provided by law. Imprisonment solely for nonpayment of a fine, or fine and costs, is unauthorized unless the judgment as pronounced and signed by the court specifically provides for such imprisonment. The language of the statute (18 U. S. C. 3569), namely, “fine, or fine and costs” does not authorize imprisonment for nonpayment of costs when only costs are assessed. When a

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fine is paid by or for a convict who is in custody under a sentence which includes a committed fine, the keeper of the jail or prison should be notified immediately.

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, relating to indigent convicts, his debt to the Government is not likewise 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; *Grier v. Kennan*, 64 F. 2d 605.)

Sureties.—Rule 46(e), Fed. Rules Crim. Proc., 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

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United States 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.

Forfeitures.—Prompt action is urged in taking forfeitures at the term in which the defendant fails to appear and in making motions at the same term 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 if the bond was filed on or after March 21, 1946. Otherwise the surety must prove that the principal was not wilfully absent. (*Taylor v. Taintor*, 83 U.S. 366.)

United States Attorneys should object to the setting aside of forfeitures and the remission of judgments of default, unless the costs are paid and the Government has been reimbursed for any expenses incurred.

Default on Bond.—While the efforts of sureties to find and surrender their principals are often helpful, United States Attorneys should promptly refer all cases of default involving over \$250, and related matters pertaining to financial responsibility, to the FBI without waiting to ascertain the results of action by the sureties. Cases involving \$250 or less should not be referred to the Bureau, but should unusual circumstances in such a case require investigation the matter should be referred to the Deputy Attorney General. It should be noted that under Rule 46(f)(3) there is no necessity for instituting a separate action to recover on a forfeited appearance bond, but the liability of principals and sureties may be enforced on motion.

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

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(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 otherwise 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

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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 for 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

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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), 5017 (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*, p. 28.2.)

When the United States 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 United States Attorney should submit a statement of the facts, with reasons in support 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 Title 2, p. 28.3).

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

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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 the Matter of the Application of Paul L. Gault, et al.*, No. 116, O. T. 1966. 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 (C. A. 2). 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 Revisers 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 permitted 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

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the discussion of the Youth Corrections Act, 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).

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 United States 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 United States Attorney should request the probation officer to make an investigation and submit a report. If the United States 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

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under state law, may be transferred to the appropriate state authorities by the United States 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 United States 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.

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 United States 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. For the purpose of the examination, the court may order commitment to such hospital or facility as it may designate.

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If the report indicates present mental incompetency of the accused, the court, upon due notice, shall hold a hearing on the evidence and make a finding. In addition to the accused, the reporting psychiatrist should be present at this hearing. If the court finds that the accused is 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.

When commitment follows a finding of mental incompetency the United States 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.

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 suggestion 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 Federal Medical Center, 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.

Competency Recovered—Trial

Upon receipt of notice from the authorities of the Federal Medical Center 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 United States Attorney should promptly cause issuance of a writ of habeas corpus ad prosequendum out of his court to be executed by the United States 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.

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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 United States 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 United States 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 of the 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 (C. A. 9, 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 (C. A. 10, 1962); *Burrow v. United States*, 301 F. 2d 442 (C. A. 8, 1962); *United States v. Thomas*, 291 F. 2d 478 (C. A. 6, 1961); *Hoskins v. United States*, 251 F. 2d 51 (C. A. 6, 1957).

TITLE 2: CRIMINAL DIVISION**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 (C. A. 10, 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 United States 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 im-

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posed 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 committed 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 power 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

Form 792, "Report on convicted prisoner by United States Attorney," must be prepared on all convicted persons committed under sentence to federal penal institutions. The form must be prepared in triplicate, one to be retained by the issuing office, and the remaining two handed to the United States Marshal for delivery to the warden or superintendent of the institution to which the prisoner is committed. If preparation of the form is impossible prior to departure of the Marshal with the prisoner, it should be completed without delay and forwarded by mail to the institution. Any additional and pertinent information relating to the prisoner's background or criminal record, inadvertently omitted in the form or received after its delivery to the Marshal, should be transmitted directly to the Board of Parole

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by letter. As to convicted persons committed to non-federal penal institutions, Form 792 need not be submitted unless specific request therefor is made either by the Board of Parole or the Bureau of Prisons.

Form 792 should be prepared and submitted as to narcotic drug offenders even though they are ineligible for parole. The data supplied by the form is of value and practical use to prison officials. In narcotic cases the form should disclose with particularity the code title and the section or sections of the code under which conviction occurred.

The Board of Parole frequently considers a case several months prior to the date of actual eligibility for parole. Form 792 supplies the only official information regarding the nature of the offense. These two facts make it imperative that the form be submitted in all cases, excepting only those persons committed to non-federal institutions, with the least possible delay.

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 a United States 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

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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 (C. A. D. C. 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, 362; *Tippitt v. Squier*, 145 F. 2d 211 (9th 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 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 (C. A. 2, 1944)), or by both fine and imprisonment. When the offense is punishable by both fine and 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.

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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. 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.

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 originally. 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).

TITLE 2: CRIMINAL DIVISION**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 (C. A. 6, 1964); *Sanford v. King*, 136 F. 2d 106 (C. A. 5, 1943). However, the court has power by specific direction to make the probation period take effect upon termination of the prison term. *Frad v. Kelly*, 302 U. S. 312 (1937); *Cosman v. United States*, 302 U. S. 617 (1938); *Gaddis v. United States*, 280 F. 2d 334 (C. A. 6, 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 (C. A. 1, 1965); *Demarois v. Farrell*, 87 F. 2d 957 (C. A. 8, 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**

United States 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 postponement 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

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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, United States Attorneys are urged to cooperate in consummating the transfer unless sound practical reasons require a contrary conclusion. The procedure in such a matter is outlined in Title 2, page 14, of this Manual.

When a detainer has been filed against a prisoner and the charges on which it rests are dismissed or otherwise disposed of during service of sentence, the United States Attorney should immediately notify, and request acknowledgment from, the United States 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 United States Marshal of the district where the prisoner is in custody, and to the United States 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

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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 United States 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 United States 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 (C. A. 7, 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 United States 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

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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 United States Marshal of that district. Upon the receipt of such a writ the Marshal will advise the United States Attorney for the district of the request. The United States 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 of the 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 United States 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,

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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 federal 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 on 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 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. See Title 2, page 34, for treatment of motion to vacate sentence under section 2255.

A petition for a writ of *habeas corpus* does not lie to secure judicial determination of a question which, even if determined favorably to the petitioner, would not result in his discharge from custody. *McNally v. Hill (warden)*, 293 U. S. 131 (1934); *McNealy v. Johnston (warden)*, 100 F.2d 280 (C. A. 9, 1938).

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, 194 F. 2d 917 (C. A. 8, 1952), cert. den. 344 U. S. 822; *Garcia v. Steele*, 193 F. 2d 276 (C. A. 8, 1951); *Powell v. Hunter (warden)*, 172 F. 2d 330 (C. A. 10, 1949).

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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 United States 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 United States 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 United States 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.

TITLE 2: CRIMINAL DIVISION**DELIVERY OF ARMED FORCES PERSONNEL FOR
CIVIL PROSECUTION**

The enactment of the Uniform Code of Military Justice (Public Law 506, 81st Congress, c. 169, Section 1; 64 Stat. 108; 50 U. S. C. 551-736) has necessitated the revision of established procedures with reference to the delivery to civil authorities of military personnel charged with the commission of civil offenses. Whereas, under former Article of War 74, it was mandatory that the military authorities, except in times of war and in certain other instances, deliver military offenders to civil authorities, Article 14 of the Uniform Code of Military Justice 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 600-320, C 1, dated September 18, 1951, and the Department of the Air Force has issued Air Force Regulation 111-11, dated June 15, 1954. 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 Treasury Department has also issued a Coast Guard regulation, Section 0705, Coast Guard Supplement to the Manual for Courts-Martial, United States, 1951.

Article 14 of the Uniform Code of Military Justice authorizes any commanding officer exercising general court-martial jurisdiction to surrender military personnel under his command to civil authority

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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, presentment, 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.

With respect to 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 United States 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 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)
 _____, United States Army, to the civil au-
(Service number)
 thorities 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 _____, that the
(Official designation)
 commanding officer of _____ will be
(General courtmartial jurisdiction)
 informed of the outcome of the trial and that said _____
 _____ will be returned to the Army authorities at the

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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 United States 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 United States Attorney in the district of prosecution. To prevent any delay, the United States 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 United States Marshal who transports such personnel.

With respect to 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 one 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 United States 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.

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With respect to 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, United States 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 Secretary of the Treasury.

Public Law 725, 83d Congress, Chapter 1143, 2d Session, 5 U. S. C. 311a, empowers the Attorney General to investigate violations of federal criminal statutes involving federal officers and employees, and requires the Departments and Agencies of the Executive Department to report such violations to the Attorney General. 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. Copies of the Memorandum of Understanding together with a letter of explanation, were sent to each United States Attorney on November 25, 1955. Additional copies of the Memorandum of Understanding and letter will be made available upon request.

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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 a reasonable likelihood that only persons subject to the Uniform Code of Military Justice are involved in the crime as principals, accessories 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 of Understanding recognizes two situations in which the military department shall exercise jurisdiction to 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 departments assert jurisdiction in a so-called "extraordinary case" the United States 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 United States 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

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before a military tribunal. This list is not intended to be exhaustive and there may be other appropriate matters for consideration by the United States Attorney in any given case. Where, however, the United States Attorney has any doubts, it is requested that he solicit the views of the Criminal Division.

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 United States Attorney where a military department has determined that an offense is minor and, based on available information, the United States Attorney believes it should have been reported to the FBI, he should immediately communicate with the appropriate military commander. If the United States 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.

It is to be observed, with reference to non-minor offenses of the types named above that 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 reservations 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

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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 United States Attorney closely appraise the facts of each case so that the responsibilities of civil authority shall be protected.

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 United States Attorney may desire to raise with reference to the Memorandum.

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.

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.

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United States 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 United States district courts, upon application, to compel attendance of witnesses before service courts.

Motion To Vacate Sentence Under Section 2255

Among the principal procedural questions settled by the courts under 28 U.S.C. 2255 are the following:

(a) This statute confers no broader right of attack upon a judgment and sentence than was possible before its passage by an habeas corpus proceeding. *Barnes v. Hunter, Warden*, 188 F. 2d 86, 88 (CA 10).

(b) This section may not be invoked for relief from errors occurring during trial. A motion under this section cannot be substituted for an appeal from conviction. *Parker v. United States*, 184 F. 2d 488, 490 (CA 4).

(c) A motion under this section may not be entertained unless the prisoner is in actual custody. *Crow v. United States*, 186 F. 2d 704, 706 (CA 9); *United States v. Bradford*, 194 F. 2d 197, 200 (CA 2). However, see *United States v. Morgan*, 346 U.S. 502, which holds that the common law writ of error *coram nobis* is available to a petitioner not in custody under the sentence he attacks.

(d) Production of a prisoner under this section before the trial court depends upon the issues raised. If the motion raises substantial issues of facts within the prisoner's knowledge, the court should secure his appearances at a hearing by causing issuance of a writ of habeas corpus ad testificandum. *United States v. Herman Hayman*, 342 U.S. 205, 223.

INTERNATIONAL EXTRADITION

International extradition proceedings are governed by treaties with foreign countries. Under most of these treaties there is no

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obligation on the part of the Attorney General or the United States 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, if counsel is necessary. United States 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 the United States 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 some instances, the representative of the foreign government seeking the extradition of a fugitive may be advised to contact the United States 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 United States 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 _____
 The honorable The Judge of the _____
 Your complainant, the attorney of the United States for the
 _____ District of _____, under oath,
 deposes and says:
 That, in the above matter, he acts for and in behalf of the Gov-
 ernment of _____;

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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 as follows:

That, through the diplomatic channel, your complainant is informed and believes that requisition for the herein-named fugitive, _____, is about to be made, accompanied by the formal papers upon which demand for extradition is founded;

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

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

The United States Attorney will represent the foreign government at the hearing. 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, unless the fugitive in the meantime sues out a writ of habeas corpus, which he may do, report his findings to the Secretary of State, who will issue a warrant for the surrender of the accused to the demanding country.

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 United States Attorney should assure himself of the existence of the following essentials:

- (a) The warrant of arrest issued in this country cannot be served owing to 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 foreign treaty, and (2) is made criminal by the laws of both countries.
- (d) Sufficient evidence in the possession of the United States 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 extradition treaties existing between the United States and foreign countries may be found printed in the several volumes of the Statutes at Large or in Malloy's "Treaties, Conventions, International Protocols, etc." but if the United States Attorney is unable to ascer-

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tain that a treaty exists between the United States and the country of asylum or that the offense committed in the United States is extraditable, he should apply to the Attorney General for such information prior to the preparation of the necessary papers.

Arrest and Detention of Fugitive; Procedure

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 telegram or letter, for his arrest and detention. Such application should contain the following information:

- (a) The name in full of the accused and his assumed name or names, if any;
- (b) A physical description of the accused;
- (c) The place and address in the foreign country where the accused can be found;
- (d) The date of the indictment, if an indictment has been filed;
- (e) The specific offense or offenses charged;
- (f) The date of the commission of the offense and the place where committed; and
- (g) 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 United States 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 duplicate to the Attorney General.

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.

In treaties with some foreign countries, the period of detention is limited to 40 days after arrest. In other jurisdictions, however, the practice is generally observed, after the arrest of the fugitive, to continue the hearing for a week, and, upon motion, to grant a further continuance. In some instances these continuances have been limited to two or three weeks.

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The essentials stated above having been found to exist, a letter similar to the following should be sent, in triplicate, to the Attorney General in transmitting the formal papers:

SIR: I transmit herewith a copy, in duplicate, 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 United States 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), 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 it is of a public or private nature, or in case of injury, the name of the person injured. The date and place should also 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.

Respectfully,

The agent selected to receive the fugitive from the hands of the foreign authority and convey him to this country should be able to identify the accused in the event identity is not disclosed or is denied at the hearing abroad.

As stated, two sets of the following papers, one set to be retained in the office of the Secretary of State and the other to go abroad, should accompany the application for extradition:

- (a) The indictment.
- (b) The warrant of arrest, with the Marshal's return indorsed thereon.
- (c) The evidence upon which the charges made in the indictment are based.

All such papers should have formal, legal captions.

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The indictment should be a true copy of that paper as filed in the office of the clerk of the United States district court. He 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 United States District Court for the District of ----- To this the clerk should sign his name and official title, and affix the seal of the court.

The warrant of arrest, which in the case of a fugitive has been returned into court with the Marshal's indorsement of nonservice, is a part of the records of the court of which a copy should be prepared by the clerk and certified in the manner indicated for the copy of the indictment.

If the evidence was reduced to writing at the time it was given to the grand jury, it should be properly authenticated under the seal of the court and transmitted with the other papers to the Attorney General, but if the evidence was not reduced to writing, original affidavits of a sufficient number of the witnesses who appeared before the grand jury to make a strong case, should be secured.

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 United States court, or a United States 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 United States Commissioner has affixed his jurat to any paper executed before him, official identity should be established by the usual certificate of a judge of a United States court under the seal of the court.

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 be begun before the defendant has been indicted.

In such cases a copy of the following papers, in duplicate, and duly authenticated, should accompany the application for extradition, signed by the United States Attorney:

TITLE 2: CRIMINAL DIVISION

(a) Complaint properly signed and sworn to, made by an officer or person having knowledge of the facts and executed before a duly authorized officer, preferably a United States judge or a United States Commissioner, or a clerk or deputy clerk of a United States court.

(b) Warrant of arrest, with the Marshal's return indorsed thereon.

(c) Original affidavits reciting facts to support the charges made in the complaint. The suggestions heretofore made as to affidavits for use in cases where the fugitive has been indicted apply to cases where he is merely charged with having committed an offense and where an indictment has not yet been returned.

When the defendant, after trial and conviction 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 duplicate 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 the certificate of the United States judge under the seal of the court.

The actual and necessary expenses incurred and paid by the agent in the execution of the President's warrant in cases of fugitives from the justice of the United States should be stated in an itemized account, supported by proper vouchers, and sworn to. The account should be forwarded direct to the Department of State for audit and payment.

Note:

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TITLE 2: CRIMINAL DIVISION

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JUVENILE DELINQUENTS**Procedure***(Delinquency)*

The procedure authorized by the Federal Juvenile Delinquency Act (18 U. S. C. 5031-5037) shall be applied, without prior authority

TITLE 2: CRIMINAL DIVISION

from the Department, in the cases of all persons who have not reached their eighteenth birthday when they violate a law (or laws) of the United States not punishable by death or life imprisonment, excepting only those:

- (a) Who refuse consent in writing;
- (b) Whose cases can properly be diverted to state authorities or to the District of Columbia under 18 U. S. C. 5001;
- (c) Whose cases, in the opinion of the United States Attorney, should be handled under regular criminal procedure in the public interest. In any case falling within this exception the United States Attorney shall submit promptly to the Department a statement of the facts and reasons supporting his opinion. He shall then await instructions as to whether he is authorized to invoke regular criminal procedure.

Diversion of Juveniles

Consistent with a proper regard for the maintenance of Federal justice, consideration should be given to diversion of Federal juvenile violators to State authorities in their home communities for appropriate disposition under State law. Such diversion is vested in the discretion of the United States Attorney under 18 U. S. C. 5001. While diversion may be invoked in any case where it best serves the interest of the United States and the juvenile violator, it should receive special attention as to violators of tender years.

Jurisdiction

The date of the violation is regarded as determinative of jurisdiction. Instructions issued by the Attorney General stated that "the procedure authorized by this Act shall be applied in the case of all persons who have not reached their eighteenth birthday at the time of the offense." That interpretation now has judicial approval. In *United States v. Fotto*, 103 F. Supp. 430, the court held that the language of the Act contemplates procedure thereunder as to any person under eighteen when violating a law even though no proceeding is begun before the eighteenth birthday, unless the Attorney General directs that adult procedure be followed.

Method of Procedure

No set form is required either for the "information" filed against the juvenile, or for the written "consent" of the juvenile as a prerequisite to procedure under the Act. The United States Attorney should assure himself that the juvenile understands his rights and

TITLE 2: CRIMINAL DIVISION

the consequences of such consent, if given. The consent shall be prepared by the United States Attorney and must be signed in the presence of the judge after the latter has fully apprised the juvenile of his rights and the consequences of his consent, as required by the statute (18 U. S. C. 5033). The consent should contain a statement that the court has informed the juvenile as indicated.

Sentence: Probation: Fine

The language of the statute (Section 5034) authorizes a court, upon a finding of juvenile ~~delinquency~~ ^{delinquency}, to place the juvenile on probation or commit the delinquent to the custody of the Attorney General for a period not exceeding minority. The Department is of the view that this specific authorization excludes power to impose a fine.

MENTAL DEFECTIVES

18 U. S. C. 4244-4248 formalize the procedure for (1) the examination and disposition of persons believed to be insane or mentally incompetent to stand trial, (2) the disposition of convicted persons believed to have been mentally incompetent at the time of trial, and (3) the detention beyond the expiration of sentence of persons who are insane and who will probably endanger the safety of officers, property, or other interests of the United States.

Under Section 4244 it is the duty of the United States Attorney to file a motion for judicial determination of the mental competency of an arrested person charged with an offense against Federal law if there is reasonable cause for belief that such person is mentally incapable of understanding the proceedings against him or of assisting in his own defense. Thereupon the court must cause examination of the accused by a psychiatrist and for that purpose may order commitment to any hospital or other facility. If the psychiatrist's report to the court indicates mental incompetency a hearing must follow, upon due notice and the court must make a finding.

If the court finds, after hearing, that the accused person is or was mentally incompetent, it may commit such person pursuant to Section 4246 to the custody of the Attorney General until mental competency to stand trial is restored or the charges are dismissed. It is considered that the first sentence of Section 4246, authorizing such commitment, applies only to those whose mental incompetency is found by the court to be temporary. Therefore the court should make a finding in each case whether the mental disability is temporary or permanent. That is the holding of an appellate court in *Wells, by Gillig v. The Attorney General*, 201 F. 2d 556 (C. A. 10). In conformity with its

TITLE 2: CRIMINAL DIVISION

conclusion, that court held further that the commitment authorized by Section 4246 cannot be made if the court finds that the mental incompetency is of a permanent nature. It premised that conclusion on the doctrine that the care of the permanently insane is the duty of the respective States.

The legislative history of these statutes and the committee hearings had thereon are persuasive of the view that when an accused person is found to be permanently insane, or that his mental incapacity to understand the proceedings against him is of a permanent nature, the provisions of Section 4247 should be invoked. The second sentence of Section 4246 authorizes the court, after a hearing pursuant to Section 4244 or 4245, to determine whether the conditions specified in Section 4247 exist and, if so, to make commitment in accordance with Section 4248. Under Section 4247, if the court finds that the accused is mentally incompetent, and that if released he would probably endanger the safety of the officers, property, or other interests of the United States, and that suitable arrangements for care and custody (assumption of responsibility by the State) are not otherwise available, it may order commitment under Section 4248 until one or the other of the conditions specified in Section 4247 no longer exists.

Consonant with the foregoing the Department's position is that if the mental disability is temporary the accused should be committed to the custody of the Attorney General until he is able to stand trial; if the condition is adjudged to be permanent and the prisoner dangerous, efforts should be made to transfer him to state custody, but if no State will accept him resort should then be had to the hearing in accordance with Section 4247. This course of procedure finds support in the sections discussed and will safeguard the general public against release of dangerous persons when state custody cannot be accomplished.

In any effort to interest state authorities in assuming responsibility for the care and custody of an accused as contemplated by Sections 4247 and 4248, the United States Probation Officer may be of assistance. Completion of arrangements with the state in such a case should be speeded because it is contrary to the policy of the Department to retain mental incompetents in jail or other facilities any longer than necessary. Where such a transfer is effected the criminal charge against the accused should not be dismissed without the Department's approval.

TITLE 2: CRIMINAL DIVISION
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 (United States Attorney) for prosecution or suit. See Sections 3 and 5 of Executive Order 6166 (5 U.S.C. 124-132).

The majority of offers in compromise within the assignment of the Criminal Division come to the Department 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 tax cases 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 acts amendatory thereto, of which the Tax Division has jurisdiction) from the time the case is referred to the Department, or United States Attorney, for prosecution or suit and while the criminal or forfeiture phases are pending. See

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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 U. S. C. 124-132).

(3) Forfeiture liability under the Contraband Transportation Act (49 U. S. C. 784, 19 U. S. C. 1617 and Executive Order 6166), the Slot Machine Act (15 U. S. C. 1177, 19 U. S. C. 1617, 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 Slot Machine 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 it is concluded that such action would jeopardize the success of any contemplated or pending criminal prosecution. The views of the United States Attorney in that respect will be given great weight.

In internal revenue liquor cases the general policy is not to compromise wilful criminal liability involving any appreciable tax loss, especially if the evidence reasonably would sustain 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 non-taxpaid 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,

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or the evidence is weak, or the other surrounding circumstances do not justify prosecution, compromises 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 successful 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 forfeiture, tax and criminal liability are made the subject of an offer. From the criminal angle the above observations are pertinent. Respecting the forfeiture phase, principally the question is whether the amount offered, compared with the value of the property, taking into consideration 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.

Forfeiture Compromises

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 outlined procedure is adhered to much unnecessary delay in the Department's final action on offers in compromise will be avoided. While expeditious action is highly desirable in all cases, it is of particular importance in forfeiture cases in which storage

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charges usually are accumulating and the property subject of the offer 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 office of the United States Attorney 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 proponent 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 the latter expenses are to be paid by the proponent to the person to whom the Government or any of its agencies has obligated itself.

A copy of the investigating agency's report or reports respecting the alleged liability should accompany the offer unless the United States Attorney has reason to believe the Department already has received a copy. If the United States Attorney has no copy available for transmission, 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 any related court proceedings, and of the probable effect the acceptance or rejection of such offer would have on same.

If practicable in important cases the United States Attorney should obtain a statement of the views of the field office of the investigating agency. This, together with his recommendation giving detailed supporting reasons as to the merits of accepting or rejecting the offer, should be transmitted to the Department. Upon receipt of an offer in the Department, except in minor or routine cases, the views and comments thereon of the headquarters office of the investigating agency is sought. This data is essential so that a memorandum brief showing the reason for the action taken by the Department may be prepared. By delegation of authority the Assistant Attorney General, Criminal Division, may take final action on such offers, except that if the claim of the Government made the subject of an offer exceeds \$100,000, the approval of the Attorney General is required.

The United States 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 the recommendation of the United States Attorney. The United States Attorney should promptly advise the proponent or his counsel in writing of such action. If the offer is

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accepted and covers criminal liability, included in an indictment or criminal information, the United States Attorney may seek dismissal as to the proponent. If the accepted offer covers forfeiture liability, he may cause dismissal of the libel 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 United States Attorney is otherwise directed by the Department. The compromise medium should not be used to deprive any bona fide claimant of seized property to his day in court if he desires a hearing on the merits of the forfeiture. If the offer is rejected the United States 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 United States Attorney. Thereupon the United States Attorney should make refund and proceed with the case. However, when any bona fide offer is tendered, the United States 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.

Dismissal of Pending Indictment

In any case where the United States 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 worth while, immediate action should be taken to dismiss the pending indictment in accordance with established procedures.

Notice to FBI re Granting Leave

Since many State penal institutions grant so-called furloughs or leaves of absence to prisoners against whom Federal detainers have been filed, United States Attorneys, in requesting local prison authorities to detain prisoners against whom Federal charges are pending, should include specific instructions that the FBI be advised before any leave is granted to such prisoners. In this way, the Bureau will not only be apprised of the fact that a prisoner of interest to it and against whom a Federal detainer has been filed is on vacation, but it will be in a position to take such steps as may be necessary in connection with the proposed leave.

January 1, 1959

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PAROLE**Eligibility**

As a result of Public Law 98, 82d Congress, approved July 31, 1951, which amended 18 U. S. C. 4202, all Federal prisoners, other than juvenile offenders or committed youth offenders, serving a definite term or terms of over 180 days may be released on parole after serving one-third of their term or terms. It is immaterial whether such minimum term of over 180 days, or any longer term, is composed of several sentences of less than 180 days ordered to run consecutively. Neither is any distinction made as to terms of imprisonment comprising a sentence imposed under a misdemeanor conviction and one imposed under a felony conviction. If ordered to be served consecutively they are aggregated to determine the date of parole eligibility. The statute also provides that a prisoner sentenced to a term of more than 45 years shall become eligible for consideration for parole after serving 15 years of his sentence.

TITLE 2: CRIMINAL DIVISION**Reports**

To enable the United States Board of Parole to make appropriate determinations, the United States Attorney shall prepare Form No. USA-792 (Revised, October 1955) on all such cases committed to Federal institutions. On cases committed to non-Federal institutions, the Board will request the form only when application is made for parole.

The form should be prepared in triplicate, with two copies for the Warden or Superintendent of the institution to which the prisoner is committed, and one copy to be retained. If possible, the report should be completed and given to the United States Marshal to be included with the commitment papers for delivery to the institution with the prisoner. If not completed in time for delivery by the Marshal, it should be completed as soon thereafter as possible and mailed to the institution. Any additional relevant information received after submission of the form should also be reported.

Since the United States Board of Parole frequently considers a case several months prior to the date of actual eligibility for parole and this report contains the only official information regarding the nature of the offense committed by a parole applicant in this category, the importance of the report to the Board will be readily appreciated.

Warrant for Arrest of Parole Violator

When a person during the period of supervision on parole or conditional release, which extends to the expiration of the maximum term of sentence in either case, is convicted and committed under sentence to a federal penal institution, the Board of Parole issues its warrant for the subject's arrest as a violator of parole. Such warrant is placed on file with the institutional authorities for execution when the subject becomes eligible for release under the latest sentence. A direction in the latest sentence that it shall be served concurrently with time owing as a parole violator on the previous sentence is ineffective because the Board of Parole is not required to order execution of such warrant prior to the date indicated. See *Zerbst, Warden v. Kidwell*, 304 U. S. 359, 362; *Tippitt v. Wood*, 140 F. 2d 689 (C. A. D. C.).

TITLE 2: CRIMINAL DIVISION**PRISONERS****Prosecution of Prisoners Serving Sentences**

United States Attorneys should not postpone the prosecution of defendants on outstanding indictments merely because they are presently serving sentences, but should take the initiative in bringing such cases to trial. Prisoners in custody under sentence are not deprived of the constitutional right to a speedy and public trial, and unreasonable delay often results in serious prejudice to the Government as well as the accused. Detainers subject a prisoner to certain institutional restrictions and prevent him from being considered for parole. If prosecution on the outstanding indictment is delayed until after a defendant is eligible for conditional release and a consecutive sentence is then imposed, he loses the benefit of aggregated good time under 18 U. S. C. 4161 which he would receive if he were tried and convicted while still in prison under the first sentence.

Detainers for Prisoners

All United States Attorneys should follow up on their requests for detainers, particularly in districts other than their own. Immediately after disposition or change of status of charges against an individual, the Marshal holding the warrant and responsible for placing or lifting a detainer should be notified.

TITLE 2: CRIMINAL DIVISION**In Federal Institutions**

Where a defendant is incarcerated under sentence in a Federal penal institution a writ of *habeas corpus ad prosequendum* should be obtained for his production at the trial. Such writ is to be addressed to the warden having actual custody of the prisoner, to the United States Marshal of the district in which the prisoner is in custody, and to the United States Marshal of the district where the trial will take place. Marshals are advised to execute the writ in the most economical manner.

In State Institutions

If the defendant is incarcerated in a State institution, the consent of State authorities should be sought to have him produced under a similar writ solely for the purpose of Federal trial, with the understanding that he will be returned immediately upon its conclusion. Should State authorities care to produce the prisoner at the place of trial and return him under State guard, the writ should be addressed to the warden or superintendent of the State institution; if not, then to such warden or superintendent and to the United States Marshal of the district where the State institution is located. Production of the prisoner by the Marshal of the trial district requires Departmental approval.

Dismissal of Pending Indictment

In any case where the United States 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 worth while, immediate action should be taken to dismiss the pending indictment in accordance with established procedures.

Notice to FBI re Granting Leave

Since many State penal institutions grant so-called furloughs or leaves of absence to prisoners against whom Federal detainers have been filed, United States Attorneys, in requesting local prison authorities to detain prisoners against whom Federal charges are pending, should include specific instructions that the FBI be advised before any leave is granted to such prisoners. In this way, the Bureau will not only be apprised of the fact that a prisoner of interest to it and against whom a Federal detainer has been filed is on vacation, but it will be in a position to take such steps as may be necessary in connection with the proposed leave.

TITLE 2: CRIMINAL DIVISION**Writs of Habeas Corpus Ad Prosequendum and Ad Testificandum**

A Federal prisoner serving a sentence may be produced to testify, or to be prosecuted in another district only upon a writ of habeas corpus in proper form. Writs of *habeas corpus ad testificandum* and *ad prosequendum* must be directed to the warden or superintendent having the prisoner in custody, and also to the Marshals of both the district of custody and the district which issues the writ. The warden or superintendent upon being served with such writ shall surrender the prisoner into the custody of the Marshal, at such institution, who shall thereupon become responsible for the prisoner.

The direction in the writ of *habeas corpus ad prosequendum* or *ad testificandum* that the prisoner shall be returned to the custody of the warden or superintendent upon the conclusion of his testimony or trial shall be strictly observed, unless contrary directions are received from the Director, Bureau of Prisons while the prisoner is in the custody of the Marshal. Writs *ad testificandum* must not be used to produce Federal prisoners for examination by United States Attorneys or investigative agencies.

Alcatraz Prisoners

Prisoners in Alcatraz Penitentiary may not be produced in response to writs of habeas corpus *ad testificandum* or *ad prosequendum* unless the matter has first been submitted to the Director, Bureau of Prisons. The necessity for such production must be clearly established.

Civil Cases

Except in the most meritorious cases United States Attorneys should oppose the granting of writs of *habeas corpus ad testificandum* in civil cases. In most instances the prisoner's deposition should suffice, and such deposition may be secured upon appropriate court order and at the convenience of the warden of the institution where the prisoner is in custody.

TITLE 2: CRIMINAL DIVISION

Production of 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 United States Marshal of that district. Upon the receipt of such a writ the Marshal will advise the United States Attorney for the district of the request. The United States 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 other 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. Authorization for production of the prisoner shall be subject to the following conditions:

(a) The State shall make arrangements for payment to the United States 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

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of issuance of the writ or at the expiration of any sentence imposed in connection with Federal 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 on 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.

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 of the 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 to produce the prisoner if granted will be subject to the conditions listed above.

PROBATION**Authorization**

18 U. S. C. 3651 authorizes a trial court, after conviction for any offense not punishable by death or life imprisonment, to suspend imposition of sentence, or impose sentence and suspend its execution, and place the defendant on probation for a period not exceeding five (5) years. Probation is authorized whether the offense is punishable by fine or imprisonment, or both. Where the statute violated makes both fine and imprisonment mandatory, a fine may be imposed and execution of sentence suspended and probation granted.

Corporations

Some trial courts have imposed fines upon corporations found guilty of violating law, suspended execution thereof in whole or in part, and placed such corporations on probation. Such practice has ample support by virtue of the fact that Section 3651 as a remedial statute is to be liberally construed and its language places convicted corporations within its purview.

TITLE 2: CRIMINAL DIVISION**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 jurisdiction of the Criminal Division 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 Slot Machine Act, civil aircraft and other cases coming within the assignment of the Criminal Division.

It should be borne in mind 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 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 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. 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

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Executive branch of the Government, have been made applicable also to such liabilities in respect to the internal revenue laws, the Contraband Transportation Act, the Slot Machine Act and the laws to protect the "Dry States." See 26 U. S. C. 7327; 18 U. S. C. 3615; 49 U. S. C. 784; 18 U. S. C. 3615, and 15 U. S. C. 1177. Section 1613

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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

Prior to reference of a case to the Department (United States Attorney) for prosecution or suit, jurisdiction to act on such petitions is in the seizing agency. (Seizures under the Slot Machine Act are made by agents of the FBI.) Thereafter, pursuant to Executive Order 6166 (5 U. S. C. 124-132), 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 mitigate forfeitures of other types of property seized under the internal revenue laws, nor in respect to any seizures under the Contraband Transportation Act, the Slot Machine Act, or other liquor laws, except Indian liquor laws, as indicated above.

Petitions for the consideration of the Criminal Division should be under oath, addressed to the Attorney General and filed through the United States 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.

Upon receipt of a petition and attachments the United States Attorney should forward a copy thereof 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

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is received the petition with attachments and the data furnished by the seizing agency should be transmitted to the Department, together with the United States Attorney's recommendation. Unless the papers set forth the facts in respect to the seizure the United States Attorney also should advise the Department in that respect.

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 these papers are received in the Department, a memorandum brief setting forth the basis of the action taken is prepared. The United States 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 petitioning lienor that he will save the Government 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; *United States ex rel. Walter E. Heller and Company v. Mellon*, 40 F. 2d 808, cert. denied 281 U. S. 766, 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 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

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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, such allowance only relates to the actual interest of the petitioner in the property. Thus if a finance company is claiming through a conditional sales contract or chattel mortgage, etc., only the unpaid balance on the contract is allowable, less any unearned interest, finance charge (time price differential or mark-up 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 United States Attorney may request the seizing agency to compute such amount. If the determined interest of the petitioner in the property exceeds its appraised value, such 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 determined interest of the petitioner, 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 should be paid to the United States 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 Court or the United States Marshal, as the case may be, or preferably, in regard to any outstanding storage charges, to the person to whom the Government or any of its agencies is obligated.

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

April 1, 1958

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SPECIFIC VIOLATIONS

AGRICULTURAL LENDING AGENCIES

Cases involving violations of 18 U. S. C. 658 and 15 U. S. C. 714m, are usually referred directly to United States Attorneys by Regional Attorneys of the Department of Agriculture. United States 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 United States 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 United States Attorney who requested the investigation.

ANTI-GAMBLING STATUTES

All cases arising under 18 U.S.C. 1084, 1952 and 1953 should be presented directly to the United States Attorney in whose district the unlawful activity takes place for an initial prosecutive opinion. All proposed indictments under these statutes should be sent to the Criminal Division for approval prior to the return of the indictment, accompanied by a memorandum outlining the views of the United States Attorney regarding the proposed prosecution. Where governmental corruption at the local level is involved the United States 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.

United States Attorneys may request the Organized Crime and Racketeering Section for any assistance needed to facilitate the effective enforcement of these important anti-gambling statutes.

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ANTI-RACKETEERING ACT

18 U. S. C. 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, §§ 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 twenty 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, cert. denied 344 U. S. 893. See also: *Hulahan v. United States*, 214 F. 2d 441 (C. A. 8), certiorari denied, 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 Anti-Racketeering Statute.

BANKING LAWS

18 U. S. C. 656 prohibits theft, embezzlement, abstraction and misapplication by a bank officer, director, agent or employee. For definitions of embezzlement, abstraction and misapplication see *United States v. Northway*, 120 U. S. 327; *United States v. Harper*, 33 Fed. 471. 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;

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United States v. Heinze, 218 U. S. 532; *Mulloney v. United States*, 79 F. 2d 566, cert. denied 296 U. S. 658.

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. See also *United States v. Giles*, 300 U. S. 41, and *Hargreaves v. United States*, 75 F. 2d 68, cert. denied 295 U. S. 759.

Cases involving violations of 18 U. S. C. 656 and 1005 are usually reported to United States 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 United States Attorney desires a further investigation, he should refer the case to the local office of the FBI with a request for an investigation. United States Attorneys should address

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all correspondence regarding a criminal prosecution to the Criminal Division, Department of Justice, and not to the office employing the examiner.

United States 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 911.

Whenever the State first takes jurisdiction of a case involving irregularities on the part of officers or employees of State-member banks or insured non-member 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 United States Attorneys by Regional Attorneys of the Department of Health, Education and Welfare. The Federal Home Loan Bank Board submits reports to United States 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 Chapter 9 Bankruptcy, Title 18 (Sections 151 through 155), your attention also is directed to the utilization of Section 1341 of Title 18, U.S.C., the mail fraud statute, particularly in instances involving false financial statements. *Dranow v. United States*, 307 F. 2d 545 (C.A. 8, 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 United States Attorney. Under 18 U.S.C. 3057(b), the United States 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

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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.

In implementing Section 3057(b), the following procedure should be followed: Upon report of a possible bankruptcy violation, the United States Attorney shall notify the referee that (1) the case will be investigated, or (2) the case has been closed. If the United States 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 investigation, the United States 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 himself is the subject of the investigation. In the event prosecution is declined, cogent and reasonably detailed reasons for such declination together with specific reference 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: pp. 2; 9-10; 31-32.

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 United States 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, manufacturer, business, 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

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**CIVIL RIGHTS, PEONAGE, AND INVOLUNTARY
SERVITUDE VIOLATIONS**

The principal statutes available for civil rights prosecutions are 18 U. S. C. 242 and 241.

18 U. S. C. 242, a misdemeanor statute, applies to *willful* deprivations of the civil rights of inhabitants (not just citizens) made under color of law. *Screws v. United States*, 325 U. S. 91; *Williams v. United States*, 341 U. S. 97. The statute is aimed at State (or Federal) officials, but private persons can be prosecuted thereunder if they aid and abet violations by officials. Police brutality cases constitute the commonest violations of the statute.

18 U. S. C. 241, a felony statute, applies to conspiracies to injure citizens in the exercise of Federal rights. Private persons as well as officials can violate the statute. Rights which arise from the relation of the victim and the Federal Government (e. g., right to safe custody in the hands of a Federal officer, right to inform of the violation of Federal law, rights conferred by Federal laws such as 29 U. S. C. 157, etc., right to vote in Federal election and have ballot counted as cast, etc.) are clearly within the statute. Application of 18 U. S. C. 241 to Fourteenth Amendment rights, where 18 U. S. C. 242 would apply were a substantive offense involved, has not been decisively adjudicated by the Supreme Court and is left in doubt by the Court's latest decision, *United States v. Williams*, 341 U. S. 70. 18 U. S. C. 371, alleging conspiracy to violate 18 U. S. C. 242, should, until further notice, be employed in conspiracy cases in the latter category.

Other more specialized criminal statutes bearing upon civil rights and which are not discussed below are: 18 U. S. C. 243 (official exclusion of jurors because of race or color); 18 U. S. C. 244 (discrimination by theater or amusement personnel against person wearing uniform of Armed Forces); 18 U. S. C. 601 (deprivation for racial or political reasons of Federal relief or other employment benefits); 18 U. S. C. 1505 (intimidation of witnesses before Federal courts, etc.); 18 U. S. C. 2234 (use of unnecessary severity by Federal officer in executing search warrant); 18 U. S. C. 2235 (malicious procurement of Federal search warrant); 18 U. S. C. 2236 (search by Federal officer of private dwelling or building without warrant, except as incident to arrest, etc.).

18 U. S. C. 1584 applies to the willful holding to involuntary servitude. There need be no proof that the victim was held for payment of a debt. Existence of a real or claimed debt is required under 18 U. S. C. 1581, *Clyatt v. United States*, 197 U. S. 207, 215; *United States*

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United States v. Moriarity, 106 Fed. 886 (S. D. N. Y. 1901), and in *United States v. Sarle*, 45 Fed. 191 (D. R. I. 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 that Department to the appropriate United States Attorney. In all instances of refusal to answer Census questionnaires affecting companies, businesses, religious bodies, and other organizations, the United States 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 United States Attorney by the Department of Commerce.

Copyright Law

Sections 104 and 105 of Title 17, U.S.C., Copyrights, provide criminal sanctions for certain violations of the Title (which has been enacted into positive law). Particularly, wilful infringement for profit (Section 104) and fraudulent notice, removal, or alteration of notice of copyright (Section 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 United States 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 no prosecution be instituted in any case under Title 17 without prior consultation with and approval of the Criminal Division.

TITLE 2: CRIMINAL DIVISION**Copyright Law**

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TITLE 2: CRIMINAL DIVISION**PURCHASE AND SALE OF PUBLIC OFFICE**

Investigations for violations of 18 U.S.C. 210, 211 will be conducted by the FBI and initiated by formal request from the Criminal Division. The United States 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.

CONTEMPT OF CONGRESS

See Title 9, p. 2: Referral Procedures.

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 United States Secret Service has investigative jurisdiction over violations of those laws. Reports of investigation are made directly to the United States 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.

18 U. S. C. 494 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

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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.

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) and 21 U. S. C. 174 (smuggling, etc., of narcotics).

The Bureau of Customs primarily is charged with the enforcement of such laws. Violations are referred for prosecution direct to the United States Attorney by the Collector of Customs, the Department receiving a copy of such reports. The criminal phase is reported immediately but forfeiture reports are withheld by the Collectors of Customs for sixty days.

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 violation may involve substantial losses of duty, or is part of the operation of a "smuggling ring", or involves the clandestine importation of contraband, such as narcotics or 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 such types of cases may be referred to the United States 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 forfeitures and 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 United States Attorney for disposition if the value thereof 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, while 19 U. S. C. 483 applies to vehicles, etc., used in the importing or subsequent transporta-

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tion, etc., of smuggled goods, as does the Contraband Transportation Act in certain instances.

Unless the forfeiture is remitted administratively or compromised or the United States Attorney declines prosecution because of the insufficiency of the evidence, the forfeiture should be consummated through the filing of a libel, a copy of which should be furnished to the Department. Such proceedings should conform as near as may be to those in admiralty. See 28 U. S. C. 2461.

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.

Disposition of Merchandise Forfeited

Merchandise forfeited under the Customs laws shall be delivered to the Collector of Customs for sale unless for special circumstances 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.

United States Attorneys should, whenever possible, provide in the decree of forfeiture for the delivery of the merchandise to the Collector of Customs of the district, 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. United States Attorneys should be guided by specific requests from competent authority such as the General Services Administration, the Department of Justice or the Collector 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 the Collector of Customs, the Marshal should promptly transmit to the Collector a statement of all proper charges in connection with the seizure, detention and delivery of the property. If the Collector of 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 the Collector shall be charged against the proceeds.

TITLE 2: CRIMINAL DIVISION**Limitations of Actions**

The limitation on bringing actions, criminal, civil penalty and forfeiture, is five years. See 18 U. S. C. 3283 and 19 U. S. C. 1621.

Libels: Judgment

To avoid unnecessary expenses (storage charges) and depreciation of property, especially in vehicle seizure cases, libels 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.

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

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.

Although the Servicemen's Dependents Allowance Act of 1942, as amended, contained four criminal sections (37 U. S. C. 216-219), neither the Career Compensation Act of 1949 nor the Dependents Assistance Act of 1950 provide specific criminal penalties. In the absence of penal provisions, prosecution for the fraudulent application for, and receipt of, allowances under the Dependents Assistance Act of 1950 should be instituted 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 United States 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 directly to the United States Attorney, copies being furnished to the Department.

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Prosecution should be instituted in these cases by the United States 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.

Section 302 (b) of the Career Compensation Act (37 U. S. C. 252 (f)), provides for increased quarters allowances based on dependency for commissioned officers. Cases have been reported involving officers who falsely applied for quarters allowances based on dependency to which they were not entitled under Section 302 (b). Where officer offenders are still 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 by officer personnel, reported after termination of their active military service, should be instituted under 18 U. S. C. 287 and 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 United States 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 mentioned statute, except those upon 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 United States Attorney if the facts warrant. (The Department of Labor itself handles the civil cases under the Act (29 U.S.C. 216(c), 217).)

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The Department of Labor will furnish to the Criminal Division copies of its initial referral letters and of all subsequent correspondence with the United States Attorneys in these cases. Copies of all correspondence from United States 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 United States Attorneys, in their processing of these direct referral cases, also 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 United States 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 United States Attorney. Prompt action in filing an information not only has the effect of deterring continued violations, but also prevents the case from being too 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-Driveursel Stations v. United States*, 150 F. 2d 923, 929 (C. A. 8, 1945); *Nabob Oil Co. v. United States*, 190 F. 2d 478, 479 (C. A. 10, 1951), cert. denied, 342 U.S. 876.

United States 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.

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The prosecution of cases under the Acts shall be conducted by United States 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 United States 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 United States Attorney to the same extent and with like responsibility as if assigned to a regular Assistant United States 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 United States Attorney as may be possible in the average case. The United States 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 individual 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.

To retain general uniformity in the handling of these cases, a uniformity believed to be highly desirable, it is part of the policy that when a United States Attorney for any reason declines or recommends against prosecution, he shall forward the file, together with his comments, to the Criminal Division for review.

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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 United States Attorneys' Manual, 2: 18 et seq. 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.

All matters pertaining to appeals, including procedure to be followed in the preparation or approval of the record and the preparation of briefs and argument in the appellate courts, will remain subject to the control and direction of the Department.

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 (C. A. 2). 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 57 and 60, 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 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 United States Attorneys

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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 United States Attorneys for prosecutive action. It is the Department's policy to transmit to United States Attorneys for criminal action cases of this type which appear to involve wilful 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 United States 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 had 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.)

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Cases involving false reports are usually referred directly to the United States Attorney by the FBI.

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

FEDERAL AVIATION ACT

The Federal Aviation Agency, including the Regional Attorneys thereof, will refer direct to the appropriate United States Attorneys cases involving violations of the civil penalty provisions of the Federal Aviation Act of 1958 (49 U.S.C. 1471).

United States 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 Agency. If the United States Attorney believes that a compromise settlement should be effected in an amount less than is acceptable to the Agency, 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 United States Attorney deems that advisable. In addition to the principal amount the settlement should include any costs to which the Government is entitled.

The above-indicated procedure for compromise settlement *before judgment* has been established on the basis of the provisions of the statute specifically authorizing compromise settlement of the civil penalty involved. See 49 U.S.C. 1471 and Section 5 of Executive Order No. 6166 (following 5 U.S.C. 132). This procedure does not apply to civil penalties generally under other statutes.

United States 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 Agency 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. Except where the statute involved specifically authorizes compromise or other similar settlement of the penalty as does the Federal Aviation Act, it has long been the Department's strict policy that civil penal actions should not be settled in any way that does not involve the entry of a judgment for the principal amount

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of the penalty, whether stipulated or not, plus costs to which the Government is entitled. Although such an action is a civil proceeding, it is nevertheless penal and perhaps can be said to be quasi-criminal in nature. For instance, it is well settled that if such an action goes to trial, the jury determines issues of fact and renders a verdict of guilty or not guilty, and if guilty, the court imposes the penalty in much the same manner as in a criminal case. The entry of judgment, whether confessed, stipulated, or otherwise, necessarily requires the approval of the court whose duty it is to impose it. When such a suit is instituted, the full amount of the penalty should therefore be sought.

Although the Clerk may enter a defendant's default pursuant to Civil Rule 55(a), he may not enter a *judgment* by default under Civil Rule 55(b)(1) 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. Civil Rule 55(b)(2).

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).

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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 contribution in one year of an aggregate amount in excess of \$5,000 to a candidate for nomination or election to a Federal office or to a political committee, except one which is organized at the State or local level (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 expenditure by a political committee, defined in Section 591, of more than \$3,000,000 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.

TITLE 2: CRIMINAL DIVISION**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 United States 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**Referral of Cases**

All seizure (libel for condemnation) and criminal cases, except those involving undecided or important questions of law or policy, will be referred direct to the appropriate United States Attorney by the Department of Health, Education, and Welfare. All injunction cases will be referred by that Department to the Department of Justice.

If the product involved is (a) butter which is deficient in fat, short-weight, filthy or decomposed, (b) cream which is filthy or decomposed, (c) crab meat which is contaminated, or was produced under insanitary conditions whereby it may have become contaminated with coli of fecal origin, (d) fresh fruits and vegetables bearing spray residue in amounts which may be injurious to health, or (e) blueberries which are contaminated by maggots or larvae, the request for seizure may emanate from the appropriate field station of the Food and Drug Administration.

Dismissal Where Goods Not Available

United States Attorneys may dismiss libel suits without prior authority where they are informed by the local station of the Food and Drug Administration that the product is 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 condemna-

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tion and libel of information 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

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

Removal of Libel 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 (C. A. 4), cert. denied 342 U. S. 825; *Fettig Canning Co. v. Steckler*, 188 F. 2d 715 (C. A. 7), cert. denied 341 U. S. 951.

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

Post-Seizure Samples

Orders authorizing the taking of post-seizure 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 United States Attorney that the Government's case will stand or fall on the analytical results of a post-seizure 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

If samples which United States 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 United States 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

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whose favor a libel suit results demands payment for samples taken for the use of the Government after seizure, and files a claim with the 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 (C. A. 5).

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. *338 Cartons * * * of Butter v. United States*, 165 F. 2d 728 (C. A. 4). A condemned article cannot be released to the owner for export. *United States v. Kent Food Corp.*, 168 F. 2d 632 (C. A. 2), cert. denied 335 U. S. 885; *United States v. O. F. Bayer & Co.*, 188 F. 2d 555 (C. A. 2).

If the owner does not obtain a decree releasing the goods to him for salvaging, the court may direct, if the condemned article is an edible food product, that, under the supervision of the Department of Health, Education and Welfare, the product be brought into compliance with the Act by the United States Marshal and sold to the

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highest bidder, or that it be turned over by the United States Marshal to a charitable or public institution for consumption. Under no circumstances should any edible food be destroyed. If the condemned article is not an edible food product, but can be used for animal feed, fertilizer or other useful purpose, the court may direct that, under the supervision of the Department of Health, Education and Welfare, the product shall be sold by the United States Marshal to the highest bidder or turned over to a charitable or public institution.

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 United States 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 United States Attorney should communicate by letter or telegram with the Department of Health, Education and Welfare. The United States Attorney should inform the 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

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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 United States Attorney with respect to punishment, and the sentence and date thereof; and if a libel 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 libel for 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 libel action adversely 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 United States Attorney. The United States 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).

TITLE 2: CRIMINAL DIVISION**FUGITIVE FELON ACT**

Primary Purpose. Though drawn as a penal statute, and therefore permitting prosecution by the Federal Government of its violators, the Act (18 U.S.C. 1073) does not supersede nor is it intended to provide an alternative for state extradition proceedings; rather, its primary purpose is to permit the Federal Government to assist in the location and apprehension of fugitives from state justice. (Department Memo No. 304, November 8, 1961.) 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, 203], 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, cert. den. 361 U.S. 834.

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 to believe 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 anxious 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 F.B.I. to compel the discharge of civil obligations. Accordingly, requests for federal assistance in instances of state worthless check violations or of desertion or non-support 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.

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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.

State prosecution of the fugitive should have been commenced by warrant, indictment or information. In this regard, it is suggested that United States Attorneys, when authorizing federal complaint, secure a certified copy of the state warrant and have the same readily available for transmission to the apprehending state when the fugitive is apprehended. Commencement of a state action is theoretically not an absolutely essential prerequisite to 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 F.B.I. 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. Federal custody of the fugitive should continue 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 the federal warrant, he should be taken before the United States Commissioner at the earliest opportunity in compliance with Fed. R. Crim. P. 5. Federal officers have no authority to accept waiver of interstate extradition by a fugitive in federal custody and should not release the fugitive to state authorities without his appearance before 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 should have been contacted and it have been ascertained whether they are ready and willing to take him into custody.

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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, Sec. 12; 18 U.S.C. 3182 and Constitution, Art. 4, Sec. 2; D.C. Code, Sec. 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 high bail on the federal charge. Where the asylum state authorities are ready immediately to receive the fugitive and hold him to await interstate extradition or under waiver of extradition, release of the defendant on his own recognizance or the dismissal of federal process is justified to expeditiously effect his transfer to asylum state authorities. In some instances the United States Commissioner or other committing magistrate may refuse to dismiss the federal process prior to dismissal of the federal warrant in the district of issuance, in which event the United States 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. This difficulty apparently could be obviated by transmitting with the federal warrant an indication that the United States Attorney in the initiating district consents to dismissal of the complaint on condition that custody of the fugitive will be accepted by state authorities where apprehended.

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. A United States Commissioner in such locality, after the defendant's initial appearance before him pursuant to Fed. R. Crim. P. 5, might set bond returnable before him within a reasonable time pending receipt of the federal warrant from the initiating district. If as previously suggested, the United States Attorney in the initiating district has already made available to the United States 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. Such procedure, although it may result in federal custody of the fugitive for two or three days pending receipt of materials from the United States Marshal in the initiating district, seems more reasonable than to provide opportunity for the United States Commissioner to unconditionally release the

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fugitive or than to hold the fugitive in federal custody for a possibly longer time while the requesting state authorities are being notified and are obtaining and furnishing a certified copy of the state warrant.

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 United States 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. Before authorizing the filing of a complaint, the United States Attorney should be satisfied that there is substantial evidence to indicate that the witness fled in order to avoid testifying.

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 Fed. R. Crim. P. 40 be instituted without the written approval of the Assistant Attorney General, Criminal Division.

TITLE 2: 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 United States 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 United States 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 United States Attorneys during the course of investigations. In the event significant questions of policy or interpretation 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.

NATIONAL HOUSING ACT VIOLATIONS

The National Housing Act of June 27, 1934, as amended (12 U. S. C. 1701 et seq.), has created a group of "housing agencies" which now consist of the Housing and Home Finance Agency, the Federal Housing Administration, the Public Housing Administration, and the Home

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Loan Bank Board. The Housing and Home Finance Agency headed by an Administrator is the "parent" organization for administrative purposes although it participates in operations in connection with slum clearance, etc. The other agencies are organizationally constituents but actually are practically autonomous in the operation of their programs.

The greatest number of complaints of violations referred to the Department by the housing agencies result from the operations of the Federal Housing Administration and involve principally two programs, the Title I Home Improvement insured loans and mortgage loan insurance.

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The act authorizing the Title I program is implemented by a Federal Register document, cited as *Regulations Under Title I Under Section 2 of the National Housing Act* (Title 24, Chapter II, subchapter B, Code of Federal Regulations, 1949) 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* prescribe other qualifications both for the borrower and lender.

The criminal provisions as originally enacted (Title 12 U. S. C. 1731 (a) to (f)) were repealed by the Act of June 25, 1948, and recodified in Title 18 U. S. C., Sections 1010 (the specific FHA 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 the Federal Housing Administration for insurance, *Cohen v. United States*, 178 F. 2d, 588 (C. A. 6), 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 transaction is consummated with non-government bodies, private lending institutions, and there is only a possible *in futuro* submission to the FHA in the event of default and claim for loss. *Terry v. United States*, 131 F. 2d 40 (C. A. 8). The element of intent may be evidenced by the use of FHA forms, approved by the Bureau of the Budget, such as Credit Application Notes and Completion Certificates with the printed heading "FHA Title I Completion Certificate," etc. See *Cohen v. United States* 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. Section 1010 penalizes the persons, principally home improvement salesmen, 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 (C. A. 6), 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 (C. A. 2). There is a limitation, however, on joining in one conspiracy the several salesmen, home-owners 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. Cf. *Blumenthal v. United States*, 332 U. S. 539.

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The frauds perpetrated in the Title I program are usually the result of the activity of "confidence" men and swindlers who victimize 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. 220.

Section 709 of Title 18 U. S. C., in part, penalizes false advertising by the unauthorized use of the name of FHA or the other housing agencies, to imply that FHA (or the other agency) endorses or approves a product, business, or project.

Section 493 of Title 18 U. S. C. encompasses the making or passing of forged, altered, or counterfeited notes, bonds, debentures, obligations, etc., of several agencies, Government corporations and banks including the Federal Housing Administration.

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

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

The mortgage insurance programs of the FHA under the National Housing Act, as amended, affecting both individual homes and multifamily rental housing give rise to false statements and material and willful 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 statute, 18 U. S. C. 1010, does not include concealments 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 the FHA. 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 the FHA 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, including allegations of violations of Title 18 U. S. C. 1010. However, the Federal Bureau of Investigation will not assume jurisdiction of any matters previously investigated by the Housing and Home Finance Agency or by the Federal Housing Administration to any substantial extent. Where these agencies have conducted no

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investigations or only nominal investigation, the FBI will initiate full investigation. Whenever a matter has been substantially investigated by the Federal Housing Administration or the Housing and Home Finance Agency, United States Attorneys should address their request for additional investigation to the Director, Compliance Division, Housing and Home Finance Agency, Washington 25, D. C.

The Public Housing Administration, formerly the United States 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* (C. A. 5), 212 F. 2d 907. The contingent liability of PHA in each project created by contract is the basis of privity.

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

GOVERNMENT RESERVATIONS: OFFENSES ON

When cases are reported to United States Attorneys involving offenses committed on lands occupied by military and naval reservations, forts, arsenals, post offices, etc., United States 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. 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 United States Attorney in the district where the land is situated.

With respect to lands 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 of a contrary intent on the part of the acquiring agency or Congress. *Mason Co. v. Tax Comm'n.*, 302 U. S. 186; *Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525. If the question of jurisdiction over a particular piece of land has not been previously decided judicially, the United States Attorney should make appropriate inquiry, usually of the local office

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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 of Government land, such as voting, liability for local licenses and taxes, residence, etc., should be submitted to the Lands Division.

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 liability 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; or (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 such reentry is otherwise impracticable or inadvisable. Where it is known that the illegal reentry took place more than five 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, United States Attorneys 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 appeal. See also Title 6, Appeals.

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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 appeal to the courts of appeals from decisions adverse to the Government. In order that they may promptly discharge this responsibility, United States Attorneys should immediately advise the appropriate District Directors 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 adverse courts 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, United States Attorneys should advise the District Directors of all other decisions in litigation affecting the Service.

No suit shall be instituted by the United States 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 lie 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 made 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. Prosecution, however, is normally not indicated if the individual goes no further

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than to attempt to impress a female acquaintance. If a civilian wears a military uniform unlawfully, prosecution should normally be initiated under 18 U. S. C. 702. 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—see page 32, this Title) 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 United States 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 direct to the United States 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 United States 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

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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, 83d Congress, 1st session (Public Law 277), amending Chapter 53 of Title 18 U. S. C., 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 U. S. C. 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 or 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.

TITLE 2: CRIMINAL DIVISION**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. 5688. Forfeitures are consummated through libels, 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 United States 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 direct to the United States Attorneys by that Division. In rare instances involving important or

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novel cases such reports may be submitted to the Department for consideration and reference by it to the United States 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 United States 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 United States Attorney for prosecution. However, evidence illegally obtained by State officers is not admissible. See *Elkins v. United States*, 364 U.S. 206.

Limitation of Actions

The limitation on bringing indictment or filing criminal informations for both substantive and conspiracy offenses is either three or six 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 five 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. Especial 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.

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In minor cases where the United States 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 United States 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 United States 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 United States Attorney for libels. However, libels 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 forfeiture. Unless forfeitures of either personality or realty are remitted or compromised by the Department in accordance with the law, or the United States 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 libels, 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 untaxed liquor or the trafficking 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 United States Attorney for libel, the Department may entertain offers in compromise or petitions seeking remissions of forfeitures as to all types of seized prop-

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erty. See Executive Order 6166 (5 U. S. C. 124). 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 (C. A. 10); *United States v. Gramling*, 180 F. 2d 498 (C. A. 5); *United States v. Andrade*, 181 F. 2d 42 (C. A. 9). As to compromises and remissions of forfeiture see pertinent paragraphs of the United States Attorneys Manual.

Disposition of Seized Property

To avoid unnecessary expenses (storage charges) and depreciation of property, especially in vehicle seizure cases, libels 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 pay-

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ment in order to acquire the vehicle or whether its request has been withdrawn.

The United States 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 of appeal by the Solicitor General.

INTERSTATE COMMERCE ACT

The Interstate Commerce Commission (including the Regional Attorneys thereof) may refer directly to the appropriate United States 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.) and the Transportation of Explosives and Dangerous Articles Act, 18 U.S.C. 831, et seq. Communications relative to such matters as additional investigation by the referring agency, arranging for the attendance of or information as to witnesses, etc., should be transmitted directly from the United States Attorney to the referring 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. Reports on the status or disposition of such cases should be directed also to the Criminal Division. Contemporaneously with the transmittal of a routine report to the Criminal Division concerning the status or disposition of a case, a copy of such report should be directed to the referring agency, and the original report to the Criminal Division should bear a notation that this has been done. The procedure outlined in this section relates only to the institution and conduct of such proceedings. Dismissal of cases after they have been begun will be governed by the same procedure as heretofore in force.

KICKBACK STATUTE

Investigations under 18 U. S. C. 874 are generally conducted by the FBI but cases may arise in consequence of investigative activities of other agencies, such as the General Services Administration. If, following a report to the Criminal Division, any particular complaint appears to deserve a full investigation, the Criminal Division will arrange for it through the FBI.

Complaints made to United States Attorneys of violations of the Act should be forwarded by them to the Criminal Division of the Department with a full statement of the alleged facts.

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Prior authorization is required from the Department before instituting any prosecution under this Act.

KIDNAPPING

United States Attorneys should give special attention to cases involving violation of the Federal kidnapping statute (18 U. S. C. 1201, 1202). Charges against a defendant being held for such an offense should not be dismissed without specific authority from the Department.

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With respect to the meaning of the word "otherwise" in the phrase "and held for ransom, reward or otherwise" attention is directed to the following cases: *Gooch v. United States*, 297 U. S. 124; *United States v. Parker*, 103 F. 2d 857, cert. denied 307 U. S. 642; *Brooks v. United States*, 199 F. 2d 836.

Important details relating to kidnapping cases should be reported promptly to the Department.

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 on 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 trustee 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

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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 Reports, are processed through the Department of Labor Regional Counsel. Except in extraordinary situations United States 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 five 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.

Certain practices have been adopted in the enforcement of those sections investigated by this Department. It is recommended that these practices be followed by United States Attorneys in enforcement of the Act. The practices are as follows:

- 29 U.S.C. 501(c). It should be noted that this section applies 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.

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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 willful, 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 United States 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 United States 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.

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.

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NARCOTIC LAW VIOLATIONS

The principal statutes involved are: 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), and 49 U. S. C. 781-788 (Contraband Transportation Act). Most of the criminal prosecutions are for violations of 26 U. S. C. 4704 (a), 4705 (a), 4742 (a), 4744 (a) and 21 U. S. C. 174. General provisions applicable to both the Harrison Narcotic Act and the Marihuana Tax Act are 26 U. S. C. 6001, 6065, 6071, 6081, 6091, 7237 and 7301. Forfeitures usually are consummated pursuant to the Contraband Transportation Act.

The Bureau of Narcotics, Treasury Department, primarily is charged with the enforcement of such laws, although the Bureau of Customs also functions in respect to illegal importations. Violations are reported for prosecution direct to the United States Attorney by the District Supervisor of Narcotics or the Collector of Customs. The Department receives no copy of the Bureau of Narcotics investigative reports, except those involving licensed doctors, dentists, veterinarians, druggists and manufacturers, but does receive copies of the Customs reports.

Prosecution

Narcotic and marihuana 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 marihuana. The emphasis should be on prosecutions of the sellers or purveyors, particularly those who deal with minors, and not the mere addict possessors. Such addicts often are persuaded voluntarily to enter appropriate hospitals for treatment, but criminal prosecutions

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of such cases in some instances may be justified so as to compel an addict to undergo complete treatment and to be committed for that purpose if necessary. Moreover, prosecutions for such minor offenses which are considered to be local in character may well be and often are left to the state or local authorities. Not falling within such minor category are cases against persons, whether addicts or not, who engage in the importation or transportation or are in possession of these drugs under circumstances reasonably indicating that the drugs were intended for use in the illegal traffic, and cases against those who otherwise are habitual criminals.

In prosecutions for serious offenses by traffickers in heroin and opium two counts may be charged, one under the internal revenue laws and the other under the Narcotic Drugs Import and Export Act. There is no lawful use of heroin.

TITLE 2: CRIMINAL DIVISION**Compromises: Remission of Forfeiture**

It is the policy of the Department not to compromise criminal liability in narcotic or marihuana 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 (Section 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 minimum mandatory penalty is not less than ten years and the maximum term of life imprisonment may be imposed, except that the jury, in its discretion, may direct a penalty of death. 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 also be imposed.

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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 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 new penalties apply to conspiracies as well as to the substantive offenses.

Such new 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. 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 United States 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 United States 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.

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Requests for Authorization to Make Application for Immunity Under the Narcotic Control Act (18 U.S.C. 1406)

Requests for immunity require detailed processing by the Criminal Division and personal consideration by the Attorney General. The Criminal Division prepares a detailed memorandum setting forth the details and circumstances surrounding the request for the benefit of the Attorney General. Therefore, a minimum of two weeks should be allowed for consideration of immunity requests.

In order for the Division adequately and expeditiously to process each request, all applications 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 before the Grand Jury or trial court.
7. The witness' relative importance in the narcotics activity in your area, and his part in the matter under investigation.
8. An estimate of what offenses, both Federal and State, which 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 the manner in which this testimony will serve the public interest.
10. An estimate as to whether the witness is expected to testify in the event immunity is granted, if known.

Should the immunity authorization be granted, the United States Attorney will notify the Criminal Division as to whether immunity was, in fact, granted by the Court, the nature of the information or testimony received after the grant of immunity, and the ultimate disposition of the case or matter.

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NATIONAL MOTOR VEHICLE THEFT ACT

The legislative history of the National Motor Vehicle Theft Act, as amended (18 U. S. C. 2311-2313), does not indicate that the statute was enacted solely for the purpose of prosecuting gangs of automobile thieves. Individual cases as well as those involving gangs should be prosecuted. The Department's obligation under the law is to investigate and prosecute such cases whenever it appears that there has been a violation of the Federal statute, notwithstanding a concurrent and perhaps more flagrant violation of the local laws.

Automobile thefts are a major criminal problem throughout the country, and it has been the Department's experience that Federal investigation and prosecution of individuals as well as organized groups in this field have had a salutary effect in discouraging the development of car theft rings which would further aggravate the problem.

With reference to the meaning of the word "stolen" as used in the National Motor Vehicle Theft Act, the case of *United States v. Adcock*, 49 F. Supp. 351, holds that the word "stolen" should not be construed in the technical sense of what constitutes larceny, but in its well-known and accepted meaning of taking the personal property of another for one's own use without right or law, and that such taking can exist whenever the intent to do so comes into existence and is deliberately carried out, regardless of how the party so taking the car may have originally come into possession of it. This interpretation of the word "stolen" was approved in *Davilman v. United States*, 180 F. 2d 284, (C. A. 6). See also *United States v. Sicurella*, 187 F. 2d 533 (C. A. 2) and *Collier v. United States*, 190 F. 2d 473 (C. A. 6). 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 (C. A. 10); *United States v. O'Carter*, 91 F. Supp. 544; also *Loney v. United States*, 151 F. 2d 1 (C. A. 10).

Venue. In all cases arising under this Act, prosecution should be instituted in the district into which the stolen motor vehicle is last brought unless it should appear that by reason of unusual circumstances it is inexpedient to institute prosecution in that district. In the event that unusual circumstances should exist, the United States Attorney in the district into which the motor vehicle has been brought will at once communicate by telegraph with the United States Attorney in the district from which the car was originally brought, advising of the facts in the case and requesting him to institute prosecution, at

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the same time stating the circumstances by reason of which it is inexpedient to prosecute in the district into which the motor vehicle has been brought. The facts and the reason for requesting that such action be taken must be reported promptly to the Criminal Division. Prosecutions under 18 U. S. C. 2313 (receiving, concealing, selling, etc.) should be instituted only in the district wherein those violations occur.

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. 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; *United States v. Greever*, 116 F. Supp. 755.

(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.

(4) Where a validly executed instrument contains a forged endorsement. *Prussian v. United States*, 282 U.S. 675; *Streett v. United States*, 331 F. 2d 151. 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."

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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; *United States v. Davis*, 231 U.S. 183; *United States v. Glasener*, 31 F. 566), 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 (*Easterday v. United States*, 292 Fed. 644; *United States v. Briggs*, 54 F. Supp. 731), or where the signature is presented as that of another who is actually fictitious. *Milton v. United States*, 110 Fed. 556; *Kreuter v. United States*, 201 F. 2d 33. 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; cf. *Cunningham v. United States*, 272 F. 2d 791. 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; *United States v. Garfinkel*, 285 F. 2d 548. It is forgery to impersonate another by the signature even though both persons have the same name. *White v. Van Horn*, 159 U.S. 3, 17; *United States v. National City Bank*, 28 F. Supp. 144; 15 ALR 2d 996. Common law forgery included fraudulently altering a genuinely executed instrument or filing blanks thereon without authority or contrary to authority. *United States v. Wilkins*, 213 F. Supp. 332; *Selvidge v. United States*, 290 F. 2d 894; 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, 828, has been distinguished from "forged" in that case and in *Stinson v. United States*, 316 F. 2d 554. 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; *Marteney v. United States*, 216 F. 2d 760; *Selvidge v. United States*, 290 F. 2d 894, 897) 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 or utter-

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ance 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, remanded for resentencing 368 U.S. 13. We regard as distinguishable the facts in *Streett v. United States*, 331 F. 2d 151, 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 "counter-signature," 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; *Peoples Savings Bank v. American Surety Co.*, 15 F. Supp. 911) or which are stolen or converted subsequent to issuance to a purchaser. *United States v. Klein*, 306 F. 2d 13.

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 United States 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 perjury 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

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the investigating body from pursuing its investigation. *United States v. Moran*, 194 F. 2d 623, cert. denied, 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. 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 perjury. There must be either two witnesses, or one witness and corroboration by other independent evidence. *United States v. Remington*, 191 F. 2d 246, cert. denied 343 U. S. 907; *United States v. Hiss*, 185 F. 2d 822, cert. denied 340 U. S. 948. See also *United States v. Seavey*, 180 F. 2d 837, cert. denied 339, U. S. 979.

POSTAL VIOLATIONS

If a United States 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 addressee and 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.

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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 United States 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 United States 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

18 U. S. C. 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

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should also be submitted to the Securities and Exchange Commission. Reports submitted to United States 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.

United States 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 United States mails, serious consideration should be given to prosecution under this statute.

Persons making complaints at United States 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 United States 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 United States Attorneys in appropriate cases.

Cases under this statute usually are referred direct to United States 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 at the same time the report is furnished to the United States Attorney. The Department should be currently advised of all developments after the case is received in the office of the United States Attorney.

Separate mailings in execution of a single scheme may be the basis of several counts, with punishment imposed on each count. *Badders v. United States*, 240 U. S. 391.

One of the principal objectives in mail fraud prosecutions is to secure with certainty evidence of the use of the mails in furtherance

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of the scheme to defraud since the use of the mails is the gravamen of the offense. Decisions have made it clear that any use of the mails after the scheme has reached fruition would not constitute a violation of the statute. *Stapp v. United States*, 120 F. 2d 898; *United States v. McKay*, 45 F. Supp. 1007.

Kann v. United States, 323 U. S. 88, a leading case construing the mail fraud statute, emphasized that the mailing must be "for the purpose of executing the fraud." The courts in recent decisions have distinguished the ruling in *Kann v. United States* which was carefully limited to the particular facts of that case. *Bauman v. United States*, 156 F. 2d 534; *United States v. Kuiken*, 196 F. 2d 223, cert. denied 344 U. S. 867; *United States v. Vidaver*, 73 F. Supp. 382. The basis of the decisions in the three cases just cited was that the acts of the defendants in a series of the same type of fraudulent transactions involving the cashing of worthless checks in different cities and causing them to be placed in the mails was a part of a continuing scheme in which use of the mails was a means of concealment.

In cases where the decision in *Kann v. United States* may present a possible obstacle, the indictment should be drawn and such proof adduced as will support the existence of a continuing scheme to defraud.

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 direct to appropriate United States Attorneys.

The Chairman of the Railroad Retirement Board will refer all cases involving alleged violations of the Railroad Retirement Act

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directly to appropriate United States 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 direct from the United States Attorney to the referral agency. While the Department desires that the decisions as to prosecution in these cases made by the United States Attorneys be final, advice should be sought from the Criminal 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 United States 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.

RAILROAD MATTERS (ICC)—MISCELLANEOUS

The Interstate Commerce Commission investigates and refers directly to the appropriate United States Attorneys cases involving violations of the Hours of Service Act (45 U. S. C. 61-64), the Signal Inspection Act (49 U. S. C. 26), the Locomotive Inspection Act (45 U. S. C. 22-34), and the Accident Reports Act (45 U. S. C. 38-43).

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With the exception of the last named, these Acts provide for civil penalties to be recovered in civil suits to be brought by the United States Attorneys. The Accident Act provides for a criminal penalty, making it a misdemeanor for a railroad to fail to submit the required report within the time provided. Penal actions arising under the above Acts should be handled substantially in accordance with the instructions for the handling of penal actions arising under the Safety Appliance Acts, *infra*.

SAFETY APPLIANCE ACTS

The Secretary of the Interstate Commerce Commission will refer direct to the appropriate United States Attorneys cases involving violations of the Safety Appliance Acts (45 U. S. C. 1-16). The Commission's Secretary will submit to the United States Attorney a copy of each report made by the Commission's inspectors relating to the case, one copy of every letter forwarded to and received from the carrier, and an original and two copies of a proposed form of complaint. Cases involving novel questions of law will be submitted to the Criminal Division. Further correspondence should be exchanged directly between the United States Attorney and the Commission. The United States Attorney should advise the I. C. C. of all developments in the case, including the filing of the complaint, the docket number, the trial date, the position taken by the railroad, the proposed settlement of the case, etc. Copies of correspondence between United States Attorneys and the Commission 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 I. C. C. should be informed as far in advance as possible of the date of trial. The inspectors and one of the I. C. C. attorneys will report to the United States Attorney and, subject to his directions, will assemble the evidence to be adduced (large parts of which frequently must 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 United States Attorney desires. The principal witnesses (the inspectors) need not be subpoenaed. Arrangements for their appearance should be made with the I. C. C. The assistance of I. C. C. attorneys, who are thoroughly familiar with the Acts, the orders of the I. C. C. issued thereunder and court decisions with respect thereto, 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

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to railroad operations and practices. In the discretion of the United States Attorney, the facts may be agreed upon and stipulated with the defendant's attorneys and submitted to the court for decision. However, the proposed stipulation should first be submitted to the Commission or its attorney for approval.

The statutory penalty for each offense is mandatory on the court when a violation is shown. *United States v. Gulf C. & S. F. Ry.*, 4 F. (2d) 722, 724. If the violation occurred before August 14, 1957, the \$100 penalty previously prescribed by the statute will, of course, apply; as to violations after August 14, 1957, the \$250 penalty applies (Public Law 85-135, 71 Stat. 352, approved August 14, 1957). Because of 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). Acceptance of the penalty without the entry of judgment is not permitted.

**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 United States 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 and, in proper cases, the Department will communicate with United States Attorneys concerning any matters it considers of importance. Because the Department considers such cases of great importance it will keep in close touch with United States 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 United States Attorneys by the Securities and Exchange Commission. Where such

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notification is made by any agency or department, or any source, other than the Commission, no prosecutions should be instituted without first obtaining authority from the Department.

Cases in which the United States 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 in 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.

15 U. S. C. 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 (a) 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. *Coplin v. United States*, 88 F. 2d 652, cert. denied 301 U. S. 703; *Pace v. United States*, 94 F. 2d

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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 circumstances. (Sections 78e, 78h (d), 78i (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., statutory 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) (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., statutory 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 filed.

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 by any person in connection with security listed on stock exchange), 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 X-15C1-2), 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.

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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. 80G-1-21), 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 investment 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.

SECURITY CONTROL OF AIR TRAFFIC

By agreement between the Department of Justice and the Civil Aeronautics Administration, cases involving violation of regulations contained in Part 620 of the Civil Aeronautics Regulations for prosecution under 49 U. S. C. 704 are referred to the United States Attorneys directly by the Regional Attorneys of the Civil Aeronautics Administration. Prior approval of the Department is not required for prosecution.

SELECTIVE SERVICE ACT OF 1948, AS AMENDED; UNIVERSAL MILITARY TRAINING AND SERVICE ACT, AS AMENDED

The Selective Service Act of 1948 was amended and reentitled the Universal Military Training and Service Act in 1951. The importance of effective enforcement of the Act cannot be overemphasized in connection with the preparedness program in which this Nation is

Note:

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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 case load 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 Selective Service System has advised that he will make available to United States 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. The Director has offered also in cases which may be of extraordinary operational significance to the Selective Service System to designate an officer from his staff to assist United States Attorneys in the preparation and presentation of such cases. It is understood, of course, that such a working arrangement will not alter the primary responsibility of United States Attorneys in the handling of these cases. Similarly, the Secretary of Defense will make available to the United States 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: Subpoenas

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, Fed. Rules Crim. Proc., 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 United States Attorney's office, a subpoena duces tecum with a view to securing agency files concerning the delinquent. United States 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 United States Attorneys were designated as registrars under the

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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 United States 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 any pending religious objector cases in which prosecution has been instituted, United States 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 Universal Military and Service Act.

Constitutionality of the Act: *United States v. Herling*, 120 F. 2d 236 (C. A. 2); *Dodez v. United States*, 329 U. S. 338; *Self v. United States*, 150 F. 2d 745 (C. A. 4); *Humes v. Pescor*, 148 F. 2d 127 (C. A. 8); *Tatum v. United States*, 146 F. 2d 406 (C. A. 9).

Venue: *United States v. Anderson*, 328 U. S. 699; *United States v. Van Den Berg*, 139 F. 2d 654 (C. A. 7); *Shurin v. United States*, 164 F. 2d 566 (C. A. 4), cert. denied 333 U. S. 837.

Second prosecution not double jeopardy: *Goodrich v. United States*, 146 F. 2d 265 (C. A. 5).

Interference by force and violence: *Bagley v. United States*, 136 F. 2d 567 (C. A. 5); *Burwell v. United States*, 137 F. 2d 155 (C. A. 4); *Moore v. United States*, 128 F. 2d 974 (C. A. 5); *Helton v. United States*, 143 F. 2d 933 (C. A. 6), cert. denied 323 U. S. 765.

Counseling evasion: *Baxley v. United States*, 134 F. 2d 937 (C. A. 4).

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Conspiracy to violate Act: *United States v. O'Connell*, 126 F. 2d 807 (C. A. 2); *Singer v. United States*, 323 U. S. 338.

Bribery of Selective Service officials: *United States v. Kemler*, 133 F. 2d 235 (C. A. 1); *Cohen v. United States*, 144 F. 2d 984 (C. A. 9), cert. denied 323 U. S. 797.

Sufficiency of Indictments: *United States v. Wernecke*, 138 F. 2d 561 (C. A. 7), cert. denied 321 U. S. 771; *United States v. Wagoner*, 143 F. 2d 1 (C. A. 7), cert. denied 323 U. S. 730.

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, United States 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; *United States v. 200 Gambling Devices*, 346 U.S. 441, 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 record keeping provisions of the Act as to all gambling devices handled, whether moving in interstate commerce or not.

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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 limited to roulette wheels, bingo-type pinball machines, electronic point-makers, 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. Should unusual circumstances militate against forfeiture, the United States Attorney should consult with the Criminal Division.

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.

Investigations

Violations of such laws primarily are investigated by agents of the Intelligence Division, Internal Revenue Service, and normally are reported for prosecution direct to the United States Attorney by the Service. Copies of the investigative reports are subsequently forwarded to the Department by the Service's Chief Counsel.

Cases may be adopted by the Intelligence Division and reported to the United States Attorney for prosecution. Inasmuch as the Intelligence Division's personnel is limited it attempts to concentrate its efforts on developing cases against major violators and normally will adopt only such cases which are believed to be of some significance. The United States Attorney is authorized to decline prosecution of any adopted case in which he believes that the punishment imposed by the local court is adequate to the offense. On the other hand the mere fact that a local court has imposed a penalty does not preclude federal prosecution, and prosecution should be undertaken whenever the evidence and the ends of justice warrant such action. See Department Memo No. 270. In this connection it should be noted that evidence illegally obtained by state officers is not admissible.

Limitation of Action

The limitations on bringing indictments or filing criminal informations for both substantive and conspiracy offenses is usually six years. Sometimes, however, a three year limitation is applicable. See 26 U.S.C. 6531.

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Prosecution

The emphasis is on prosecution of large-scale syndicated book-making and lottery operations.

Prosecutions for willful attempt to evade or defeat either the 10% excise tax imposed by Section 4401 or the occupation taxes imposed by Sections 4411 or 4461 (2) should be had under Section 7201 of Title 26. See *Spies v. United States*, 317 U.S. 492. Willful failure to file the necessary returns or to pay the tax should be prosecuted under Section 7203. Any failure to pay the occupational tax imposed by Section 4411 may be prosecuted under Section 7262 and failure to register as required by Section 4412, in addition to any other appropriate penalty, is subject to the penalty imposed by Section 7272.

The constitutionality of Sections 4401 and 4411 has been established in *United States v. Kahriger*, 345 U.S. 22. However, a person is not liable for the occupational tax unless he is also subject to the tax imposed by Section 4401 or is engaged in actually accepting bets on behalf of such a person or on his own behalf. Thus a "pick up" man, messenger, or other person employed in a gambling enterprise whose duties do not involve the actual acceptance of bets is not subject to the tax. *United States v. Calamaro*, 354 U.S. 351. Nor can such employees be charged as co-conspirators with their principal in a conspiracy to evade or defeat the payment of the tax unless there is evidence from which it can be deduced that the employee knew the principal was liable for the tax and had not paid it. *Ingram v. United States*, 360 U.S. 672.

For instructions relating to seized property; compromises and disposition of seized property; see the appropriate headings under "Internal Revenue and Related Liquor Laws."

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 United States 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.

TWENTY-EIGHT HOUR LAW

The Office of the Solicitor of the Department of Agriculture will refer direct to the appropriate United States Attorneys cases involving violations of the Twenty-Eight Hour Law (45 U. S. C. 71, et seq.),

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except those which involve novel questions of law or policy. The Office of the Solicitor will submit to the United States 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. United States 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; *St. Joseph S. Y. Co. v. United States*, 187 Fed. 105; *Oregon-Washington R. & N. Co. v. United States*, 205 Fed. 337; *United States v. Illinois Central R. Co.*, 303 U. S. 239. 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; *United States v. New York C. and H. R. R. Co.*, 165 Fed. 833; *United States v. Atchison T. & S. F. R. Co.*, 166 Fed. 160. 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; *United States v. Atlantic C. L. R. Co.*, 173 Fed. 764. 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 & N. W. R. Co. v. United States*, 246 U. S. 512.

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 Railway Company v. United States*, 220 U. S. 94.

TITLE 2: CRIMINAL DIVISION**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 United States 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 the cases decided to date. Therefore, prosecution of persons who are not 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 United States Attorney that a non-commercial 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 co-conspirators (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.

TITLE 2: CRIMINAL DIVISION
“WIRE TAPPING STATUTE”

The Department, in an effort to achieve uniformity in the enforcement of the prohibitions of Section 605 of the Communications Act of 1934 (47 U.S.C. 605), the so-called “Wire Tapping Statute”, exercises close supervision over investigations and prosecutions. The decisions of the Supreme Court in *Benanti v. United States*, 355 U.S. 96, and *Schwartz v. Texas*, 344 U.S. 199, holding that local law enforcement officers acting pursuant to State law are not excepted from the provisions of the statute, emphasize the necessity for uniform enforcement policies.

United States Attorneys should refer all wire tap complaints to the Federal Bureau of Investigation which will correlate available information and report to the Criminal Division. If a preliminary investigation is requested, the Federal Bureau of Investigation reports the results to the Criminal Division. If a full investigation is warranted, the Federal Bureau of Investigation is so notified, and thereafter all reports of investigation are furnished to the appropriate United States Attorney as well as to the Criminal Division. When the investigation is completed, the United States Attorney’s prosecutive recommendation is solicited and determination is made as to whether prosecution should be instituted. Under no circumstances should criminal proceedings be initiated, whether by information or indictment, without specific authorization from the Criminal Division.

Since the question of wire tapping has been the subject of so much controversy, it is particularly important to exercise restraint with regard to public or official comments relating to wire tapping or wire tapping legislation. If such comment is believed to be necessary, United States Attorneys are requested to communicate with the Criminal Division so that they may have the benefit of the Department’s viewpoint.

APPENDIX OF FORMS

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APPENDIX

Form No. USA-900
(Rev. 8-1-63)

REQUEST AND AUTHORIZATION TO DISMISS CRIMINAL CASE

To: <input type="checkbox"/> Criminal Division <input type="checkbox"/> Tax Division	From (District)	
United States of America vs.	Criminal Docket No.	U.S. Attorney's ref.
	Violations(s)	Dept. of Justice ref.
1. (Check one) <input type="checkbox"/> Indictment <input type="checkbox"/> Information	Number of counts	Date filed

2. Dismissal recommended as to (Specify defendant(s))

3. Present status of case:

4. Pertinent facts of case:

5. Reasons for dismissal *in detail*: (If necessary, attach separate sheet)

6. Recommendation, if any, of referral or investigating agency:

APPROVAL ACTION

DEPARTMENT		OFFICE OF UNITED STATES ATTORNEY	
Approved (Asst. Atty. Gen.)—Criminal or Tax Division		Approval recommended: Asst. Handling case	Asst. in charge of Sec.
By (Chief of Section)		United States Attorney	Date
Name of Section	Date	Check one: <input type="checkbox"/> Approved <input type="checkbox"/> Approval recommended	

Submission to the Department should be in triplicate. One copy will be returned after action.

See instructions regarding dismissal in the United States Attorney's Manual, Title 2 "Authorization For Dismissal" or Title 4 "Dismissal Of Criminal Tax Cases".

TITLE 2: CRIMINAL DIVISION

FORM 2

MOTION TO DISMISS INDICTMENT (OR INFORMATION)

DISTRICT COURT OF THE UNITED STATES
FOR THE ----- DISTRICT OF -----

UNITED STATES OF AMERICA }
vs. } Criminal No. -----
----- }

MOTION TO DISMISS INDICTMENT (or information)

Comes now the United States of America by and through its counsel and respectfully moves the Court for leave to dismiss the indictment (or information) in the above-entitled case, and in support of this motion avers as follows:

On or about -----, the grand jury for the ----- District of ----- returned an indictment or the U. S. A. filed an information) against the defendant in the above-entitled case, charging that (simple statement of the crime) in violation of Section -----, Title ----- of the United States Code.

The reasons for dismissal are:

On -----, the Attorney General of the United States authorized the dismissal of said indictment (or information).

(United States Attorney)

Presented by:

(Assistant United States Attorney)

ORDER

And now, this ----- day of ----- 19--, in open court, the within motion is granted and it is hereby ordered and decreed that Indictment (or information) No. ----- against ----- be and the same is hereby dismissed.

(United States District Judge)