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UNITED STATES DEPARTMENT OF JUSTICE

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TABLE OF CONTENTS

POINTS TO REMEMBER

CARRYING CONCEALED DEADLY OR DANGEROUS WEAPONS ABOARD AIRCRAFT

Recently, declinations have been made in matters involving the carrying or attempting to carry concealed deadly or dangerous weapons aboard aircraft in violation of 49 U.S.C. §1472(l). Often the expressed reason for the declination is the absence of intent of the actor to carry the weapon aboard. In United States v. Margraf, No. 72-1331 (Third Circuit, June 20, 1973), the court specifically refuted that position. In Margraf the defendant was convicted of attempting to carry a "concealed deadly or dangerous weapon" aboard a commercial aircraft in violation of 49 U.S.C. §1472(l) (1971). Upon the defendant's passage through a magnetometer a positive reading occurred. After denying possession of any knife, weapon or metal object, the defendant was searched and a seven and one-half inch folding pocket knife with a three and one-quarter inch blade was discovered. In affirming the conviction, the Third Circuit emphatically held that there is no specific intent requirement in the statute and therefore it was only necessary for the government to prove that the defendant was boarding a plane with a concealed deadly weapon on his person.

(Criminal Division)

OBSTRUCTION OF JUSTICE

Attached to this issue of the United States Attorneys Bulletin is an appendix entitled: OBSTRUCTION OF JUSTICE. RECURRING PROBLEMS IN PROSECUTIONS UNDER 18 U.S.C. §§1503, 1510.

(Criminal Division)

REMINDER NOTICE

On infrequent occasions, at the request of the Chief Counsel or Regional Counsel of the Revenue Service, the Tax Division has authorized grand jury interrogations of reluctant witnesses in criminal tax investigations. We have learned of instances recently where this has been undertaken by U. S. Attorneys' offices or Strike Force Attorneys without authority from the Tax Division.

Before any grand jury investigation which is concerned solely with possible income tax charges is undertaken, you are reminded that authority must be secured grom the Tax Division. This is essential so that we can be fully advised of the necessity for departing from usual IRS investigation procedures and also so that

the Internal revenue Service can properly manage its investigative resources for maximum effectiveness.

(Tax Division)

NOTICE

The Civil Rights Division has received a number of inquiries from U. S. Attorneys in states covered by the Voting Rights Act of 1965 concerning changes in voting practices and procedures which are required to be submitted for approval to the Attorney General or the U. S. District Court for the District of Columbia pursuant to Section 5 of that Act. In order to inform U. S. Attorneys in the covered states of Section 5 submissions in the future, the Department will begin sending them copies of weekly notices which list Section 5 submissions received during the previous week. The Department welcomes information or comments by U. S. Attorneys on submissions made by governing bodies within their jurisdictions.

(Civil Rights Division)

ANTITRUST DIVISION
Assistant Attorney General Thomas E. Kauper

DISTRICT COURT

CLAYTON ACT
SHERMAN ACT

TIRE COMPANIES CHARGED WITH VIOLATING SECTION 2 OF THE SHERMAN ACT AND SECTION 7 OF THE CLAYTON ACT.

United States v. The Goodyear Tire & Rubber Co. (Civ. C-73-835; August 9, 1973; DJ 60-175-58)

United States v. The Firestone Tire & Rubber Co. (Civ. C-73-836; August 9, 1973; DJ 60-175-59)

On August 9, 1973 two civil actions were filed at Cleveland, Ohio against the Goodyear Tire & Rubber Company, the nation's largest tire manufacturers. Each suit charged a single defendant with violating Section 2 of the Sherman Act and Section 7 of the Clayton Act. The Sherman 2 charge was attempted monopolization of the replacement tire market by each defendant acting unilaterally. The Clayton 7 charge was based on a series of acquisitions by each defendant of tire manufacturers and distributors.

The complaints, in addition to injunctive relief, seek divestiture of the defendants' acquisitions and of other additional assets so as to restore competition and cure the Sherman 2 violations.

The complaints state that the tire manufacturing industry is highly and unduly concentrated. The industry structure as described by the complaint alleges that the replacement market exceeds $2 billion dollars a year, about twice that of the original equipment market. The Big Four manufacturers (Goodyear, Firestone, Uniroyal, B.F. Goodrich) together with General Tire control about 95% of the original equipment market and about 80% of the replacement market. Goodyear's share of the replacement tire market is alleged to be about 28% and Firestone's, about 25%. In 1971 Goodyear ranked 19th and Firestone ranked 34th among the nation's industrials.

The suits are based on a series of independent acts and practices by Goodyear and Firestone. The complaints focus on the overall history of the industry and the relationship of each defendant to the industry as part of that history.

Predatory Pricing

The complaint against Goodyear charges that, beginning in 1959, it substantially lowered prices in an attempt to increase

its share of the replacement tire market at the expense of smaller companies. The complaint against Firestone says the company engaged in the same practice beginning in 1960.

Both complaints state that the low price levels were maintained by Firestone and Goodyear until at least 1966 for the purpose of controlling prices and weakening smaller competitors.

Foreclosure

During substantially the same period, i.e. from 1959 through 1967, the two defendants foreclosed smaller tire producers from important service station outlets by arranging certain sales commission plans with numerous oil companies. Such plans, called TBA plans (tires, batteries, and accessories), are described by the complaint as economically coercive on the service station outlets.

The complaints also charge that Goodyear and Firestone used their vast purchasing power as a tool for obtaining business at the expense of smaller tire producers. Such programs of reciprocal dealing with customers are cited as part of the attempted-monopolization charge contained in both complaints.

Acquisitions

The complaint against Goodyear charges that as part of its attempt to monopolize, that company foreclosed significant outlets to smaller tire companies by acquiring a large number of important wholesale and retail tire distributors. Specifically mentioned are Vanderbilt Tire & Rubber Co., the marketing division of Lee Tire & Rubber Co.; G.T. Duke Co.; American Auto Stores Inc.; Hicks Rubber Co. and Star Rubber Co.

Goodyear's 1963 acquisition of the manufacturing facilities of Lee Tires, which had been a substantial competitor, also is cited as an act of attempted monopolization in violation of the Sherman Antitrust Act.

The complaint against Firestone charges that Firestone also foreclosed competing tire producers from significant outlets by acquiring several important wholesale and retail tire distributors, including Abel Corp., which had been purchased in 1961 by Mansfield Tire & Rubber Co., and Bailey Tire Co., a leading tire distributor in the Southwest.

In addition, Firestone's 1961 acquisition of the tire-making facilities, certain brand names and trademarks of Dayton Rubber Co., and Firestone's 1965 acquisition of Seiberling Rubber Co.'s tire division are alleged to be in violation of the Clayton Act as well as acts of attempted monopolization in violation of the Sherman Act.

Monopolistic Pricing and Effects

Both Goodyear and Firestone are charged with raising tire prices significantly beginning in 1966, after Lee, Seiberling, Dayton, Vanderbilt and Mansfield had been badly damaged by the defendants' anticompetitive practices and, as a result, forced to sell out in whole or part.

Both complaints state that the conduct of Goodyear and Firestone contributed significantly to the financial demise of important distributors and manufacturers and to the subsequent sale of such concerns to a major tire company.

As a result of such anticompetitive activity, Goodyear's market share was thereby increased to about 28% from 23%, and Firestone's share rose to about 25% from about 15%.

The Goodyear case was assigned to Judge Green and The Firestone case was assigned to Judge Krupansky.

Staff: Joseph T. Maioriello, Joel Davidow
(Antitrust Division)

CRIMINAL DIVISION
Assistant Attorney General Henry E. Petersen

COURTS OF APPEAL

IMMIGRATION - WAIVER OF DEPORTATION
Under 8 U.S.C. 1251(f)

SECTION 241(f), IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. 1251(f), NOT AVAILABLE TO ALIEN ORDERED DEPORTED ON GROUNDS NOT RELATED TO FRAUD OR MISREPRESENTATION IN GAINING ENTRY INTO THE UNITED STATES.

Francisco Milande v. Immigration and Naturalization Service, (C.A. 7, No 72-1529, July 5, 1973; D.J. 39-89-3).

The petitioner in Milande v. Immigration and Naturalization Service entered the United States as a nonimmigrant visitor for a stipulated period. After entry, he fathered a child, a United States citizen by birth. Milande was ordered deported under Section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1251 (a)(2), on the ground that he had remained longer than permitted by his visa. He defended on the ground that he was saved from deportation by 8 U.S.C. 1251(f).

Section 1251(f) grants a statutory waiver of deportation to an alien who obtained entry into this country by fraud or misrepresentation, but was otherwise admissible at the time of entry, if the alien has a spouse, parent, or child who is a United States citizen or a lawful permanent resident alien. The Supreme Court ruled in Immigration and Naturalization Service v. Errico, 385 U.S. 214 (1966), that the section "... waives any deportation charge that results directly from the misrepresentation regardless of the section of the statute under which the charge that results directly from the misrepresentation regardless of the section of the statute under which the charge was brought...."

In Milande the Seventh Circuit refused to adopt the Government's argument that Section 1251(f) waives deportation for aliens who meet the criteria set forth therein only if the aliens have been documented as immigrants and applied for admission on the basis of such documentation. However, in upholding the deportability of the alien, the Court agreed with the Ninth Circuit's ruling in Cabuco-Flores v. Immigration and Naturalization Service (C.A. 9, No. 72-1333, April 13, 1973, D.J. 39-12-836), that Section 1251 (f) applies only to that fraud or misrepresentation which the Government must prove to establish the ground relied upon for deportation, and that it does not make the alien's fraud an affirmative defense. In this case, the petitioner was ordered deported because the period of his authorized stay had expired, and proof that petitioner's visa was procured by fraud was irrelevant to the charge.

Staff: United States Attorney James A. Thompson, Jr.
(Northern District of Illinois)
Bruce R. Heurlin (Criminal Division)

NARCOTICS AND DANGEROUS DRUGS
DISTRIBUTION OF CONTROLLED SUBSTANCES - 21 U.S.C. 841(a)(1)

A "PROCURING AGENT" INSTRUCTION IS IMPROPER UNDER A CHARGE BASED ON 21 U.S.C. 841(a)(1)

United States v. Tony Hernandez (No. 73-1318); United States v. Sergio T. Ramos (No. 73-1426)(C.A. 9, June 25, 1973; D.J. 12-8-1698)

The appellants, Hernandez and Ramos, were convicted by a jury in the United States District Court for the District of Arizona on various violations of the Comprehensive Drug Abuse Prevention and Control Act of 1970, P.L. 91-513, 84 Stat. 1236. Ramos raised a question of first impression under 21 U.S.C. 841(a)(1) that being, whether the trial court judge erred in refusing to give a requested instruction on "procuring agent" theory to the jury.

The Court of Appeals, in reaffirming the District judge's ruling, held that the basis for the refusal was that 21 U.S.C. 841(a)(1), under which Ramos was charged, was a new statute materially different from former 21 U.S.C. 174, which was involved in Ramos' principal case authority, United States v. Prince, 264 F.2d 850, 852 (3rd Cir. 1959).

The Court noted that 21 U.S.C. 841(a)(1) prohibits distribution of narcotics, as opposed to the facilitation of sale prohibited under former 21 U.S.C. 174. Under the new statute, "distribute" means the "transfer of a controlled substance, whether or not there exist an agency relationship." 21 U.S.C. 802(8) (emphasis added). Therefore, the statute, by its wording, excludes the "procuring agent" defense in toto as to a distribution charge.

Furthermore, the Court equated distribution as legally akin to facilitation under the old statute, and even under the former statutes, a "procuring agent" may be properly convicted of facilitation of either transportation or sale. See Garcia De La Rosa v. United States, 418 F.2d 562, 563 (9th Cir. 1969); Cerda v. United States, 391 F.2d 210, 220 (9th Cir. 1968) (per curiam), cert. denied, 393 U. S. 872 (1968); Vasquez v. United States, 290 F.2d 897, 898-899 (9th Cir. 1961).

Staff: United States Attorney William C. Smith
Assistant United States Attorney Thomas N. Crowe
(District of Arizona)

NARCOTICS AND DANGEROUS DRUGS

SECTION 841(a)(1) OF TITLE 21 U.S.C. IS CONSTITUTIONAL AS APPLIED TO PHYSICIANS

United States v. Henry M. Collier, Jr. M.D. (C.A. 5, May 1, 1973, No. 72-3242; D.J. 12A-20-2)

This appeal arose from the conviction on a guilty plea of the defendant-appellant on six counts of violating 21 U.S.C. 841(a)(1) by distributing a controlled substance, methadone, while not acting in the usual course of his professional practice. On appeal, he claimed 21 U.S.C. 841(a)(1) to be unconstitutional as applied to physicians.

Appellant's first contention was that the statute, as applied to physicians, was unconstitutionally vague in that the words "in the course of his professional practice" do not establish objective standards and are subject to diverse interpretation. The Court, however, stated that "statutes affecting medical practice need not delineate the precise circumstances constituting the bounds of permissible practice."

Appellant argued next that the statute violated the Tenth Amendment by invading the police powers reserved to the states, in particular the power to control medical practice.

In rejecting this contention, the Court cited authority holding that "Congress could reasonably decide that in order to effectively regulate interstate commerce in drugs, it was necessary to insure that persons within legitimate distribution channels, including the dispensing physicians and pharmacists, did not divert drugs into the illicit market."

The Court quickly rejected appellant's contention that 21 U.S.C. 841(a)(1) negated the presumption of innocence. The Court also refused to accept claims that the maximum punishment established by 21 U.S.C. 841(a)(1) was cruelly excessive and that the statute violated the constitutionally protected right to privacy in the physician-patient relationship. Accordingly, the Court affirmed the conviction of appellant Dr. Collier.

Staff: United States Attorney R. Jackson B. Smith, Jr.
Assistant United States Attorney Lamar Walters
(S. D. Georgia)

FOREIGN AGENTS REGISTRATION ACT

OF 1938, AS AMENDED

The Registration Unit of the Criminal Division administers the Foreign Agents Registration Act of 1938, as amended, (22 U.S.C. 611) which requires registration with the Attorney General by certain persons who engage within the United States in defined categories of activity on behalf of foreign principals.

JULY 1973

During the last half of this month the following new registrations were filed with the Attorney General pursuant to the provisions of the Act:

Coudert Brothers of New York City registered as agent of the Government of Colombia. Registrant will render advise and counsel with respect to the ratification of a tready signed September 8, 1972 between the United States and Colombia, affecting the islands of Rancador, Quitasueno and Serrana. Such representation may include consultations with officials of the Department of State and members of the Senate Foreign Relations Committee. The foreign principal will be billed up to a maximum of $10,000 calculated according to the registrant's regular hourly rates plus out of pocket expenses.

Kobe Trade Information Office of Seattle registered as agent of the Kobe Municipal Government, Japan. Registrant is a subdivision of its Japanese parent and engages in the promotion of trade between Japan and the United States. The registrant reported receipt of $25,655.69 to cover the first-half year budget for 1973. Kotaro Yamada filed a short-form registration statement as director and reports receipt of a living expense of $1,381.60 per month.

Milton LaLosh of Southgate, Michigan registered as agent of the Bank for Foreign Trade, Moscow, USSR. Registrant has an agreement for sole distributorship in the United States of the 1973 Russian Mint Sets.

Netherlands Antilles Economic Mission of New York City registered as agent of the Minister of Economic affairs, Netherlands Antilles Government. Registrant is engaged in the promotion of the economic development of the Netherlands Antilles and is funded by that Government in the amount of $108,000.00 per each 12 month period. Edward J. Alofs files a short-form registration statement as Economic Commissioner reporting a salary of $30,000 per year.

Manhattan Publishing Company of New York City registered as agent of the European Community Information Service. Registrant has contracted to produce and distribute to members of Congress and persons prominent in the fields of industry, banking, business and labor the booklet The U.S. and the European Community: Their Common Interests. Registrant is to receive a fee of $9,690.00 for these services. Kenneth E. Beer filed a short-form registration statement as Publishing Contractor.

LKP/Sapan, Inc. of New York City registered as agent of the Netherlands National Tourist Office, The Hague. Registrant is engaged in the preparation and production of creative materials in connection with the promotion of tourism to the Netherlands. Registrant reported receipt of $78,523.80 for the period January 1 - June 13, 1973. Max Sapan filed a short-form registration statement as President reporting a salary of $60,000 per year; Samuel R. Eisnitz filed as Advertising Director reporting a salary of $40,000 per year; John C. Walsh filed as Advertising Director reporting a salary of $49,000 per year; Stephen E. Silver filed as Vice President - Finance reporting a salary of $35,000 per year; Lawrence Silverstein filed as Account Executive reporting a salary of $32,500 per year; Maryiln M. Kravit filed as Copywriter reporting a salary of $9,000 per year; Stanley H. Katz filed as Director reporting a salary of $96,000 per year and Ian M. Summers filed as Art Director reporting a salary of $25,000 per year.

The Softness Group, Inc. of New York City registered as agent of the Hungarian People's Republic, Budapest. Registrant is engaged in the promotion of trade between the United States and Hungary. Donald G. Softness filed a short-form registration as President and reports a commission of 7 1/2 % of each order placed for the principal plus 25% of the net profit due the foreign principal. Thomas P. Vagi filed as an associate and reports a 50% commission on all business brought in.

Michael Finn Associates, Inc., d/b/a Cayman Islands News Bureau of New York City registered as agent of the Cayman Islands Tourist Board, BWI. Registrant was retained as public relations counsel effective June 1, 1973 and the contract is effective for a one-year period subject to renewal thereafter. Registrant's agreement calls for a monthly fee of $2,000 plus out of pocket expenses. Registrant will perform all publicity functions necessary to reach both trade and consumer publications and the broadcast media to promote tourism to the Islands. A. Michael Finn filed a short-form registration as Director and reports a salary of $30,000 per year.

Activities of persons or organizations already registered under the Act:

Tribune Films, Inc. of New York filed exhibits in connection with its representation of the Alpine Tourist Commission; Bahama Islands Tourist Office; Ceylon Tourist Board; Swedish National Tourist Office and the Swiss National Tourist Office. Registrant distributes films on behalf of the above foreign principals and receives $3.00 to $3.25 per regular booking and $7.50 to $13.25 per TV booking for each film.

T. J. Ross and Associates, Inc. of New York filed exhibits in connection with its representation of Thos. Cook & Son, Inc. an American subsidiary of Midland Bank Finance Corporation Ltd., London. Registrant will engage in public relations activities on behalf of the principal and will receive a retainer of $12,000 plus charges for any necessary production work for a three month period.

The Tea Council of the U.S.A., Inc. of New York filed exhibits in connection with its representation of the Tanzania Tea Authority. Registrant is engaged in the promotion of tea consumption in the United States and the Tanzanian principal is an active member and financial contributor.

Association-Sterling Films, Inc. of New York filed exhibits in connection with its representation of the East Asia Travel Association (Tourist Organization of Thailand), Sabah Tourist Association, Malaysia, Chinese Information Service, Los Angeles, French Embassy, Turkish Tourism & Information Office and Tourist Development Corporation, Malaysia. Registrant promotes, ships and maintains prints of filmed subjects placed in its film libraries by the foreign principals and receives $4.10 per film for regular booking and $7.50 to $20.00 per telecast.

The National Film Board of Canada of New York filed exhibits in connection with its representation of its parent in Ottowa. Registrant distributes and promotes the distribution of films, filmstrips and other visual aid material to agencies of the United States Government, other organizations and private citizens designed to interpret Canada to other nations. Registrant is funded by the parent.

Jack Wayne Hugentugler, d/b/a Jack Hugen International of Fort Lauderdale filed copies of its contracts with the Government of El Salvador and the Guatemala Tourist Commission. Registrant is to engage in public relations activities to promote tourism to El Salvador and Guatemala and for these services will receive from El Salvador $7,500 and from Guatemala Nine thousand Quetzales.

Short-form registration statements filed in support of registrations already on file:

On behalf of the Australian Tourist Commission of Chicago: Stephen Bowman as Manager engaged in tourist promotion and reporting a salary of $25,000.

On behalf of the Colombian Information Service of New York: Mercedes Velez as information officer engaged in the dissemination of information on Colombia and reporting a salary of $16,875 per year.

On behalf of the Australian Broadcasting Commission of New York: Peter Barnett as Journalist broadcasting on U. S. news and events and reporting a salary of $26,084 per year.

On behalf of Netherlands Chamber of Commerce in the U.S., Inc., San Francisco: J. A. Greve as Consultant; J. W. M. Schorer as President; Gerard G. Sanders as Director; J. H. Ter Laare as Director; A. Taapken as Director and Fred W. Bloch as Director. All render their services on a part-time basis, report no compensation and are engaged in the promotion of trade between the United States and the Netherlands.

On behalf of Samuel E. Stavisky & Associates of Washington, D. C. whose foreign principals are the Instituto Mexicano de Comercio Exterior, Mexico City and Pan-American Coffee Bureau, New York: Elizabeth H. Souza as Public Relations Associate and reporting a salary of $7,800 per year.

On behalf of Mc-Cann-Erickson, Inc. of New York whose foreign principals are Communications Affiliates, Ltd. (Bahamas) and Australian Tourist Commission: Anthony F. Rosa as Media Planning Supervisor reporting a salary of $20,500 per year.

On behalf of the Amtorg Trading Corporation of New York which is the official Soviet purchasing agent in the United States: Ludmila Petrovna Gorchilina as Secretary reporting a salary of $338 per month and Henrietta Ivanovna Kuzmichova as Attorney reporting a salary of $540 per month and Vladimir Grigoryevich Zhebel as Senior Engineer reporting a salary of $540 per month.

On behalf of Arnold & Porter of Washington, D.C. whose foreign principals are: the Ambassador of the Swiss Confederation; Federation of British Carpet Manufacturers; Confederation Internationale des Fabricants de Tapis et de Tissus d'Ameublement; Swiss Cheese Union, Inc. and Switzerland Gruyere Processed Cheese Manufacturers Association: Nancy K. Mintz as Attorney rendering legal services to the foreign principals and a regular salaried employee of the registrant law firm and Lawrence W. Sunderland as Foreign Trade Consultant and reporting a fee of $12,000 per year.

On behalf of Moss Internation of Washington, D. C. whose foreign principal is TRICORP, Great Britain: Lucille Larkin as Counsultant reporting a fee of $75.00 and Ronald Rustam Van Doren as Public Relations Consultant reporting a fee of $1,500 and Julia T. Cellini as Consultant rendering services on a special basis and reporting no fee. All were engaged in publicizing the visit to the United States of His Royal Highness Prince Sultan, Defense Minister of Saudi Arabia.

On behalf of the Spanish National Tourist Office of Miami: Mercedes L. Amores as Acting Director engaged in the promotion of tourism to Spain and reporting a salary of $6,000 per year.

On behalf of the Alpine Tourist Commission of New York: Walter Bruderer as Treasurer on a part-time basis and reporting no compensation.

On behalf of the Irish Northern Aid Committee of the Bronx whose foreign principal is Irish Northern Aid Committee, Belfast: Peter Byrnes as officer engaged in the collection of funds to assist the foreign principal and its refugees elsewhere. Mr. Byrnes renders his services on a part-time basis and reports no compensation.

On behalf of Cox, Langford & Brown of Washington, D. C. whose foreign principals are the Embassies of Belgium, India and Italy, the Government of Belgium and Corporacion National de Hoteles y Turismo de Venezuela: William F. Taylor as attorney reporting a salary of $18,000 per year.

On behalf of the Central American Sugar Council of Washington, D.C.: James R. Patton, Jr. as Executive Secretary rendering his services on a part-time basis and reporting no compensation.

On behalf of Gadsby & Hannah of Washington, D.C. whose foreign principals are Embassy of Japan and Mitsui & Co., Ltd: Milton P. Semer as attorney rendering his services on a part-time basis and reporting no compensation.

On behalf of the United States-Japan Trade Council of Washington, D.C. whose foreign principal is the Japan Trade Promotion Office: Eugene J. Kaplan as Chief Economist analyzing and reporting on trade and economic developments and reporting a salary of $23,000 per year.

On behalf of Package Express and Travel Agency, Inc. of New York City whose foreign principal is Vneshposyltorg, U.S.S.R.: Klemens Babiak engaged in the shipment of gift parcels to recipients in the USSR and reporting receipt of $6 - $7 per parcel depending on its size.

On behalf of T. J. Ross Associates, Inc. whose foreign principals are Thos. Cook & Son. Ltd., Midland Bank Ltd., Trust Houses Forte and the Automobile Association of the United Kingdom, London: Weldon Miller as public relations consultant reporting a fee of $12,000 per a three month period and Wayne Kurlinski reporting public relations activities on behalf of the Bermuda Department of Tourism and reporting a fee of $11,145 per year.

On behalf of the British Broadcasting Corporation of New York: Veronica L. Young as Associate Television Producer engaged in general program research and reporting a salary of $13,624 per year.

On behalf of Taussig-Tomb & Associates of Washington, D.C. whose foreign principal is Messerschmitt-Bolkow-Blohn, Munchen, West Germany: Mark G. Treat as Technical/Educational Consultant rendering engineering liaison between the principal and various elements of the U. S. Air Force.

On behalf of T. J. Ross and Associates, Inc. of New York whose foreign principals are Bermuda Department of Tourism, Thos. Cook & Son, Inc., London; Midland Bank Ltd., London, Trust Houses Forte, London; and Automobile Association of the United Kingdom: William J. Gaskill; Thomas J. Ross; William M. Simpich; Gordon M. Sears; and Weldon Miller. All are engaged in public relations activities on behalf of the foreign principals: Messrs. Gaskill, Ross, and Simpich report a yearly fee of $11,145 and Messrs. Sears and Miller report a yearly fee of $12,000.

On behalf of Select Magazines of New York whose foreign principal is The Enterprise for Distribution of Foreign Publications of the Polish Peoples Republic, Warsaw: Thomas J. Cahill as Assistant to the President and a regular salaried employee of registrant corporation. Registrant is engaged in the distribution of the magazine Poland within the United States.

On behalf of the European Travel Commission of New York: James T. Turbayne representing British interests and rendering his services on a part time basis and reporting no compensation.

On behalf of Development and Resources Corporation of New York City whose foreign principals are Khuzestan Water & Power Authority, Iran; Ministry of National Resources, Iran; Mahab Consulting Engineers, Iran; and Federal Union of Brazil, Ministry of Interior: Margaret C. Kane as Administrative Officer reporting a salary of $15,200 per year; David E. Lilienthal as President reporting a salary of $50,000 per year; Allan W. McCulloch as Engineer reporting a salary of $25,000 per year; Thomas A. Mead as Manager, Tehran Office reporting a salary of $29,000 per year and Walton Seymour as Vice President reporting a salary of $45,000 per year. The registrant is engaged in advisory and technical consulting services involving engineering design, power, economics and agricultural development on behalf of the foreign principals.

On behalf of the Jamaica Tourist Board, New York: Frederick Wilson, Jr. reporting a salary of $16,000 per year; Mario J. Tallarico reporting a salary of $18,000 per year; Hopeton Fearon reporting a salary of $11,000 per year and Winston A. Cole reporting a salary of $7,000 per year. All are engaged in public relations activities in connection with the promotion of tourism to Jamaica.

On behalf of Roy Blumenthal International Associates, Inc. of New York City whose foreign principals are The Federal Republic of Germany, the City of Berlin and the German National Tourist Office: Walter John Marx as editor of the German Press Review and reporting a salary of $18,000 per year and David Charles Venz as Public Relations Counsel reporting a salary of $15,000 per year.

On behalf of Package Express & Travel Agency, Inc. of New York whose foreign principals are Vneshposyltorg, Moscow and Vnestorgbank, U.S.S.R.: A. Svenchansky as President reporting a salary of $35,000 per year; Onik Abrahamian as Associate reporting a fee of $5.60 - $9.60 per parcel; Nathaniel Frankfurt as Manager reporting a fee of $9,000; Max Klamfer as Assistant Manager reporting a fee of $8,000; Zurach Duke as agent reporting a fee of $16 per package; Kateryna Gotman as agent reporting a fee of $4 - $5 per parcel and Harry Kujtkowski as associate reporting a fee of $6.13 per parcel plus a commission of 3 1/2% on gift items. All are engaged in sending parcels to recipients in the Soviet Union.

LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Wallace H. Johnson

COURT OF APPEALS

CLEAN AIR ACT

STATUTORY REVIEW REQUIREMENTS; RIPENESS FOR REVIEW; NEPA STATEMENT NOT REQUIRED FROM EPA; ADJUDICATORY HEARING NOT REQUIRED

Anaconda Co. v. Ruckelshaus, et al. (C.A. 10, No. 73-1272, Aug. 8, 1973; D.J. 90-5-2-3-82)

Anaconda brought this suit in the district court to enjoin the EPA from conducting further hearings or promulgating a regulation which would limit sulfur oxide emissions from its Deer Lodge County, Montana, plant, until the EPA filed an environmental impact statement and granted Anaconda an adjudicatory hearing on the proposed regulation. The district court, in an opinion strongly critical of the EPA, granted the relief sought.

The Tenth Circuit reversed and ordered the district court to dismiss the complaint. It held: (1) the statutory provisions (Section 307(b)(1), 42 U.S.C. sec. 1857 h-5(b)(1) for direct review by the appropriate Court of Appeals of EPA action under Section 110(c) (42 U.S.C. sec. 1857c-5(c)), of the Clean Air Act are exclusive and bar district court review except under extraordinary conditions; (2) the EPA regulation at issue was merely proposed, so the cause was not ripe for injunctive relief; (3) Anaconda's contention that the EPA must file an impact statement is without merit, and thus does not justify district court jurisdiction and (4) even though this proposed EPA regulation applied only to Anaconda, the company had not been deprived of procedural due process by the EPA's refusal to grant it a trial-type adjudicatory hearing.

Staff: James A. Glasgow and Henry J. Bourguignon (Land and Natural Resources Division); Assistant United States Attorney Charles W. Johnson (D. Colo.)

STATE SUPREME COURT

INDIANS

STATE COURT'S JURISDICTION; DIVORCE

State ex rel Mary Iron Bear v. District Court of the Fifteenth Judicial District of the State of Montana (No. 12405, S. Ct. Mont., May 2, 1973; D.J. 90-2-0-739)

In reversing the Montana district court which had dismissed a divorce action involving two Indians, for lack of jurisdiction, the State Supreme Court concluded that, before a district court can assume jurisdiction in an Indian matter, it must first determine (1) whether the federal treaties and statutes applicable have preempted state jurisdiction; (2) whether the exercise of state jurisdiction would interfere with reservation self-government; and (3) whether the tribal court is currently exercising jurisdiction or has exercised jurisdiction in such a manner as to preempt state jurisdiction.

The Assiniboine-Sioux Tribe prior to the Civil Rights Act of 1968 and passage of Public Law 280 of the 1953 Congress had hoped to subject its members to the laws of the State of Montana with respect to divorce and marriages. While the Civil Rights Act of 1968 provides a specific procedure for a state with the tribe's consent, to assume both civil and criminal jurisdiction the situation presented here was determined to not be affected by the subsequently passed federal statutes. The adoption by the tribe of state jurisdiction in divorce matters was not changed by the Civil Rights Act of 1968 and was found to be consistent with the principle that state courts are open to individual Indian citizens who choose to avail themselves of their jurisdiction to the same extent accorded any other person.

Staff: George R. Hyde (Land and Natural Resources Division)

APPENDIX II

OBSTRUCTION OF JUSTICE
RECURRING PROBLEMS IN PROSECUTIONS UNDER 18 U.S.C. §§1503, 1510

I. Introduction

Recurring questions relating to prosecutions under statutes that protect the integrity of judicial processes have been presented to department attorneys. These questions have arisen in cases brought under 18 U.S.C. §1503 (influencing or injuring officer, juror or witness generally), and 18 U.S.C. §1510 (obstruction of criminal investigations). The following memorandum discusses several of the more troublesome areas and is intended to clarify the applicability of the two statutes.

II. 18 U.S.C. §1503

The purpose of 18 U.S.C. §1503 is to protect the administration of justice in the Federal courts and those participating therein from corrupt influence and intimidation. The statute condemns attempts to influence or injure witnesses, jurors, officers of the court, and parties. More particularly, the statute forbids:

> corrupt or threatening endeavors to influence any witness, any grand or petit juror, any officer of the court, or magistrate; injury of any party or witness in his person or property on account of his participation;
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> injury of any grand or petit juror in his person or property on account of his participation;
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> injury of any officer, magistrate, or committing magistrate in his person or property on account of his participation;
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> corrupt or threatening acts to influence, obstruct, impede, or to endeavor to influence, obstruct, or impede the due administration of justice.

It will be seen that there must be some actual injury to one's person or property in a revenge situation; mere threats are not sufficient after the conclusion of judicial proceedings. While proceedings are pending, however, any threat or other corrupt endeavor to influence a participant is an offense. An endeavor need not be successful to be punishable under §1503. E.g. Roberts v. United States, 239 F.2d 467 (9th Cir. 1956).

It is significant that both endeavors and actual obstructions may be charged under the last provision of §1503. Although this "due administration of justice" clause appears to be a broad, catch-all phrase, the courts in recent years have construed it strictly. In United States v. Ryan, 455 F.2d 728 (9th Cir. 1972) it was held that the general clause must be construed in accordance with the doctrine of ejusdem generis, and thus refers only to offenses similar to those specifically enumerated in the earlier provisions of the statute. But see Falk v. United States, 370 F.2d 472 (9th Cir. 1966), cert. denied, 387 U.S. 926 (1967).

A. Who is a "witness" under §1503

In order that one be a witness protected by §1503, it is not necessary that he have been subpoenaed to testify. Falk v. United States, 370 F.2d 472 (9th Cir. 1966), cert. denied 387 U.S. 926 (1967). A judicial proceeding must be pending at the time of the intimidation or influence, but there is no clear-cut point at which one becomes a witness.

In United States v. Griffin, 463 F.2d 177 (10th Cir. 1972), a prospective witness had given information to a government agent, but had not been subpoenaed nor had she testified before the grand jury. Applying the often-quoted definition of a witness as "one who knows, or is supposed to know, material facts and is expected to testify to them or to be called as a witness to so testify," the court held that protection of prospective witnesses is essential to maintain the integrity of federal courts. It was sufficient under §1503 to show that the witness had given information and that the defendants had confronted her about her actions, threatened her, and forcefully assaulted her.

Another case illustrating this sort of methodology is Hunt v. United States, 400 F.2d 306 (5th Cir. 1968), cert. denied, 393 U.S. 1021 (1969). In that case an informer was subpoenaed by the defendant at his preliminary hearing but never testified. The day after the hearing, the informer was beaten. The informer came within the above definition of "witness" because it was clear that he knew material facts and that as an informer he had given his information to the Government and expected to testify to those facts in the future.

Walker v. United States, 93 F.2d 792 (8th Cir. 1938) indicates where the line is drawn. The "witness" there, Mrs. Albright, had been interrogated as a co-defendant in an investigation. She was charged, along with the defendant, in an indictment returned on January 9, 1937. That evening she was approached by the defendant to change her story. The court stated the test of witness status to be whether, at the time of the threat, the person "intended to testify on the trial of the case then pending in the District Court."

Although proof of this intent can be circumstantial, the Government showed only that Mrs. Albright had been interrogated by the investigator which was not sufficient to support the inference. She was not asked to, nor did she say that she would, testify. As a co-defendant at that time Mrs. Albright could not be required to testify against herself. Thus, there was nothing in the record to indicate that she desired or intended to be a witness or that she would be requested to testify.

These cases lead to the conclusion that courts will find one entitled to protection as a witness where the person has been cooperating or offers to cooperate with the Government. The person must know material facts and the Government must be aware of this. Either the witness' intention to testify or the Government's expectations of calling the witness should be sufficient to confer witness status.

It should also be noted that the Government, in addition to showing that the one influenced was or intended to be a "witness," must show beyond a reasonable doubt that the defendant then and there had knowledge or notice of that fact and because of that endeavored to influence the witness. Id. See also Pettibone v. United States, 148 U.S. 197, 206-07 (1893). In Odom v. United States, 116 F2d 996 (5th Cir. 1941), reversed on other grounds, 313 U.S. 544 (1941), it was held that the defendant's knowledge of the witness status is not absolute or direct knowledge, but information or a reasonably founded belief thereof is sufficient to establish the requisite scienter. It has been suggested that the standard is one of actual knowledge or belief, but this appears to be only a semantic distinction. United States v. Solow, 138 F. Supp. 812, 816 n. 14 (S.D.N.Y. 1956).

B. Witnesses before grand juries

Although the plain words of the statute do not mention witnesses before grand juries, it seems clear that such witnesses are protected by the statute. The statute condemns endeavors to intimidate or influence witnesses "in any court of the United States...." It has been held that a grand jury is a part of the court, Wilson v. United States, 77 F.2d 236 (8th Cir. (1935), cert. denied, 295 U.S. 759, and that the obstruction of justice statute is effective at the grand jury stage. Davey v. United States, 208 Fed. 237 (7th Cir.), cert. denied, 231 U.S. 747 (1913). In United States v. Grunewald, 233 F.2d 556 (2d Cir. 1955), reversed on other grounds, 353 U.S. 391 (1956), a grand jury had been empaneled and the defendant was charged with endeavoring to influence a witness before the grand jury. The court held that the evidence was plain of an obstruction of grand jury proceedings and improper tampering with witnesses. "It

is now and has long been established that the law protects the integrity of the entire judicial process, of grand jury proceedings, as well as trials." 233 F.2d at 571.

The question of whether one is a "witness" before the grand jury is resolved according to the principles discussed above.

> "The connotation of 'witness' is similarly determined with a view to substance, rather than form and hence anyone who 'knows or is supposed to know material facts, and is expected to testify to them, or be called on to testify. . .is a witness'."

C. Requirement of a pending proceeding

It appears that no offense can be charged under §1503 if the alleged obstruction has occurred prior to the pendency of a judicial proceeding. The courts often express this requirement as a "jurisdictional" element of any §1503 offense. E.g. Cotton v. United States, 409 F.2d 1049 (10th Cir. 1969)

The origin of the requirement seems to be Pettibone v. United States, 148 U.S. 197 (1893):

> "The obstruction of the due administration of justice in any court of the United States, corruptly or by threats or force, is indeed made criminal, but such obstruction can only arise when justice is being administered. Unless that fact exists, the statutory offense cannot be committed; and while, with knowledge or notice of that fact, the intent to offend accompanies obstructive action, without such knowledge or notice the evil intent is lacking." 148 U.S. at 206-07.

In this regard, note that 18 U.S.C. §1510 was passed specifically to plug this loophole in §1503. The legislative history of that statute is replete with comments that the section was necessary to prohibit intimidation of informers and witnesses prior to the pendency of judicial proceedings. H. R. Rep. No. 658, 90th Cong. 1st Sess., 1967 U.S. Code Cong. & Admin. News 1790-66 (1967). That report contains a letter from the Acting Attorney General which states: "But there is no protection under present law for potential witnesses prior to the institution of court proceedings." It is extremely unlikely that any court will feel obliged to extend §1503 now that §1510 has been enacted.

After concluding that some proceeding must be pending, the question becomes "when is a proceeding pending." An investigation by the FBI or IRS is not a pending proceeding for §1503 purposes. United States v. Ryan, 455 F.2d 728 (9th Cir. 1972); United States v. Scoratow, 137 F. Supp. 620 (W. D. Pa. 1956). Most courts that have drawn a line have said that the statute is not applicable until, at the earliest, a complaint has been filed with a U.S. Commissioner. E.g. United States v. Metcalf, 435 F. 2d 754 (9th Cir. 1970); United States v. Scoratow, supra.

This statement becomes troublesome with respect to obstructions of grand jury proceedings in which no complaint has been filed. As discussed above, §1503 has been held to protect witnesses before grand juries. In United States v. Grunewald, supra, it does not appear that any complaint had been filed, yet the defendant's conviction for tampering with witnesses was upheld. Because the grand jury is part of a court, its ministrations are properly protected by §1503. Wilson v. United States, supra. It might be argued that §1503 should not apply to grand juries until a complaint has been filed or an indictment returned. However, the grand jury acts for the court whether or not a complaint has been filed. Once convened, the grand jury is a court proceeding, and the convenient language of cases like Metcalf and Scoratow is inapposite.

With respect to injuries on account of participation, it is clear that a proceeding need not be pending at the time of the injury. In order to prove scienter, however, it is necessary that the requisite nexus between the act and the prior participation be shown.

III. 18 U.S.C. §1510

The statute forbids willful endeavors "to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator." (Emphasis added) Injury of such a person in his person or property on account of his giving information to a Federal investigator is also condemned. Although "person" is not defined by the statute, the person must be one who has such information to communicate. Beyond that, it is unclear what must be known about the potential witness. The stated purpose of the statute is "to protect informants and witnesses against intimidation or injury." H. R. Re. No. 658, 90th Cong., 1st Sess., 1967 U.S. Code Cong. & Admin. News 1760, 1762 (1967). Elsewhere it is stated that the section was needed to plug a loophole that resulted from the fact that it was not a Federal crime "to harass, intimidate, or assault a witness who may communicate information to Federal investigators prior to a case reaching the court." Id. at 1761 (emphasis added). In United States v. Carzoli, 447 F.2d 774 (7th Cir. 1971), cert. denied, 404 U.S. 1015 (1972), the person

threatened had apparently been asked only one question which she had not answered at the time the defendant threatened her. The defendant's conviction was upheld, so the implication is that one need not have already cooperated or agreed to cooperate in order to be protected.

More problems are likely to be encountered with respect to showing (1) a reasonably well-founded belief that information had been or was about to be given; and (2) actual knowledge on the part of the accused that the recipient or intended recipient of information is a criminal investigator as defined in subsection 1510(b). United States v. Kozak, 438 F.2d 1062, 1065-66 (3rd Cir. 1971), cert. denied, 402 U.S. 996 (1971).

The Government in United States v. Williams, 470 F.2d 1339 (8th Cir. 1973) showed only that the defendant was a part-time janitor at the place of the assault, that he was present at the time of the assault, and that he had struck the informer. Because there was no evidence to justify an inference that he had ever seen the informer before or that he had any knowledge of what the fracas was about, the defendant's conviction was reversed.

As to the second type of scienter, the legislative history of §1510 gives an example of the requirement of actual knowledge that the intended recipient is a "criminal investigator."

> "Being a criminal statute, the required criminal scienter is a necessary element of the crime. For example, if a person does not know that the investigator is a federal investigator, an act which would normally be in violation would not be so because of the lack of scienter...."
> 1967 U.S. Code, Cong. & Admin. News at 1762.

The Third Circuit interprets this statement as follows:

> "In its discussion of scienter, the House Committee on the Judiciary specifically stated that there must be actual knowledge that the recipient or intended recipient of information be a criminal investigator....
> United States v. Kozak, 438 F.2d at 1065.

VI. Venue for Offenses under §1503 and §1510

There is no apparent reason to believe that question of venue are decided differently for actions under §1510 than they are under §1503, so the two are discussed here together. Venue

in criminal proceedings is generally governed by Rule 18 of the Federal Rules of Criminal Procedure:

"Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed."

Multiple venue is established for continuing offenses by 18 U.S.C. 3237(a) which provides in pertinent part: "[A]ny offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued or completed." These provisions implement the constitutional requirements of trial in the state and district where the offense was committed. See generally, 8 Moore's Federal Practice §18.01 to 18.03 (1972); 1 Wright, Federal Practice and Procedure § §300-03 (1969).

It is usually suggested that the key verbs of a criminal statute solve the problem of where the crime was committed. Wright, supra §302. Similarly, "[t]he determination of whether 18 U.S.C. §3237 may be invoked to sustain venue rests upon an analysis of the nature of the crime charged; can the crime...be considered a 'continuous offense' or is it a 'single act crime.'" United States v. Rodriquez, 465 F.2d 5, 10 (2d Cir. 1972). Courts normally construe §3237(a) as allowing multiple venue for continuing offenses when the crime consists of distinct parts which have been committed in different localities or where there is a "continuously moving act." E.g. DeRosier v. United States, 218 F.2d 429 (5th Cir.), cert. denied, 319 U.S. 921 (1955). Thus, venue will generally lie in the district where the threat, injury, or corrupt endeavor was accomplished.

Authority for this proposition is found in United States v. Swann, 441 F.2d 1053 (D.C. Cir. 1971) which also raises another possibility for multiple venue. The indictment in Swann charged the defendant with endeavoring to obstruct justice under §1503. The defendant had assaulted a witness in Maryland who was to testify at a trial then pending in the District of Columbia. The court held that venue was improperly laid in the District of Columbia because the offense condemned by the statute and charged in the indictment was begun, carried out and completed in Maryland; the offense was not begun in one district and completed in another, nor was it committed in more than one district. The court reasoned that the pending D.C. trial could not establish D.C. venue under §3237(a) because if it did, venue in bribery cases would lie wherever the testimony was affected, which is not the law. Similarly, venue in murder cases would lie wherever the fatal wound took its effect rather than where the wound was inflicted, which is not the law.

The concurring opinion suggests that the case leaves open the question of whether venue could lie in the District of Columbia had the indictment charged the defendant with actually "obstructing...the due administration of justice" in D.C. by acts done outside the District. Because the second count of the indictment was solely for endeavoring, the case speaks only to that offense and not to actual obstruction. See United States v. Essex, 275 F. Supp. 393 397 (E.D. Tenn. 1967), reversed on other grounds, 407 F.2d 214 (6th Cir. 1969) for an example of informed draftsmanship of charges as affecting venue. Note that this concept is inapplicable for §1510 because only endeavors may be charged pursuant to that section.

United States Attorneys should report any unusual or significant problems regarding these statutes to attorneys in the General Crimes Section who use telephone extensions 2604 and 3738.