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PROPOSALS TO IMPROVE ENFORCEMENT OF CRIMINAL LAWS OF THE UNITED STATES

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

COMMENTS UPON PROPOSALS TO IMPROVE ENFORCEMENT OF THE CRIMINAL LAWS OF THE UNITED STATES

JANUARY 13, 1930.—Referred to the Committees on Ways and Means, Judiciary, Interstate and Foreign Commerce, Expenditures in the Executive Departments, District of Columbia, and Immigration and Naturalization, and ordered to be printed

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To the Congress of the United States:

In my previous messages I have requested the attention of the Congress to the urgent situation which has grown up in the matter of enforcement of Federal criminal laws.

After exhaustive examination of the subject, the Commission on Law Observance and Enforcement and the officials of the Department of Justice and of the Treasury Department unite in the conclusion that increasing enactment of Federal criminal laws over the past 20 years, as to which violation of the prohibition laws comprises rather more than one-half of the total arrests, has finally culminated in a burden upon the Federal courts of a character for which they are ill-designed, and in many cases entirely beyond their capacity. The result is to delay civil causes, and of even more importance, the defeat of both justice and law enforcement. Moreover, experience shows division of authority, responsibility, and lack of fundamental organization in Federal enforcement agencies and ofttimes results in ineffective action.

While some sections of the American people may disagree upon the merits of some of the questions involved, every responsible citizen supports the fundamental principle that the law of the land must be enforced.

The development of the facts shows the necessity for certain important and evident administrative reforms in the enforcement and judicial machinery, concrete proposals for which are available from Government departments. They are in the main:

1. Reorganization of the Federal court structure so as to give relief from congestion.
2. Concentration of responsibility in detection and prosecution of prohibition violations.
3. Consolidation of the various agencies engaged in prevention of smuggling of liquor, narcotics, other merchandise, and aliens over our frontiers.
4. Provision of adequate court and prosecuting officials.
5. Expansion of Federal prisons and reorganization of parole and other practices.
6. Specific legislation for the District of Columbia.

I append hereto a preliminary and a supplementary report from the Commission on Law Observance and Enforcement relating to several of these and other questions. I particularly call attention to their recommended plan for reducing congestion in the Federal courts by giving court commissioners enlarged powers in minor criminal cases. Their discussion of the workability and the constitutionality of the plan, which is concurred in by the eminent jurist upon the commission and others whose advice they have sought, is set out in more detail in the supplementary report. I also append memoranda from the Attorney General and the Secretary of the Treasury upon several phases of these problems.

I believe the administrative changes mentioned above will contribute to cure many abuses. Beyond these immediate questions are others which reach deeply into the whole question of the growth of crime and the enforcement of the laws. The causes of crime, the character of criminal laws, the benefits and liabilities that flow from them, the abuses which arise under them, the method by which enforcement and judicial personnel is secured, the judicial procedure, the respective responsibility of the Federal and State Governments to these problems, all require further most exhaustive consideration and investigation, which will require time and earnest research as to the facts and forces in action before sound opinions can be arrived at upon them.

HERBERT HOOVER.

THE WHITE HOUSE, *January 13, 1930.*

OFFICE OF THE ATTORNEY GENERAL,
Washington, D. C., January 13, 1930.

DEAR MR. PRESIDENT: With your permission I submit some comments upon proposals to improve enforcement of the criminal laws of the United States.

There are some obvious defects in our enforcement agencies, and there are measures that may be readily devised and taken tending to cure them. There are other defects obscure in their nature, requiring more prolonged study.

It has seemed to me, therefore, that any program for improvement naturally falls into two parts:

First. The prompt adoption of measures readily to be devised for curing obvious defects; and

Second. Extended inquiry to determine the more fundamental troubles and means of remedying them.

The Department of Justice and the Commission on Law Observance and Enforcement have been cooperating in the preparation of proposals which may be put into effect speedily to produce immediate improvement, having in mind that this preliminary program would be followed by more elaborate and thorough consideration of the subject. Only measures requiring new legislation need now be mentioned.

The task of enforcing the criminal laws is not confined to a single agency. Several must operate efficiently to produce good results. There must be—

First. Agencies to detect offenses and obtain evidence.

Second. Prosecuting attorneys who use the evidence thus prepared and try the cases in court.

Third. Courts to hear the cases.

At present obvious defects exist in each of these agencies.

Congestion in the courts deserves utmost consideration. In many districts the Federal courts are unable to cope with the volume of business brought before them. This results in delay, with weakening of evidence and difficulty in obtaining convictions. Another effect of congestion is the effort to clear dockets by wholesale acceptance of pleas of guilty, with light punishment. The deterrent effect of speedy trial and adequate punishment is lost. Congestion also means delay in trial of civil cases, with hardship to private litigants, particularly those of small means. This condition has been disclosed in the statistics for the year ending June 30, 1929, set forth in my annual report. That there has been no relief since June 30, 1929, is shown by telegraphic reports from United States attorneys (excepting those in the Territories) covering prohibition and narcotic cases commenced and terminated during the six months ended December 31, 1929. These reports show 28,437 prohibition and narcotic cases commenced; 25,887 such cases terminated; and 20,066 pending December 31, 1929—an increase over the number pending June 30 last and an increase as compared with those pending December 31, 1928.

REMEDIES

The most important and constructive suggestion comes from the Commission on Law Observance and Enforcement in the form of a proposal to use the United States commissioners for disposing of a large number of criminal cases, thus speeding up the work and relieving the Federal judges of burdensome details. There are some constitutional questions involved, but in my opinion these do not present insurmountable difficulties, and the validity of the proposal is supported by such eminent jurists and lawyers as George W. Wickersham, Henry W. Anderson, Newton D. Baker, Judge William I. Grubb, Judge William S. Kenyon, Monte M. Lemann, Frank J. Loesch, Judge Kenneth Mackintosh, Judge Paul J. McCormick, and

An important recommendation for amendment to the national prohibition act is that relating to so-called padlock injunctions. It is intended to remedy jurisdictional difficulties which arise under the existing law.

There has already been prepared and submitted to Congress a complete plan for reorganization of our prison system, including probation and paroles, which directly relate to enforcement of criminal laws. I have also submitted to the chairman of the Senate Committee on the District of Columbia specific recommendations relating to the District, so no further mention of these matters is required.

To summarize I recommend—

First. Immediate consideration of legislation to relieve congestion in the United States courts by—

Enlarging the powers and duties of the United States Commissioners.

By providing some additional judges.

By appropriation of funds for enlarging and improving personnel in the clerks' and marshals' offices.

Second. Immediate consideration of legislation to transfer to the Department of Justice the agencies for the detection of offenses under the national prohibition act.

Third. Appropriation of funds to increase the rates of pay and to provide additional forces in the offices of the United States attorneys.

Fourth. Amendment to padlock injunction provisions of the national prohibition act.

In respect to prohibition, attention has recently been directed more to Federal than to State agencies for enforcement. Placing all Federal agencies in good order is not the only requirement. It has never been contemplated that the whole task of enforcing prohibition should be borne by the Federal Government. Any constructive plan for better prohibition enforcement must give attention to improvement in State as well as Federal agencies, and to the adjustment between them of the burden of enforcement.

Respectfully,

WILLIAM D. MITCHELL,
Attorney General.

The PRESIDENT,
The White House.

PRELIMINARY REPORT ON OBSERVANCE AND ENFORCEMENT OF PROHIBITION

To the PRESIDENT.

MR. PRESIDENT: Ever since the organization of this commission on May 28, 1929, it has been giving careful consideration, among other things, to the question of the observance and enforcement of the eighteenth amendment and the national prohibition act. The problems presented have been numerous and difficult. It was urged upon us from certain sources that we proceed at once to hold public hearings on this subject, but we conceived it to be more useful to make a careful study of the whole question, securing information from the responsible officers of government and from printed reports, as well as from hearings before committees of Congress, before em-

Roscoe Pound, who are members of the commission. If legislation along these lines can be made effective, a decided improvement will result.

Some additional relief for congested conditions will be afforded by providing additional judges in a few districts already recommended by the conference of senior circuit judges and by me.

Delay in judicial operations through inadequate forces in the clerks' and marshals' offices may be taken care of by additional appropriations, request for which is already pending before Congress.

AGENCIES FOR DETECTION OF OFFENSES

Since the passage of the national prohibition act, the attorneys who conduct the prosecutions in court have been under the Department of Justice, while the Federal agency for detecting offenses against the national prohibition act and preparing the evidence has been in the Prohibition Unit in the Treasury Department. There are no agencies in the Department of Justice authorized to perform the latter function. The closest cooperation must exist between officers charged with the detection of offenses and preparation of evidence on the one hand, and the United States attorneys and their assistants, who prosecute the cases, on the other hand. These agencies, now in different departments, would work together more efficiently if in the same department. A plan has been drafted by the Department of Justice and the Treasury Department to effect such a transfer. It leaves in the Treasury Department the administrative function of issuing permits for the manufacture and distribution of industrial alcohol and related matters. These proposals contemplate a revision of the regulations respecting permits so as to provide more complete supervision to prevent diversion from authorized uses, such regulations to be prepared jointly by the Secretary of the Treasury and the Attorney General so that the legal experience of the Department of Justice in prosecutions under the national prohibition act may be utilized in the drafting of the regulations. This plan also contemplates that in any case in which the Department of Justice has information bearing on the merits of an application for a permit, a representative of the department shall participate in the decision as to whether the permit shall issue.

PROSECUTING ATTORNEYS

However efficient the detection agencies may be, and however well equipped to handle the business the courts may be, in order to produce good results the prosecuting force, that is, the United States attorneys and their assistants, must be efficient. Some additional force and some increases in the rates of pay should be provided for these officials to enable us to procure and retain the services of competent lawyers. I have mentioned this before. Requests for additional funds for this purpose have been made and await congressional action. If the amounts we have asked for prove to be insufficient, requests for additional amounts may be made.

Attention should again be called to the necessity for reorganizing and coordinating the forces charged with patrolling the borders to prevent smuggling.

barking upon public hearings. While we are not ready to make a final report on the subject, we have reached certain conclusions which we are transmitting to you with this communication. The extent and complexity of the problem perhaps may be strikingly presented by reference to a few outstanding facts.

I. Scope and Size of the Problem

As to observance: It is impossible wholly to set off observance of the prohibition act from the large question of the views and habits of the American people with respect to private judgment as to statutes and regulations affecting their conduct. To reach conclusions of any value, we must go into deep questions of public opinion and the criminal law. We must look into the several factors in the attitude of the people, both generally and in particular localities, toward laws in general and toward specific regulations. We must note the attitude of the pioneer toward such things. We must bear in mind the Puritan's objection to administration; the Whig tradition of a "right of revolution"; the conception of natural rights, classical in our polity; the democratic tradition of individual participation in sovereignty; the attitude of the business world toward local regulation of enterprise; the clash of organized interests and opinions in a diversified community; and the divergences of attitude in different sections of the country and as between different groups in the same locality. We must not forget the many historical examples of large-scale public disregard of laws in our past. To give proper weight to these things, in connection with the social and economic effects of the prohibition law, is not a matter of a few months.

As to enforcement, there are no reliable figures to show the size of the problem. But the reported arrest in the last fiscal year of upward of 80,000 persons from every part of continental United States indicates a staggering number of what might be called focal points of infection. To these must be added the points of possible contact from without, along 3,700 miles of land boundaries, substantially 3,000 miles of frontage on the Great Lakes and connecting rivers (excluding Lake Michigan), and almost 12,000 miles of Atlantic, Gulf, and Pacific shore line. Thus there are about 18,700 miles of mainland of the continental United States at every point of which infection is possible.

There are no satisfactory estimates of the number of roads into the United States from Mexico and Canada. The number of smuggling roads from Canada is reported as at least 1,000, and on the Mexican border there are entrances into the United States at most points along a boundary of 1,744 miles.

To deal with an enforcement problem of this size and spread, the Federal Government can draw only on a portion of the personnel of three Federal services, whose staffs aggregate about 23,000. Approximately one-tenth of this number is in the investigative section of the Prohibition Unit. Of the remaining 20,000, only a small proportion of the personnel is available for actual preventive and investigative work. The remainder is engaged in work far different from prohibition.

These figures speak for themselves.

II. Administrative Difficulties

A frequent complaint is that the Federal Government is prosecuting small cases and not getting at those responsible for the large supplies of illegal liquor. To get at the smugglers, the wholesale distributors, and those who manufacture and divert on a large scale, it is necessary to have either an integration of the forces working at the supply and distribution ends or a close working relation between the two forces. With respect to both liquor and narcotics, it is frequently stated by enforcement officials and those who study phases of the problem that the Federal officials who deal with local or retail distribution upset many an investigation which might lead to the sources of supply; and, on the other hand, investigators who are dealing with sources are frequently ineffectual in getting at persons who control the sources.

To adjust the machinery of Federal administration, as it had grown up for other purposes, to this huge problem of enforcement of prohibition is not easy and will require much further study. Unification, centralization of responsibility, and means of insuring cooperation between Federal and State agencies are things to which we must come, quite apart from the exigencies of enforcement of prohibition, but which can not be achieved overnight.

III. Legal Difficulties and Proposed Remedies

When we come to the legal difficulties in enforcement, it is possible to speak with much more assurance as to what may be done at once by way of improvement.

Pending study of the whole subject, there are certain features of Federal enforcement of the law as it stands with respect to which the testimony of judges, district attorneys, and enforcement officers is general and substantially unanimous. If on no other grounds than to give the law a fair trial, there are obvious and uncontroverted difficulties, abundantly pointed out by experience, which may, and, as we think, should be met so as to make enforcement more effective. Summarily stated, these difficulties are due to (1) the division of enforcement between the Treasury Department and the Department of Justice; (2) the disordered condition of Federal legislation involved in enforcement; (3) the possibilities of evading or defeating injunction proceedings, commonly known as padlock injunctions, by means of transfers and concealments of persons interested in property used for manufacture and sale of illicit liquor; and (4) the congestion of petty prosecutions in the Federal courts, requiring great delays, interfering seriously with general business, and leading to wholesale disposition of accumulated causes under circumstances impairing the dignity of and injuring respect for those tribunals.

Without prejudice to any ultimate conclusions, we think that in the interest of promoting observance of and respect for law the national prohibition law may well be strengthened and its effectiveness increased in these important particulars.

(A) TRANSFER OF INVESTIGATION AND PREPARATION OF CASES TO THE DEPARTMENT OF JUSTICE

There is very general agreement among those who have had to do with enforcement of prohibition that the whole task of enforcement through the courts, as distinguished from the granting of permits and administration of regulations as to the legitimate use of alcohol or of liquors, should be concentrated in the Department of Justice. It is an anomaly that the cases are investigated and prepared by agencies entirely disconnected with and not answerable to those which are to prosecute them. All experience of administration shows the importance of concentration rather than diffusion of responsibility. If prosecution, the legal side of enforcement, is partitioned between two distinct agencies, the diffused, ill-defined, nonlocated responsibility is sure in the long run to be an obstacle to efficiency. No doubt in certain special situations, where technical knowledge of a special type is involved and where the number of prosecutions each year is very small, it is consistent with a high degree of efficiency to have these few cases investigated and prepared by some body of experienced men in some other department and turned over to the Department of Justice for trial. But where the volume is so enormous and the circumstances are so varied as in liquor prosecutions, this is not expedient. To dispose of such a mass of cases satisfactorily, there must be a well-organized coordination of investigation and prosecution, which can only function effectively when under a single head, with responsibility definitely placed, so that there can be no falling down between two distinct bureaus and no lapsing at either point into a perfunctory routine. There must be careful study of how to separate the permit-granting work of the Treasury Department, which belongs there, from the work of investigation and prosecution, which should all be done in the Department of Justice. But the principle of transfer of the latter to the Department of Justice is, we think, clear.

(B) CODIFICATION OF FEDERAL LEGISLATION APPLICABLE TO ENFORCEMENT OF PROHIBITION

Enforcement of prohibition involves resort to more than 25 statutes, enacted at various times during 40 years, many of them much antedating the eighteenth amendment. As they stand, they are in form disconnected, unwieldy, and in much need of coordination and adjustment to each other. It has been urged upon us, from many parts of the country, by those charged with administering them, and we find it true on examining them, that they are much in need of being put in order, revised, and simplified. We recommend that all Federal legislation applicable to the enforcement of prohibition be revised and digested with a view of making it a unified whole in the form of a simpler, better ordered, and hence more workable code. In our judgment this will make for much greater efficiency. As things are, it is sometimes far from easy for those charged with enforcement to find all the law bearing on their powers. Such things are all to the advantage of the commercialized lawbreaker who commands excellent advice on points which, at the crisis of action, the enforcement officer may have to look up hurriedly for himself. We

recommend a codification of the laws on this subject as an important step toward better enforcement.

(C) PROVISION FOR MAKING SO-CALLED PADLOCK INJUNCTIONS MORE EFFECTIVE

Long before the national prohibition act it had been found that the jurisdiction of courts of equity to abate nuisances could be made a most effective way of dealing with many forms of vice. Nearly two generations ago this jurisdiction was applied to violations of State liquor laws, and it was later applied with good results to violations of laws against prostitution. The national prohibition law took advantage of this experience and provided for injunctions in causes where property was habitually used in connection with violations of that law. These provisions are well conceived and are capable of doing much toward making the law effective in action. But means of evading them have been discovered in certain limitations of procedure growing out of the need of serving process upon the persons interested in the property. By conveying some small fraction of the title to a nonresident, or by resident owners, landlords, or tenants concealing themselves and evading the service of process, such proceedings are increasingly rendered nugatory. We are advised that open, persistent, and extensive violators of the law have been enabled to escape so-called padlocking of their property in this way.

We think this grave defect may be met by a simple amendment adding to section 22, Title II, of the national prohibition law a provision that if in a proceeding under that section it is made to appear to the court that any person unknown has or claims an interest in the property or some part of it, which would be affected by the order prayed for it may order that such person be made a party by designating him as unknown owner or claimant of some interest in the property described. It should go on to provide that such person and any defendant who is absent from the jurisdiction or whom, whether within or without the jurisdiction, it is impracticable to serve otherwise, or who is shown to the satisfaction of the court to be concealing himself for the purpose of evading service of process or of any order of the court, may be served in accordance with the provisions of section 57 of the Judicial Code.

The use of injunction proceedings as a means of enforcement is so important that this provision for reaching unknown claimants, nonresidents, and residents who conceal themselves to evade service of process would add very greatly to the efficacy of the statute. It contains nothing which is not already done in the States generally when private claims to property are concerned.

(D) PROVISIONS FOR RELIEVING CONGESTION IN THE FEDERAL COURTS

From various parts of the country come complaints of congestion of the Federal courts due to the large volumes of petty prosecutions under the national prohibition act. Obviously, these prosecutions must go on. It would not do to create an impression that minor infractions are to be ignored. As things are, however, the congestion of prosecutions in the Federal courts for minor infractions caused by

the necessity of proceeding by indictment in all cases, except for maintenance of a nuisance or for unlawful possession, is a serious handicap to dealing vigorously with major infractions and makes handling of the minor infractions perfunctory. It has done much to create a feeling in some localities that the law can not be enforced. In our opinion the delays and opportunities for escape from punishment thus occasioned may be and should be obviated.

Three methods to this end have been suggested: First, to increase the number of Federal judges; second, to create inferior Federal courts, or, as it has been put, Federal police courts, for such cases; and, third, to utilize the present machinery of the courts, meeting the causes of delay and congestion by a simpler procedure for petty cases.

There are constitutional questions to be considered in connection with both the second and the third of these proposals. The first does not involve any constitutional difficulties. But it leaves the cumbersome procedure by indictment, wholly inappropriate to minor infractions, in full force and multiplies the apparatus designed for great cases in order to deal with small ones. The objections to this method are palpable, and it should not be adopted if the situation may be met in some other way. So with the second. It involves some of the constitutional questions which must give us pause in connection with the third. But, what is more to be thought of, there are serious objections to multiplying courts. If it is possible to deal with this matter adequately with the existing machinery of the Federal system, it should be done. We think such a solution entirely possible and in the right line of progress, not merely in the enforcement of the national prohibition act but of all Federal legislation.

Under the fifth amendment no one shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury. As construed by the Supreme Court, "infamous crime" means one punishable by imprisonment in a penitentiary, or for more than one year, or for any period if at hard labor. Hence, where imprisonment is to be in jail, is not to exceed six months, and is not to be at hard labor, the crime is not infamous. It is only where there is a possibility of imprisonment in the penitentiary, or for more than a year, or at hard labor, that an indictment is required. The Jones law has expressly recognized a class of "casual or slight violations." A statute providing that in prosecutions under Title II of the national prohibition law the district attorney may, in case of "casual or slight violations," prosecute by complaint or information, and in such cases, when so prosecuted, the penalty for each offense should be a fine not to exceed $500, or imprisonment in jail without hard labor, not to exceed six months, or both, would obviate the long delay, unnecessary expense, and needless keeping in session of grand juries, which are demanded by the present state of the law.

We think also that it would be expedient for Congress to define the term "casual or slight violations." Speedy convictions and certain imposition of penalties are important considerations, and are more likely to be efficacious than threats of severe punishment rendered nugatory by congested dockets overpassing any possibilities of trial in the manner constitutionally appointed for crimes of such magnitude. But this suggestion, made on general considerations applicable to all criminal laws, and out of abundant caution, may not be a vital part of the plan.

Next, to simplify the mode of prosecution of petty cases, we must consider the matter of pleas of guilty and of trials. As the law is, every offender must be indicted, must await indictment before he can plead guilty, even if ready to do so at once, and his case must, if he pleads not guilty, await its turn on the calendar, obstructing, if it is a petty case, the disposition of important cases. The mere accumulated number of these petty prosecutions awaiting trial has become a source of embarrassment in many Federal courts.

Section 3 of Article III of the Constitution requires trial of all "crimes" to be by jury. The sixth amendment provides that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed." It has been held that "crimes" in this connection does not refer to petty offenses. In view of the general holding of State courts on analogous provisions and of the concessions and distinctions made by the Supreme Court of the United States in the leading case of Callen *v.* Wilson (127 U. S. 540, 555, 557), we think it is possible to provide for a hearing in the United States district court before a magistrate provided trial by jury in that court is preserved to the accussed. But we see no need of setting up special Federal magistrates. It would seem entirely feasible to make use of the existing system of United States commissioners.

It could be provided that in case the accused, prosecuted by complaint or information, pleads guilty, such plea may be reported by the commissioner to the court and judgment of conviction rendered and sentence imposed by the court. Then it could be provided that in case the accused so prosecuted pleads not guilty, there shall be a hearing before the commissioner, who shall report to the court, and the court on examination of his findings render judgment of acquittal or conviction as the case may be, and in case of conviction impose sentence. It could be provided further that if conviction is recommended by the commissioner, the accused may within three days after filing of the commissioner's report, except in writing to the report and demand trial by jury. Finally, it could be provided that in such case the district attorney may elect whether to go to trial on the complaint or information, or to submit the case to the grand jury, and that in case the grand jury indictes the case shall then proceed upon the indictment.

The Jones law was enacted to make enforcement more efficacious in two ways: (*a*) By providing for more severe penalties in the discretion of the court; (*b*) by making available the collateral consequences of a felony, such, for example, as the rules of law applicable to prevention of a felony and the capture of felons. This was done by making every violation of the national prohibition act a potential felony.

The foregoing suggestions aim at preserving this feature of the existing law. Up to the time when the district attorney elects how to prosecute there is a potential felony. In other words, all the possibilities in the way of arrest and prevention which obtain under the existing law are conserved. But the intention is to make it possible in case of "casual or slight violations" (language of the Jones law) to prosecute as a petty offense, thus relieving congestion in the Federal courts, maintining the dignity of those tribunals, and

making possible speedy disposition. As things are now, the cumbersome process of indictment must be resorted to even in the most petty case. The result is that large numbers of these cases pile up and have to be disposed of offhand by "bargain day," and similar unseemly processes. In any case which the district attorney elects to prosecute by indictment the judge will still have the discretion provided for in the existing law. If it is objected that a wide discretion is put in the district attorney by the proposed legislation, the answer is that he has that discretion already in effect, simply exercising it, not in the beginning by the mode in which he prosecutes but later by including any particular prosecution in the wholesale disposition on some bargain day.

Thus, a few simple legislative enactments, in our opinion, could be made greatly to strengthen enforcement of the national prohibition law. Such measures, making it more adequate to its purposes, are suggested by study of material which has come to us from all agencies concerned with its administration. We think they could not in anywise interfere with any ultimate program which we may have to recommend, and would in the meantime advance observance of the law.

Respectfully,

GEORGE W. WICKERSHAM, *Chairman*
(For the Commission).

NOVEMBER 21, 1929.

REPORT SUPPLEMENTAL TO THE PRELIMINARY REPORT SUBMITTED TO THE PRESIDENT ON NOVEMBER 21, 1929

In our preliminary report we suggested four measures for increasing the effectiveness of the national prohibition act, namely, (1) transfer to the Department of Justice of investigation and preparation of cases for prosecution and related activities of enforcement, (2) codification of Federal legislation applicable to the enforcement of prohibition, (3) provision for making the procedure in so-called padlock injunctions more effective, and (4) provisions for relieving congestion in the Federal courts.

I. TRANSFER OF INVESTIGATIONS AND PREPARATION OF CASE TO THE DEPARTMENT OF JUSTICE

We have examined carefully the draft bill agreed upon by the Department of the Treasury and the Department of Justice and are of opinion that it is well adapted to the purpose and that the partition of authority which it makes is well conceived and carried out. We recommend that this measure be enacted and that thereupon, in codifying the laws relating to enforcement of prohibition, the proper amendments and adaptations be made to adjust the existing laws in detail to the changes so made.

II. Codification of Legislation Applicable to Enforcement of Prohibition

(a) the draft made by the bureau of prohibition

Before the draft bill for transfer of investigation and preparation of cases came to us (on January 3) we had received (on December 20) a draft compilation in which the Bureau of Prohibition has brought together the materials, with certain suggested amendments. We have gone over this compilation thoroughly and in detail, and consider it well done. It will serve excellently as the basis of the codification we recommend, and we are at work adapting the details to the requirements of the transfer to the Department of Justice, working into the text our recommendations as to strengthening enforcement in certain particular respects, and putting the whole material in such form as to present the entire body of statute law bearing upon enforcement of prohibition in one harmonious statute.

As illustrating the need of this it should be noted that the national prohibition act as originally enacted provided for enforcement by the Commissioner of Internal Revenue. Hence from one end to the other it refers to powers and duties of "the commissioner." Afterwards the act of March 3, 1927 (ch. 348, 44 Stat. L. 1381), put most of these powers in and conferred most of these duties upon the Commissioner of Prohibition. If now the act for transfer to the Department of Justice is adopted, these latter powers and duties will be partitioned between the Secretary of the Treasury and the Attorney General, or committed to them jointly. Thus the words "the commissioner," recurring in section after section of the laws relating to enforcement of prohibition, will mean the Secretary of the Treasury, the Attorney General, the two acting jointly, or the Commissioner of Internal Revenue, according to the results of a historical investigation extending through at least three successive statutes. This is only one of many examples which might be adduced.

It is our purpose to submit a further supplemental report shortly, in which we shall present a fully worked out codification.

(b) the suggestion as to rewriting the whole act

One preliminary question must be considered. In his letter of transmission to the chairman of this commission, the Commissioner of Prohibition says, with much truth, "It is believed that the substance of all present statutes should be rewritten in less than half the words now used to express them." It is submitted that such a rewriting of the several sections is not desirable. It would put in jeopardy the results of long continued judicial construction of the different provisions as they stand, some of which have been in force for a long time and have been the subject of much litigation. Questions would be raised as to the reasons for the verbal changes made in the revision. A long period of uncertainty as to the meaning of many sections would ensue. The experience of revisions in which the wording of statutes has been changed, in order to make the revision as a whole more compendious or put it in better literary form, is full of warnings.

III. Amendments Recommended

In addition to changes of form needed to make the legislation relating to enforcement of prohibition more effective we recommend certain amendments to the substance of the national prohibition act.

(A) PROVISION FOR MAKING SO-CALLED PADLOCK INJUNCTIONS MORE EFFECTIVE

We recommend adding at the end of section 22, Title II, of the national prohibition act the following paragraph:

> If in any proceeding under this section it is made to appear to the court that any person or persons unknown have or claim an interest in such room, house, building, structure, boat, vehicle, or place, or some part thereof, which would be affected by the order prayed for, it may order that such person or persons unknown be made parties by designating them as unknown owners of or claimants of some interest in the property described, and such person or persons, and any defendant or defendants who are absent from the jurisdiction or whom, whether within or without the jurisdiction, it is impracticable to serve otherwise, or who are shown to the satisfaction of the court to be concealing themselves for the purpose of evading service of process or of any order of the court, may be served in accordance with the provisions of section 57 of the Judicial Code (Title 28, sec. 118, U. S. C.).

This will require a further amendment by adding to section 39 of Title II as follows:

Change the period at the end of the last line to a comma, and proceed, "or there must be substituted service as provided in section 22 of this title."

As to the need of such an amendment see United States *v.* McCrory, 26 Fed. (2d) 189; United States *v.* Waverly Club, 22 Fed. (2d) 422.

There is testimony before us that this Waverly Club has been "an open, persistent, and extensive violator of the prohibition law," that on November 11 last it was "still operating," and that "all efforts to obtain service upon interested owners or proprietors have been futile, so that the place is constantly conducted in open defiance of law." Also a Federal judge, who has been hearing so-called padlock cases in New York, says:

> I am not only concerned about the inadequacies of the law to enforce "padlock" proceedings against nonresident defendants, but I have observed its failure to control effectively situations where resident owners, landlords, and tenants were concealing themselves and successfully evading service of process. Many cases that I heard * * * were distressing because of the inability under the law to close places that were flagrant and persistent violators, because of the cunning, strategy, and resourcefulness of the owners of such places in disabling the authorities from making the necessary service of process. This condition not only appeared in the service of original subpœnas, but * * * in many cases it has been impossible to effect final process or decree by serving it upon the party in interest.

We recommend meeting this situation by making available to the Government the course of procedure regularly made use of in the States generally when private claims to property are concerned.

(B) PROVISION FOR TAKING FULL ADVANTAGE OF THE ACTIVITIES OF STATE OFFICERS IN CASES OF UNLAWFUL TRANSPORTATION

This subject was considered at the time we made our preliminary report, but there was not sufficient time to permit of our reaching a satisfactory conclusion. Further study has convinced us of the

importance of this matter and of the entire feasibility of meeting the situation by a short amendment. Hence, we recommend the following new paragraph to be inserted at the end of section 26 of title 2:

> Any State, county, or municipal officer of the law may, on discovery of any person in the act of transporting in violation of this title intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, seize the same and any and all intoxicating liquors found therein being transported contrary to law, and arrest any person in charge of the same, and may thereupon proceed against such person and property in the appropriate Federal court, as hereinbefore provided.

As to the need of this we have the testimony of a number of prohibition administrators and an interesting statement in the prohibition survey of New York. Experience has shown that inability to take full advantage of the activities of State officers in localities where they are inclined to cooperate has been a source of embarrassment, particularly in States in which there is no State enforcement law under which to carry on a State prosecution. As things are the most that such officers do is, if so inclined, to notify the prohibition administrator of what they have found and leave it to his frequently overworked office to send to the locality and take charge. In that event, it is true, the Federal authorities may use the evidence obtained. (United States *v.* Jankowski, 28 F. (2d) 800; Marsh *v.* United States, 29 F. (2d) 172; United States *v.* Bumbola, 23 F. (2d) 696.) Also they may adopt a seizure by State officers and enforce a forfeiture. (Dodge *v.* United States, 272 U. S. 530.) But where the local officers are willing to do more they ought to be empowered to do so. They ought to be empowered to take the person and property before a State magistrate or United States commissioner under section 591, title 18, United States Code, and section 26, Title II, national prohibition act, and have the person held to the Federal court and the property disposed of as there prescribed, without having to send for the prohibition agent.

As to the constitutionality of giving such power to the State officers, there can be no question. Section 591, title 18, United States Code, provides:

> For any crime or offense against the United States the offender may by any justice or judge of the United States, or by any United States commissioner, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace or other magistrate of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense.

This section (with the exception of the clause as to United States commissioners) was in the original judiciary act of 1789 (1 Stat. L. 91), In 1842 (5 Stat. L. 516, secs. 1, 2) "commissioners of the circuit courts" were given the powers of a justice of the peace as to "arresting, imprisoning, or bailing" in cases of Federal offenses. In the Revised Statutes, commissioners were, accordingly, interpolated in the original section of the judiciary act, and afterwards, in 1896 (29 Stat. L. 154), the office of United States commissioner was created, to "have the same powers and perform the same duties as are now imposed upon commissioners of the circuit courts." In the Judicial Code section 591 was put in its present form to incorporate the change.

Thus from 1789 to the present State magistrates have been empowered to issue warrants, admit to bail, and bind over to the Federal courts, in cases of offenses against the United States. Moreover, the power to issue search warrants, in case of Federal offenses, is given to judges of State courts of record by section 611, title 18, United States Code, and this is expressly applied to enforcement of prohibition by section 2, Title II of the national prohibition act.

If these powers may be given to the State magistrates, power of instituting proceedings under Federal laws may be given to State peace officers.

There can be no question of the constitutionality of the provision in section 591, title 18, United States Code. It was passed on directly in ex parte Gist (26 Ala. 156, 161).

In that case, in which the subject is considered very fully, the court says (p. 164):

> The act in question was passed by the first Congress which assembled after the adoption of the Constitution. The Government was then principally administered by those who had framed that instrument. It must be regarded as a contemporaneous legislative exposition of the Constitution, made after very mature deliberation and discussion. It has been acquiesced in ever since, and has been repeatedly recognized as a valid law by every department of the Government; and if any question should be considered as put to rest by long acquiescence, contemporaneous exposition, and extensive and uniform recognition of its validity, the one before us would certainly fall within that category; and if we were doubtful as to the constitutionality of this law, these considerations would go far.

Also the court says (p. 164–165):

> There is nothing in the objection that the exercise of this power makes the justice a Federal officer within the meaning of the second clause of the second section of Article II of the Constitution. He renders a voluntary service, and in an enlarged sense is, pro hac vice, an officer, but not one within the meaning of the clause above referred to. He is an officer of the State, and permitted by the State to aid the Federal Government in securing offenders against the criminal laws of the Union, so that they may be brought to trial before the Federal courts; and this power, we are of opinion he may constitutionally exercise.

An act of Congress of February 12, 1793, authorized State magistrates to act in the rendition of fugitive slaves under the laws of the United States. This was held constitutional in Prigg *v.* Pennsylvania (16 Pet. 539).

The court said it had no doubt that under that act "State magistrates may, if they choose, exercise that authority."

In Kurtz *v.* Moffitt (115 U. S. 487) it was held that a State police officer or private citizen could not arrest a deserter from the military service of the United States unless the power was derived "from some rule of the law of England, which has become part of our law, or from the legislation of Congress" (p. 498).

Gambino *v.* United States (275 U. S. 310) holds that the words "any officer of the law" in section 26, Title II, national prohibition act, refer only to Federal officers. The holding of the Supreme Court of the United States on the provision of the fugitive slave law, in Prigg *v.* Pennsylvania (16 Pet. 539) and the argument last quoted from Ex parte Gist, supra, shows that the proposed provision would not have the effect of making State, county and municipal peace officers Federal officers. They would have a power to assist in executing the Federal laws, just as a citizen without becoming thereby a peace officer, may assist in enforcing the law by arresting a felon.

Compare also section 22, Title II, national prohibition act, allowing "any prosecuting attorney of any State or any subdivision thereof" to bring a suit to enjoin a nuisance under that act.

In view of the foregoing, it is submitted that United States *v.* Lanza (260 U. S. 377), which does not involve nor consider the questions here raised, but only decides that there are two distinct sovereignties, administering two distinct laws, has no bearing on the constitutionality of what is proposed.

In Harris *v.* Superior Court (51 Cal. App. 15) the court held that the power given State magistrates under section 591 authorized State and municipal peace officers to arrest under warrants issued by such magistrates, as an incident of the power conferred on the magistrates. But to come within this case, a warrant from the State magistrate would have to precede action by the State peace officer. It would not go so far as to authorize the seizure and other proceedings under section 26, Title II, national prohibition act, where a State officer acting lawfully under his State authority discovers liquor in course of unlawful transportation. It is submitted that he ought to be given that power.

(C) DEFINITION OF "CASUAL OR SLIGHT VIOLATIONS"

In order to enable legislation for relief of congestion in the Federal courts to avoid certain constitutional difficulties hereinafter considered it was suggested in our preliminary report that it would be expedient to define the term "casual or slight violations" made use of in the Jones law. This could be done by inserting a paragraph after the first paragraph of section 29, Title II. The following is suggested:

> For the purposes of prosecution the following shall be deemed casual or slight violations: (1) Unlawful possession, (2) single sales of small quantities by persons not engaged in habitual violation of the law, (3) unlawful making of small quantities where no other person is employed, (4) assisting in making or transporting as a casual employee only, (5) transporting of small quantities by persons not habitually engaged in transportation of illicit liquors or habitually employed by habitual violators of the law.

This should be considered in connection with our proposal as to relief of congestion in the Federal courts. We propose that in case of "casual or slight violations" the District Attorney may prosecute by complaint or information, and in such case, if so prosecuted, the penalty for each offense shall be a fine not to exceed $500 or imprisonment in jail (not at hard labor) not to exceed six months or both. Thus the discretion of the judge as to sentence in all cases prosecuted by indictment remains. Also we propose that the district attorney may prosecute in any case by indictment with the possibility of severe penalties. But in the five cases named he may prosecute by complaint or information and the matter may be disposed of summarily.

Why it is important to define "casual or slight violations" will be shown at length in connection with the proposal for relief of congestion in the Federal courts.

IV. Relief of Congestion in the Federal Courts

Complaints of congestion in the Federal courts, due to the large number of petty prosecutions under the national prohibition act, come from many parts of the country. For example, in one of the less populous districts there were 1,263 liquor prosecutions in the year just ended and 800 cases are now pending. It is not merely that this volume of prosecutions clogs the dockets and interferes with the other business of the courts. In order to dispose of the cases at all it is necessary to resort to "bargain days" or to hold a "cafeteria court," with serious effects on the dignity of the tribunal and on respect for the Federal courts. In one large city, Saturday is "bargain day"; 95 per cent of those prosecuted in liquor cases plead guilty, are fined, and go their way as in a police court. In one Federal court there are 30 to 35 pleas of guilty on each weekly "bargain day." Under such circumstances the severe penalties prescribed by the law become a joke. Moreover, it happens not infrequently that those who ought to be dealt with severely are able to take advantage of the crowded dockets and participate in the bargain penalties. Petty prosecutions must go on. It will not do to create an impression that minor infractions are to be tolerated. But the pressure of the large volume of prosecutions for minor infractions, due to the necessity of proceeding in the great run of cases by indictment and jury trial, seriously interferes with vigorous handling of major infractions and makes the treatment of minor infractions perfunctory. This condition and the resulting policy of wholesale disposition of cases on bargain days has done much toward creating a feeling in some localities that the law can not be enforced.

(A) THE PLANS SUGGESTED

Three plans have been urged for relieving this congestion. One is to increase the number of Federal judges; another to create inferior Federal courts, or, as it has been put, Federal police courts, for petty cases; while a third would utilize the present machinery of the courts. In our preliminary report we recommend the third plan. We considered that the first plan would leave the cumbersome procedure by indictment, which is wholly unsuited to minor infractions, in full force, and would simply multiply the apparatus designed for great cases in order to deal with small cases. We considered the second plan objectionable because it would multiply courts. It would also involve the constitutional questions which arise in connection with the third plan. Moreover, as the judges, under section 1 of Article III of the Constitution, would necessarily hold for life, it would give us a set of permanent courts for what conceivably might prove a transient situation.

Assuming that the third plan is preferable, it remains to consider the constitutional questions involved and work out the details of the needed legislation.

(B) THE CONSTITUTIONAL REQUIREMENTS AS TO A GRAND JURY

Either the second or the third plan would have to be adjusted to the requirements of the fifth amendment as to prosecution by indictment found by a grand jury, of Article III, section 3, and the sixth

amendment as to trial by jury, and of Article III, section 1, as to the appointment and tenure of judges.

In the fifth amendment it is provided that "no person shall be held to answer for a capital or other infamous crime unless on an indictment or presentment of a grand jury." This provision has been considered in the following cases: Ex parte Wilson (114 U. S. 417, 423); Mackin *v.* United States (117 U. S. 351); Ex parte Bain (121 U. S. 13); Parkinson *v.* United States, (121 U. S. 281); United States *v.* De Walt (128 U. S. 393); In re Medley (134 U. S. 160, 164); In re Mills (133 U. S. 263, 267); In re Clausen (140 U. S. 205); Wong Wing *v.* United States (163 U. S. 228); Paquete Habana (175 U. S. 677, 682); United States *v.* Moreland (258 U. S. 433); Brede *v.* Powers (263 U. S. 4); Dickinson *v.* United States (159 Fed. 801); Low *v.* United States (169 Fed. 86); Weeks *v.* United States (216 Fed. 292); Yaffee *v.* United States (276 Fed. 497); Falconi *v.* United States (280 Fed. 706); De Jianne *v.* United States (282 Fed. 757); Rossini *v.* United States (6 F. (2d) 350); Christian *v.* United States (8 F. (2d) 732); Grader *v.* United States (21 F. (2d) 513).

The decisive cases are Ex parte Wilson and United States *v.* Moreland.

In Ex parte Wilson the actual decision was that "a crime punishable by imprisonment for a term of years at hard labor" was an infamous crime within the fifth amendment and could only be prosecuted by indictment of a grand jury (p. 429). But in the course of a historical review of the subject, Gray, Justice, pointed out that any imprisonment at hard labor (p. 429) and any imprisonment in a State prison or penitentiary (428) were infamous punishments. He quoted Chief Justice Shaw, who said in the leading case of Jones *v.* Robbins (8 Gray, 329, 349):

> The State prison, for any term of time, is now by law substituted for all the ignominious punishments formerly in use; and unless this is ignominious, then there is no ignominious punishment other than capital.

Also (p. 426), Gray, Justice, said:

> The question is whether the crime is one for which the statutes authorize the court to award an infamous punishment, not whether the punishment ultimately awarded is an infamous one. When the accused is in danger of being subjected to an infamous punishment, he has the right to insist that he shall not be put upon his trial except on the accusation of a grand jury.

In United States *v.* Moreland, the statute provided a fine of not more than $500 and imprisonment at hard labor for not more than one year. The actual sentence was six months in a workhouse at hard labor. The feature of hard labor was held to make it an infamous crime. Also in Wong Wing *v.* United States, relied on in the Moreland case, a commitment for 60 days to a house of correction at hard labor was held to come within the constitutional provision.

The result of the cases is that where the statute subjects the accused to a danger of (1) any imprisonment in a penitentiary or State prison or its equivalent; or (2) for more than one year, since by section 541, title 18, United States Code, crimes punishable by imprisonment for more than one year are felonies; or (3) for any period, if at hard labor, the crime is infamous and there must be an indictment by a grand jury as the basis of prosecution. Hence where the imprisonment is to be in jail, is not to exceed six months, and is not to be at hard labor it would seem clear that the crime is not

infamous. It is only where there is a possibility of imprisonment in a penitentiary or State prison, or its equivalent, or for more than a year, or at hard labor, that an indictment is required.

A distinction is made in the Jones law (act of March 2, 1929) between "casual or slight violations" and major violations. This distinction may well be taken advantage of to set off a category of offenses to be the subject of simpler prosecution. Legislation defining the term "casual or slight violations," providing that the district attorney may prosecute such violations upon complaint or by information, and that in such cases, when so prosecuted, the penalty for each offense should be a fine not to exceed $500, or confinement in jail, without hard labor, not to exceed six months, or both, would obviate the long delay, unnecessary expense, and needless keeping in session of grand juries, which are demanded by the present state of the law.

Three observations should be made at this point.

It has been seen that the necessity of indictment by a grand jury depends on the possibility of punishment attached to the charge the Jones law prescribes for every offense under Title II of the national prohibition act a possible maximum punishment of five years' imprisonment. Hence, since that law every prosecution, even for the most casual or slight violation, except for unlawful possession or for maintenance of a nuisance, requires the action of a grand jury.

A question might be raised why the maximum penalties for "casual or slight violations" are proposed to be fixed as low as a fine of $500 and six months in jail. The answer is that we have to consider also the constitutional provisions with respect to jury trial and the limits of petty prosecutions in which hearing before a magistrate is constitutionally allowable. This will be considered in another connection.

Another question might arise as to the need of defining "casual or slight violations." The Jones law gives a wide judicial discretion as to sentence. This discretion will remain in all cases prosecuted by indictment. But with respect to cases to be prosecuted by a simpler procedure it is necessary to define a class of offenses with respect to which the accused is not potentially subjected to an infamous punishment. The surest way of doing this is by defining the term already used in the law.

(c) THE CONSTITUTIONAL REQUIREMENTS AS TO JURY TRIAL

Section 3 of Article III of the Constitution requires trial of all "crimes" to be by jury. The sixth amendment provides that "in all criminal prosecutions the accused shall enjoy the right to a speedy public trial by an impartial jury of the State and district wherein the crime shall have been committed."

The important cases bearing on these provisions are: Callen *v.* Wilson (127 U. S. 540); Thompson *v.* Utah (170 U. S. 345); Capital Traction Co. *v.* Hof. (174 U. S. 1); Schick *v.* United States (195 U. S. 65); Rasmussen *v.* United States (197 U. S. 516); Dickinson *v.* United States (C. C. A.) (159 Fed. 601); Low *v.* United States (C. C. A.) (169 Fed. 86); Freeman *v.* United States (C. C. A.) (227 Fed. 732); Coates *v.* United States (C. C. A.) (290 Fed. 194.)

In Callen *v.* Wilson the statute provided for trial before a magistrate without a jury in the police court of the District of Columbia, with an

appeal in case of conviction to the Supreme Court, where there would be trial by jury. This was held contrary to the requirements of section 3, Article III. The crux of the case was that the police court of the District of Columbia was a separate court. The Supreme Court of the United States said that this police court was "a trial court in the fullest sense of the word" (p. 552). But it conceded (p. 555) that there may be a class of "petty or minor offenses" and not of the class triable before a jury, which might by act of Congress be tried without a jury and to which the doctrine of Jones *v.* Robbins (8 Gray, 329, 341) (generally accepted by the State courts), i. e., that it is enough if accused may have a jury trial as of right on appeal—would apply.

Harlan, Justice, said (in conclusion, p. 557):

> Except in that grade of offenses called petty offenses, which according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guaranty of an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by or under the authority of the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court he is put on trial for the offense charged. In such cases a judgment of conviction, not based on a verdict of a jury, is void. To accord to the accused a right to be tried by jury in an appellate court, after he has been once fully tried otherwise than by a jury in the court of criminal jurisdiction, and sentenced to pay a fine or be imprisoned for not paying it, does not satisfy the requirements of the Constitution."

There is no definition of "petty offenses" in Callen *v.* Wilson.

Thompson *v.* Utah really involves the question of waiver of a jury in felony cases and necessity of personal presence of accused at the trial in such cases. Very likely it is applicable also to high grade misdemeanors punishable with impriosnment for a considerable time (not more than a year, however) or a short time with hard labor. But it has no application to petty offenses.

Schick *v.* United States was a prosecution on information for violation of the oleomargarine statute. It involved a penalty of $50. The court held the Constitution did not require a jury trial in such cases.

The court said (pp. 67–68):

> So small a penalty for violating a revenue statute indicates only a petty offense. It is not one necessarily involving any moral delinquency. The violation may have been the result of ignorance or thoughtlessness, and must be classed with such illegal acts as acting as an auctioneer or peddler without a license or making a deed without affixing the proper stamp. That by other sections of this statute more serious offenses are described and more grave punishments provided does not lift this one to the dignity of a crime (i. e. as referred to in Article III, section 2 of the Constitution).

This case is important, also, because it indicates (pp. 71–72) that in case of a petty offense the sixth amendment does not apply.

As to the suggestion about moral delinquency, compare United States *v.* Day (C. A. A., Second Circuit) July 15, 1929.

Capital Traction Co. *v.* Hof is interesting for the way in which the court limited Callen *v.* Wilson. In the latter case the court had rejected the doctrine of Shaw, Chief Justice, in Jones *v.* Robbins, 8 Gray, 327, 341, which is followed in the State courts. But in Capital Traction Co. *v.* Hof the court adopted that doctrine for civil cases, distinguishing Callen *v.* Wilson on the ground that the latter was a criminal case. If the seventh amendment and Article III, section 5, are compared with respect to their purpose and historical

background, there is no real distinction between the requirement for criminal and that for civil cases. The court was, so far as it could, giving up the position taken in Callen *v.* Wilson.

In Rasmussen *v.* United States, a statute as to Alaska provided for a jury of six in trials for misdemeanors. It was held that the sixth amendment applied to Alaska and that the statute was unconstitutional. Here the misdemeanor in question called for imprisonment in jail not less than three months nor more than a year and a fine of not more than $500. But the only jury trial allowed was by a jury of six.

Dickinson *v.* United States holds that section 3 of Article III is "peremptory in form," so that there can be no waiver of a full jury of 12 in a misdeameanor of high grade. It has no bearing on the question as to a hearing in the district court before a commissioner, with a jury trial in that court, if sought, in case of petty offenses.

This decision of a circuit court of appeals is not conclusive. It goes on what we venture to think an unsound distinction, between Article III, section 3, and the sixth amendment—namely, that the former defines a tribunal while the latter creates a right which may be waived. The claims asserted by the Colonists before the Revolution, the Declaration of Rights of the Continental Congress in 1774, the discussions in the Constitutional Convention and the Federalist, as well as the whole history of the subject, show that Article III, section 3, as well as the sixth amendment, was designed to declare an immemorial common-law right.

In Low *v.* United States the question was as to waiver of a jury in case of felony. The court distinguishes "petty offenses." It also distinguishes between a civil and a criminal case.

Freeman *v.* United States is another decision of a circuit court of appeals to much the same effect. It holds that in case of felony the accused can not agree to substitution of one judge for another during the trial—that jury trial is trial by "Twelve men presided over by a judge" (p. 774).

In Coates *v.* United States there was a conviction under the national prohibition act with sentence of 12 months in jail and a fine of $1,000. The court held that in view of the punishment this was a case requiring a jury trial and that (under Thompson *v.* Utah) a jury could not be waived.

The court distinguishes petty offenses but declines to draw the line. See, however, Frank *v.* United States (C. C. A. Sixth Circuit) (192 Fed. 864), where there was a fine of $200 and was held to be a petty offense.

As to the historical background of this subject, see Frankfurter and Corcoran, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury (39 Harvard Law Review, 917).

In view of the general holding of State courts on analogous provisions and of the concessions and distinctions made by the Supreme Court of the United States in the leading case of Callen *v.* Wilson, it is submitted we may provide for a hearing in the district court before a magistrate, providing trial by jury in that court, is preserved to the accused.

As will be shown presently, the United States commissioner is not a separate court and does not hold a court. What he does is done in the district court. Hence we recommended, in our prelimi-

nary report, a hearing in the district court, before magistrate in that court, with provision for jury trial in the same court. But in view of Rasmussen *v.* United States and Coates *v.* United States, it seems desirable to limit the penalty by a maximum of a fine of $500 and six months in jail. This is strongly indicated also by the history of jury trial in the Colonies and in our several States. See the article of Frankfurter and Corcoran, in 39 Harvard Law Review, 917, above referred to.

(D) THE NATURE OF THE OFFICE OF UNITED STATES COMMISSIONER

It is important, as shown by Callen *v.* Wilson, that the United States commissioner should not hold a separate court. Also it is important not to make him a judge subject to the requirements of Article III, section 1, of the Constitution.

The significant cases at to United States commissioners are:

Orin *v.* Shine (187 U. S. 181); United States *v.* Allred (155 U. S. 591); United States *v.* Maresca (C. C. A., 266 Fed. 713); United States *v.* Elliott (3 Fed. (2d) 496); In re Sing Tuck (126 Fed. 386, 397); Ex parte Perkins (29 Fed. 900, 909); United States *v.* Case (8 Blatchf. 250); United States *v.* Schumann (2 Abb. (U. S.) 523); United States *v.* Schwartz (249 Fed. 755).

In Grin *v.* Shine, Brown, J., says (p. 187):

> If the district judge, acting under section 5270, Revised Statutes, had made the warrant returnable before himself, there could be no doubt of its legality; and in such case, upon the return of the warrant with the prisoner in custody, he might refer the case to the commissioner to examine the witnesses, hear the case, and report his conclusions to the court for its approval.

On the same page, Brown, judge, says:

> The commissioner is in fact an adjunct of the court, possessing independent, though subordinate, judicial powers of his own.

In United States *v.* Allred, Brown, judge, says on page 595:

> Though not strictly officers of the court, they have always been considered in the same light as masters in chancery and registers in bankruptcy, and subject to its supervision and control.

In Maresca *v.* United States, Hough, judge, says on page 720:

> It follows that for many purposes * * * the United States commissioner is a justice of the peace of the United States.

In the same case, Hough, J., says on page 723:

> Remembering that nothing but an act of Congress can make an inferior court of the United States, that no act makes a commissioner's court, and that by tradition an examining and committing magistrate, especially a justice of the peace, holds a court, I am compelled to the conclusion that, when a commissioner issues criminal process, including a search warrant, he does it in and as a part of the proceedings of the district court.

In United States *v.* Elliott, following the Maresca case, it is held that when the United States commissioner issues a search warrant he exercises a power of the district court.

In United States *v.* Sing Tuck, a district judge holds that "no part of the judicial power of the United States" can be vested in a commissioner. This is true as to the commissioner as a separate tribunal. But it can be vested in the court and exercised by the commissioner

as "an adjunct of the court" exercising certain of its powers, as the foregoin decisions show.

In United States *v.* Schumann, Field, J., says:

> He is * * * a magistrate of the Government.

The other cases (in the district courts) simply hold that the commissioner does not hold a court.

It is clear that what is done before a commissioner is done in the district court. So if it were provided that prosecution for a petty offense should be heard before a commissioner, it would be heard before a magistrate in and as a proceeding of the district court. A provision for judgment and sentence by the judge would make this very clear. So a plea of guilty before a commissioner would be plea of guilty in the district court. It could be reported to the judge, who could render judgment of conviction on it by imposing sentence. The basis for the judgment of conviction (or of acquittal on plea of not guilty) would be a plea of guilty or a hearing in the district court, although before a commissioner. By providing for report to the court and judgment (sentence) by the judge, any question of exercise of judicial power by the commissioner is avoided.

(E) DRAFT OF THE PROPOSED LEGISLATION

Stated summarily, the plan recommended in our preliminary report is as follows:

(1) To define "casual or slight violations" and provide for penalties in those cases such as to keep them within the category of petty offenses.

(2) To enable the district attorney to prosecute such violations by complaint or information.

(3) To provide that in case the accused, so prosecuted, pleads guilty, such plea may be made before a United States commissioner and reported by him to the court, and judgment of conviction may be rendered and sentence imposed by the court.

(4) To provide that in case the accused, so prosecuted, pleads not guilty, there shall be a hearing before a United States commissioner, who shall report to the court, and the court, on examination of his findings, may render judgment of acquittal or conviction as the case may be, and in case of conviction impose sentence.

(5) To provided that if conviction is recommended by the United States commissioner, the accused may, within three days after filing of the commissioner's report, except to the report in writing and call for trial by jury.

(6) Finally to provide that in the latter case the district attorney may elect whether to go to trial on the complaint or information or to submit the case to a grand jury, and in case the grand jury indicts, that the case shall proceed upon the indictment.

In order to carry out these recommendations, a paragraph should be added at the end of section 29, Title II, national prohibition act, as follows:

> In case of casual or slight violations, as hereinbefore defined, the district attorney may prosecute upon complaint or information, and in such cases, when so prosecuted, the penalty for each offense shall be a fine of not to exceed $500 or confinement in jail, without hard labor, not to exceed six months, or both.

For the remainder of the proposal, a separate act would be needed. We recommend the following:

SECTION 1. In prosecutions by complaint or information for casual or slight violations of Title II of the national prohibition act, the accused shall plead to the complaint or information before the United States commissioner before whom he may be taken pursuant to section 595, title 18, United States Code. If he pleads guilty, the commissioner shall transmit the complaint and warrant to the clerk of the district court, with a report of the plea, and thereupon judgment of conviction shall be rendered and sentence imposed by a judge of the court.

SEC. 2. If the accused so prosecuted pleads not guilty, there shall be a hearing before the United States commissioner, who shall have the same powers with respect to summoning witnesses for prosecution and defense as those of a magistrate in a prosecution before him under the usual mode of process in the State, and the commissioner shall, as soon as practicable thereafter, transmit the complaint and warrant to the clerk of the district court, with a report of the plea and hearing and his finding and recommendations, and a judge of the court, on examination of the report and finding, may render judgment of conviction or acquittal as the case may be, and in case of conviction impose sentence.

SEC. 3. In case conviction is recommended by the commissioner, the accused may within three days after filing of the commissioner's report, except to the report in writing and may also demand trial by jury. In case trial by jury is not so demanded it shall operate as a waiver of any right thereto.

SEC. 4. In case the report of the commissioner is excepted to and trial by jury demanded, the district attorney may elect whether to go to trial on the complaint or information or to submit the case to a grand jury; and in case the grand jury finds an indictment, the prosecution shall then proceed upon such indictment.

SEC. 5. In addition to the fees provided for in section 597, title 28, United States Code, the United States commissioner shall be entitled to the following fees: for reporting a plea of guilty, $1; for hearing, finding, and report in case of plea of not guilty, $5.

SEC. 6. The circuit judges in each circuit shall have power to make rules for the details of practice suitable to carry out the several provisions of this act.

As to the constitutionality of giving power to the judges of the court of review to make rules governing the details of procedure in the court of first instance, see:

Wayman *v.* Southard (10 Wheat. 1).

Beers *v.* Haughton (9 Pet. 358).

The Supreme Court of the United States has been given the broadest rule-making power with respect to procedure in the district courts in equity, admiralty, bankruptcy, and copyright. For the general run of cases, the circuit courts of appeal now stand toward the Federal courts of first instance where the Supreme Court did formerly. Hence the historical argument, relied upon by Story, J., in Beers *v.* Haughton, would now apply to a rule-making power in the circuit judges.

It is manifest that the procedure here recommended might well be extended to all petty prosecutions in the district court. But it may be expedient to confine it for the present to liquor cases. Legislation could extend it later to other petty cases if found expedient.

Respectfully,

GEO. W. WICKERSHAM, *Chairman*
(For the Commission).

MR. PRESIDENT: The Treasury has been considering for some time the creation of a unified border patrol, in order that the execution of the customs, immigration, prohibition, and other laws regulating or prohibiting the entry into the United States of persons and merchandise may be made more effective. The following recommenda-

tions are submitted for your consideration and transmission to the Congress if you approve:

(1) The entry into the United States of all persons should be prohibited except at points of entry designated by the President.

(2) The present number of points of entry should be increased sufficiently to permit uninterrupted and unhampered intercourse with our neighboring countries over established and customary routes.

(3) A unified border patrol should be created to patrol the border and prevent illegal entry.

(4) The unified border patrol should be a part of the Coast Guard.

A specific statutory prohibition of entry into the United States, of either aliens or citizens, in any manner and with or without merchandise, except at designated points, is essential as a basis if the border patrol is to function efficiently, since it will give the patrol a plain and simple rule to enforce, and relieve them of any necessity of interpreting and applying the customs, immigration, and other laws. Customs, immigration, quarantine, and other officers will be stationed at the designated points of entry, and the administration of the laws at these points should remain, of course, under the jurisdiction of the present services.

The points of entry should be designated by the President, just as ports of entry are now designated. They should be established at the boundary intersection of all established and customary routes and wherever intercourse with our neighboring countries justifies. Flexibility is essential in order to permit an increase in the points of entry conformably with the growth of commerce and travel and in order to meet seasonal necessities and constantly changing conditions. There should be a substantial increase, rather than a decrease, in the present number of customs and immigration stations.

It is believed that the proposed plan will promote materially the convenience of the traveling public, as well as relieve those traveling on inland highways from inspection. To-day, generally speaking, travelers may enter the United States anywhere but must report at a customhouse, which may well be entirely out of their line of travel, and declare and enter their merchandise. Moreover, our present patrol must necessarily be maintained on interior roads and not along the border, with the consequent necessity of stopping vehicles and pedestrians who may never have left the country. Adequate provision should, of course, be made by regulation so as to meet the needs of farmers and others whose property extends across the border or who are living along the border.

The unified border patrol should be charged with the enforcement of the statutory prohibition—that is, it should be charged with the duty of guarding the border between the designated points and preventing entry of all persons and merchandise, over land and water borders, except at the points of entry specified, where the usual customs, immigration, quarantine, and other officers will be stationed. The proposed unified border patrol will replace the patrols now maintained by both the Customs Service and the Immigration Service on our Mexican and Canadian boundaries, and will cover the same territory as those patrols, thus complementing the work of the Coast Guard on the maritime boundaries, eliminating duplication of effort,

concentrating responsibility for the protection of all our borders, and bringing about a more effective coordination of the work.

Preliminary surveys have established the practicability of the plan. An actual physical examination of our entire border, however, will be necessary prior to the final designation of points of entry or the closing of trails and untraveled roads. The work must be done in harmonious cooperation with our neighboring countries and their consent obtained as a matter of courtesy. It is believed that at least six months will be required before the new border patrol can be organized and the preliminary work completed.

The cost of maintaining the unified border patrol will exceed the present cost of maintaining our customs and immigration patrols, and additional immigration and customs stations will be required. Surveys upon which estimates of the increased costs can be based are under way and should soon be completed.

Very sincerely,

A. W. MELLON,
Secretary of the Treasury.

The PRESIDENT,
The White House, January 13, 1930.

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