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JUDICIAL NOTICE IN FEDERAL CRIMINAL PROCEDURE

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I. INTRODUCTION

IN approaching any study of federal criminal evidence, it is immediately apparent that criminal trials are enormously expensive in terms of time, energy and money. A recent examination of over twenty-eight hundred cases dealing with this subject[1] reveals that where resort can be had to judicial notice,[2] some relief may emerge.[3] Hence, just what is understood to be within the scope of this doctrine is of the utmost importance if the fruits of its application are to be realized.

A current decision[4] of the Court of Appeals for the Seventh Circuit indicates that the canonical words of Dean Wigmore[5] still are regarded as the beacons of truth in this shadowy area of the law:

> That a matter is judicially noticed means merely that it is taken as true without the offering of evidence by the party who should ordinarily have done so. This is because the Court *assumes* that the matter is so notorious that it will not be disputed. But the *opponent is not prevented from disputing the matter by* evidence, if he believes it disputable.[6]

But, while language couched in such general terms avoids the pitfall of inconsistent specificity, it aids the practitioner little—his primary concern being the procedure and particular rule involved in an individual

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1. The author, adopting the plan of Professor Morgan, has thought it fitting to commence with the topic of Judicial Notice. See Morgan, Some Problems of Proof Under the Anglo-American System of Litigation (1956). But see McCormick, Evidence (1954), where it is dealt with as the last topic in evidence.

2. "'Judicial notice or knowledge may be defined as the cognizance of certain facts which judges and jurors may, under the rules of legal procedure or otherwise, properly take and act upon without proof because they already know them.'" United States v. Hammers, 241 Fed. 542, 543 (S.D. Fla. 1917). See also Beadnell v. United States, 303 F.2d 87, 89 (9th Cir. 1962).

3. See generally McCormick, Evidence §§ 323-31 (1954); Model Code of Evidence rules 801-06 (1942); Underhill, Criminal Evidence §§ 60-70 (4th ed. 1935); Uniform Rules of Evidence 9-12; 1 Wharton, Criminal Evidence §§ 34-85 (12th ed. 1955); 9 Wigmore, Evidence §§ 2565-83 (3d ed. 1940); Slovenko, Establishing the Guilt of the Accused, 31 Tul. L. Rev. 173, 177 (1956).

4. United States v. Grady, 225 F.2d 410 (7th Cir. 1955).

5. See 9 Wigmore, Evidence § 2567 (3d ed. 1940). Compare McCormick, Evidence § 330, at 710 (1954); Morgan, Judicial Notice, 57 Harv. L. Rev. 269, 273-87 (1944).

6. 225 F.2d at 416-17. See also Garner v. Louisiana, 368 U.S. 157, 194-96 (1961); United States v. Aluminum Co. of America, 148 F.2d 416, 446 (2d Cir. 1945); State v. Duranleau, 99 N.H. 30, 104 A.2d 519 (1954); Davis, Judicial Notice, 55 Colum. L. Rev. 945, 978-82 (1955); Annot., 45 A.L.R.2d 1169, 1172 (1956).

situation. For example, a court may take judicial notice without application by either party.[7] A trial judge in his instructions may comment on matters of which judicial notice may be taken where the comment is applicable to the subject matter.[8] Yet, a state court in a prosecution for grand larceny of an automobile held that it was reversible error for the trial judge judicially to notice that the automobile was worth more than fifty dollars, the statutory minimum for grand larceny, and then to instruct the jury that if the defendant was guilty, he was guilty of grand larceny.[9]

II. Matters of Law

In ascertaining the facts of which judges are bound to take judicial notice, as in the decision concerning matters of law, they may refresh their memory and inform themselves from sources which they deem most trustworthy.[10] As to the existence of a statute, or the date when it took effect, they may consult the original roll or other official records. With respect to international affairs, they may inquire of the State Department.

Judicial notice is taken of amendments to the United States Constitution,[11] of federal statutes,[12] and of federal executive and departmental regulations.[13] In one case, judicial notice was taken of the regulations of the Secretary of Agriculture but not of those of the Bureau of Animal

7. In Green v. United States, 176 F.2d 541 (1st Cir. 1949), the court noticed a postal regulation and stated that "we are not aware of any authority for the proposition that a court cannot if it wishes take judicial notice sua sponte of any matter proper for it to notice." Id. at 544. See McCormick, Evidence § 330, at 708 (1954). But see 9 Wigmore, Evidence § 2568 (3d ed. 1940).

8. Lake v. United States, 302 F.2d 452, 454 (8th Cir. 1962).

9. State v. Lawrence, 120 Utah 323, 234 P.2d 600 (1951), 32 B.U.L. Rev. 115 (1952). See also United States v. Wilson, 284 F.2d 407 (4th Cir. 1960) (reaching a similar result as to judicial notice of value).

10. Jones v. United States, 137 U.S. 202, 216 (1890). See also McCormick, Evidence § 326, at 694 (1954).

11. Judicial notice has been taken to the effect that the twenty-first amendment repealed the eighteenth amendment, United States v. Chambers, 291 U.S. 217, 222 (1934); and also that the purpose of the twenty-first amendment was to repeal the eighteenth amendment, United States v. Colorado Wholesale Wine & Liquor Dealers Ass'n, 47 F. Supp. 160, 162 (D. Colo. 1942).

12. Beadnell v. United States, 303 F.2d 87, 89 (9th Cir. 1962); Leonard v. United States, 18 F.2d 208, 212 (6th Cir. 1927); Marrash v. United States, 168 Fed. 225, 230 (2d Cir. 1909).

13. Thornton v. United States, 271 U.S. 414, 420 (1926); Caha v. United States, 152 U.S. 211, 221 (1894); United States v. Grady, 225 F.2d 410, 415 (7th Cir. 1955); United States v. Bradford, 160 F.2d 729, 731 (2d Cir.), cert. denied, 331 U.S. 829 (1947); Nurnberger v. United States, 156 Fed. 721, 730 (8th Cir. 1907); Wilkins v. United States, 96 Fed. 837, 841 (3d Cir.), cert. denied, 175 U.S. 727 (1899); In re Quirk, 1 F.2d 484, 486 (W.D.N.Y. 1924); United States v. Moody, 164 Fed. 269, 275 (W.D. Mich. 1908).

Husbandry.[14] On the other hand, regulations of the Secretary of War,[15] proclamations of the President[16] and regulations of the Commissioner of Internal Revenue[17] have all been noticed. The Supreme Court took judicial notice of a decision of the Director of Selective Service rendered on an appeal pursuant to the Selective Service Act of 1949.[18] Amendments to regulations will also be judicially noticed under the express provisions of the statute providing for the Federal Register[19] and under judicial precedents.[20] Moreover, it has been held that a court of appeals may take judicial notice of the legislative history of a federal statute,[21] and a ration order need not be introduced in evidence when the court's instructions summarize it for the jury.[22]

It would seem that the trial court not only may, but must take judicial notice of domestic statutes. In a civil case it was held that a party may be precluded on appeal from complaining of the trial judge's failure to notice a statute where his counsel has failed to call it to the judge's attention.[23] In a subsequent decision, the Supreme Court reversed for failure to notice a rule of the Interstate Commerce Commission, although the rule was not called to the attention of the trial court.[24] The latter seems to be the better approach.[25]

Rule 7(c) of the Federal Rules of Criminal Procedure provides in part:

> The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant

14. United States v. Rohe & Bro., 218 Fed. 182, 184 (S.D.N.Y. 1914). The court gave no reasons.

15. United States v. Casey, 247 Fed. 362, 363-64 (S.D. Ohio 1918).

16. Armstrong v. United States, 80 U.S. (13 Wall.) 154, 156 (1871); Merritt v. United States, 264 Fed. 870, 873 (9th Cir. 1920), rev'd on other grounds, 255 U.S. 579 (1921); Krichman v. United States, 263 Fed. 538, 544 (2d Cir. 1920), rev'd on other grounds, 256 U.S. 363 (1921).

17. United States v. Monarch Distrib. Co., 116 F.2d 11, 13 (7th Cir. 1940), cert. denied, 312 U.S. 695 (1941).

18. Bowles v. United States, 319 U.S. 33, 35 (1943).

19. 49 Stat. 502 (1935), 44 U.S.C. § 307 (1958). "The contents of the Federal Register are judicially noticed and may be cited by volume and page number." Kempe v. United States, 151 F.2d 680, 684 (8th Cir. 1945), cert. denied, 331 U.S. 843 (1947).

20. United States v. Lutz, 142 F.2d 985, 989 (3d Cir. 1944).

21. Flippin v. United States, 121 F.2d 742, 744 (8th Cir.), cert. denied, 314 U.S. 677 (1941); Dolloff v. United States, 121 F.2d 157, 159 (8th Cir.), cert. denied, 314 U.S. 626 (1941).

22. United States v. Stefanowicz, 81 F. Supp. 974 (E.D. Pa.), rev'd on other grounds, 177 F.2d 189 (3d Cir. 1949).

23. Great Am. Ins. Co. v. Glenwood Irr. Co., 265 Fed. 594, 597 (8th Cir. 1920).

24. Lilly v. Grand Trunk W.R.R., 317 U.S. 481, 488 (1943).

25. McCormick, Evidence § 326, at 695-96, § 330, at 708 (1954); Comment, 30 Yale L.J. 855 (1921).

is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.[26]

But the rule does not expressly provide against taking judicial notice of the statute, and as a result there have been virtually no reversals because of a violation of the rule.[27] Thus, in effect, as before the adoption of the rule,[28] judicial notice is taken of the statute.

When an indictment makes reference to laws of the state in which the federal court sits, the court will take judicial notice of such statutes.[29] When there is no state constitutional provision or statute, the federal court may judicially notice the common law as to a sheriff's duties.[30] In one case, judicial notice has even been taken of a city ordinance regulating the sale of live poultry.[31]

Judicial notice is not taken of foreign law, since foreign law is "a question of fact to be proved by the government."[32] Judicial notice, however, is taken of the rules of international law.[33] The inviolability of diplomatic correspondence has been so noticed,[34] as have been United States treaties.[35]

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26. Fed. R. Crim. P. 7(c).

27. Orfield, Indictment and Information in Federal Criminal Procedure, 13 Syracuse L. Rev. 389, 404-05 (1962).

28. Orfield, Indictment and Information in Federal Criminal Prosecution, 13 Syracuse L. Rev. 218, 245-47 (1961).

29. Jelke v. United States, 255 Fed. 264, 287 (7th Cir. 1918); United States v. Quinn, 27 Fed. Cas. 673, 680 (No. 16110) (C.C.S.D.N.Y. 1870). See Moore v. United States, 2 F.2d 839, 842 (7th Cir. 1924), cert. denied, 267 U.S. 599 (1925); Thornton v. United States, 2 F.2d 561, 562 (5th Cir. 1924), aff'd, 271 U.S. 414 (1926); United States v. Sutter, 127 F. Supp. 109, 118 (S.D. Cal. 1954); United States v. Chaplin, 54 F. Supp. 926, 927 (S.D. Cal. 1944).

30. Catlette v. United States, 132 F.2d 902, 906 (4th Cir. 1943).

31. United States v. A. L. A. Schechter Poultry Corp., 76 F.2d 617, 623 (2d Cir.), rev'd on other grounds, 295 U.S. 495 (1935).

32. United States v. Luvisch, 17 F.2d 200, 202 (E.D. Mich. 1927) (counterfeiting Canadian excise stamps). In United States v. Lutwak, 195 F.2d 748, 761-62 (7th Cir. 1952), the court indulged in the bold presumption that the French law as to the validity of "immigration marriages" is the same as that of Illinois. In affirming the case, the majority of the Supreme Court did not pass on the point, 344 U.S. 604 (1953), but the three dissenters disapproved the unrealistic presumption. 344 U.S. at 621 (dissenting opinion).

33. McCormick, Evidence § 326, at 700 (1954). See also Skiriotes v. Florida, 313 U.S. 69, 72-73 (1941); The Paquete Habana, 175 U.S. 677, 708 (1900).

34. Viereck v. United States, 139 F.2d 847, 850 (D.C. Cir.), cert. denied, 321 U.S. 794 (1944).

35. United States v. Spector, 102 F. Supp. 75, 83 (S.D. Cal. 1951), rev'd on other grounds, 193 F.2d 1002 (9th Cir. 1952).

III. Facts Relating to the Personnel, Operation and Records of the Court

The court takes judicial notice of the power of its clerk, *e.g.*, the power to administer oaths.[36] A court of appeals has judicially noticed that at the time of a trial Congress had not appropriated any money to pay court reporters[37] and, hence, a criminal trial could proceed without a reporter.

Limited concepts of judicial notice as to public officers have been laid down by all courts.[38] But a district court need not take judicial notice of what officers are the officers of another district court, even if they are in the same circuit.[39] It need not notice the signatures of the United States Attorney of another federal district or of another federal circuit.[40] This strained reasoning was employed to invalidate Rule 20 of the Federal Rules of Criminal Procedure on transfer for a plea of guilty. In another case in which the trial judge had improperly reprimanded counsel for the defendant, the court of appeals judicially noticed that such counsel "is a reputable attorney of high standing," and a former Assistant United States Attorney.[41]

A court of appeals will take judicial notice of whether at the time a grand jury was impanelled and returned indictments, both the district courts and the circuit courts were in session, and as to who were the presiding judges and clerks thereof.[42] A court notices that all courts and court proceedings in England are public,[43] and that districts are usually divided into divisions.[44]

Judicial notice is taken that there are United States commissioners at named places within the federal district;[45] that a United States commissioner had competent authority to administer the oath to the defendant in a perjury prosecution;[46] and that all proceedings before the

36. United States v. Bickford, 168 F.2d 26, 27 (9th Cir. 1948). The court also cited the statute on powers of the clerk. Id. at 27.

37. Ricard v. United States, 148 F.2d 895 (5th Cir. 1945).

38. McCormick, Evidence § 328, at 703 (1954).

39. Petition of Mundorff, 8 F.R.D. 7, 8 (D. Ore. 1958).

40. Ibid.

41. Kraft v. United States, 238 F.2d 794, 800 (8th Cir. 1956).

42. Ledbetter v. United States, 108 Fed. 52, 54 (5th Cir. 1901). Accord, Gordon v. United States, 18 F.2d 531 (8th Cir. 1927).

43. Hartzell v. United States, 72 F.2d 569, 580 (8th Cir.), cert. denied, 293 U.S. 621 (1934).

44. Morris v. United States, 128 F.2d 912, 915 (5th Cir.), cert. denied, 317 U.S. 661 (1942).

45. United States v. Gross, 159 F. Supp. 316, 318 (D. Nev. 1958).

46. In Barnard v. United States, 162 Fed. 618, 624 (9th Cir. 1908), the court held that the indictment was not defective for failure to allege the commissioner's authority to ad-

commissioner as to issuance of a search warrant are in the district court in a prosecution for unlawful possession of liquor.[47]

The trial judge, in considering a plea in abatement to an indictment for an omission of the clerk in drawing the grand jury, will take judicial notice of the record relative to the duty which it is claimed the clerk failed to perform.[48] It will also take judicial notice that a grand jury was publicly drawn in the presence of the officials required to be present,[49] and that there has been no order of the district court limiting the authority of any judge over the grand jury and its continued session during a succeeding term.[50] A court, however, will not judicially notice that Negroes have been excluded from the grand jury.[51] A trial judge in the District of Columbia took judicial notice that names of jurors are picked at random from the city directory by the jury commissioners in such a way as to obtain the needed number.[52] A court notices that the grand jury when convened and impanelled was properly sworn in and instructed in its duties as disclosed in the minutes of the grand jury.[53] The court may also judicially notice the sessions of the grand jury within the district.[54]

In one case, a trial judge, in sentencing, took judicial notice of grand jury investigations in state and federal courts involving the defendant and also that the United States Attorney had been directed to secure indictments and institute contempt proceedings which might involve the defendant.[55] In another case, in imposing a light sentence, the court took notice that in areas well back from the west coast, Japanese who are well disposed are permitted to be at large while others are under guard.[56] A court of appeals may take judicial notice that a sentence, imposed by a state court upon the expiration of which a federal sentence was to begin, was not for violation of a federal statute.[57] Following a plea of *nolo contendere*, a court took judicial notice that the defendant

minister the oath on which the perjury was based. Accord, Link v. United States, 2 F.2d 709 (6th Cir. 1924).

47. United States v. Casino, 286 Fed. 976, 978 (S.D.N.Y. 1923) (dictum).

48. United States v. Greene, 113 Fed. 683, 691 (S.D. Ga. 1902), cert. denied, 207 U.S. 596 (1907); United States v. Lewis, 192 Fed. 633, 636 (E.D. Mo. 1911).

49. 113 Fed. at 694.

50. United States v. Malone, 18 F. Supp. 865, 868 (N.D. Ill. 1937).

51. McKenzie v. United States, 126 F.2d 533, 534 (D.C. Cir. 1942).

52. United States v. Fields, 6 F.R.D. 203, 205 (D.D.C. 1946), cert. denied, 332 U.S. 851 (1948).

53. United States v. Agnew, 6 F.R.D. 566, 567 (E.D. Pa. 1947).

54. Zacher v. United States, 227 F.2d 219, 225 (8th Cir. 1955), cert. denied, 350 U.S. 993 (1956). See White v. United States, 216 F.2d 1, 4 (5th Cir. 1954) (dictum).

55. United States v. Pendergast, 28 F. Supp. 601, 612 (W.D. Mo. 1939).

56. United States v. Minoru Yasui, 51 F. Supp. 234 (D. Ore. 1943).

57. Dryden v. United States, 139 F.2d 487 (8th Cir. 1944).

corporation had a corps of experts who keep abreast of government regulations.[58]

In general, a court will judicially notice its own records in the same case. On application to the trial judge for allowance of an appeal, stay of proceedings and printing of the record for appeal, the trial judge may notice that the defendant was tendered a jury trial at his arraignment, and that under advice of counsel of his own selection, he voluntarily pleaded guilty.[59] A court has taken judicial notice from the counts of an indictment that the same offense "is charged in them all, and that the conviction on one of the counts subjects the defendant to the same punishment as a conviction on all of them."[60]

A court of appeals will take judicial notice of its own records in a case,[61] but a district court need not notice prior litigation in the same court, such as a prior criminal trial.[62] Nor will a court of appeals take judicial notice of prior litigation unless proof thereof appears in the record. Where reference has been made in the record to other indictments against the defendant, a court of appeals will take judicial notice of such indictments.[63] On a plea of double jeopardy a court may notice its own records and also compare indictments.[64] In a criminal contempt proceeding the court may judicially notice the proceedings, files and records in the original case out of which the contempt proceeding arose.[65] In an appeal from denial of the writ of error coram nobis, a court of appeals may take judicial notice of its records in the original appeal

58. United States v. Weirton Steel Co., 62 F. Supp. 961, 962 (N.D. W. Va. 1945).

59. United States v. Wright, 224 Fed. 285 (N.D.N.Y. 1915). On judicial notice of records of the court see McCormick, Evidence § 327 (1954); Morgan, Maguire & Weinstein, Evidence 26 (4th ed. 1957); 1 Wharton, Criminal Evidence § 63 (12th ed. 1955); 9 Wigmore, Evidence § 2579 (3d ed. 1940).

60. United States v. Keen, 26 Fed. Cas. 686, 693 (No. 15510) (C.C.D. Ind. 1839).

61. Weber v. United States, 104 F.2d 300 (5th Cir.) (per curiam), cert. denied, 303 U.S. 590 (1939). In an early court of appeals case it was said: "While judicial knowledge does not extend to the record or proceedings in former or other cases, it does extend to the record and proceedings in the case on trial." Withaup v. United States, 127 Fed. 530, 536 (8th Cir. 1903). See also Winslow v. United States, 216 F.2d 912, 914 n.2 (9th Cir. 1954); Fletcher v. United States, 174 F.2d 373, 376 (4th Cir.), cert. denied, 338 U.S. 851 (1949); Hood v. United States, 152 F.2d 431, 433 (8th Cir. 1946). But in a later case the same court held that it could take judicial notice of the record in another, but interrelated case. Norris v. United States, 86 F.2d 379, 381 (8th Cir. 1936), rev'd on other grounds, 300 U.S. 564 (1937).

62. Walker v. United States, 113 F.2d 314, 318 (9th Cir. 1940); Benetti v. United States, 97 F.2d 263, 266 (9th Cir. 1938).

63. United States v. Krepper, 159 F.2d 958, 968 (3d Cir. 1946), cert. denied, 330 U.S. 824 (1947).

64. United States v. Halbrook, 36 F. Supp. 345, 346 (E.D. Mo. 1941).

65. O'Malley v. United States, 128 F.2d 676, 687 (8th Cir. 1942), rev'd on other grounds, 317 U.S. 412 (1943); Oates v. United States, 233 Fed. 201, 206 (4th Cir.), cert. denied, 242 U.S. 633 (1916); Schwartz v. United States, 217 Fed. 866, 870 (4th Cir. 1914).

from the conviction.[66] On a motion to vacate a conviction, a district court may notice habeas corpus proceedings in a different federal court in which a similar contention was made.[67] On appeal from a judgment denying defendant's motion to vacate a judgment of conviction and sentence which on a prior appeal had been partly affirmed, a court of appeals will notice that the defendant had unsuccessfully sought release from custody in two habeas corpus proceedings.[68] Moreover, a federal trial judge may judicially notice the opinion of the chief judge of the district court in a prior prosecution in which the codefendants were found guilty.[69]

The federal district court can take judicial notice to some extent of the proceedings before the commissioner in the same criminal proceeding. Rule 5(c) of the Federal Rules of Criminal Procedure provides:

> After concluding the proceeding the commissioner shall transmit forthwith to the clerk of the district court all papers in the proceeding and any bail taken by him.[70]

A court of appeals has stated that it construed this rule "to permit the district court to take judicial notice of the proceedings before the commissioner on preliminary examination which have been transmitted to the clerk of the district court."[71] But if in fact the papers have not been so transmitted at the time of the trial, then they are not a part of the record on which the court can rely.[72]

IV. Other Governmental Facts

If a pardon is by public statute or presidential proclamation, the court must take judicial notice of it.[73] But an individual pardon by the President must be pleaded in bar by motion, plea or otherwise.[74] In one of the earliest decisions involving judicial notice, after citing the views of Blackstone, Mr. Chief Justice Marshall stated:

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66. Wiley v. United States, 144 F.2d 707 (9th Cir. 1944).

67. Hood v. United States, 152 F.2d 431, 435 (8th Cir. 1946).

68. Wells v. United States, 158 F.2d 833 (5th Cir. 1946), cert. denied, 331 U.S. 852 (1947).

69. United States v. Austrew, 202 F. Supp. 816, 821 (D. Md. 1962). The court cited McCormick. Evidence § at 695 (1954).

70. Fed. R. Crim. P. 5(c).

71. White v. United States, 216 F.2d 1, 4 (5th Cir. 1954). See Pollock v. United States, 202 F.2d 281, 282 (5th Cir. 1953); see also Orfield, Proceedings Before the Commissioner in Federal Criminal Procedure, 19 U. Pitt. L. Rev. 489, 564 (1958).

72. White v. United States, 216 F.2d 1, 7-8 (5th Cir. 1954).

73. Armstrong v. United States, 80 U.S. (13 Wall.) 154, 156 (1871); United States v. Richards, 91 F. Supp. 323 (D.D.C. 1950); In re Greathouse, 10 Fed. Cas. 1057, 1059 (No. 5741) (C.C.N.D. Cal. 1864).

74. United States v. Wilson, 32 U.S. (7 Pet.) 150, 161 (1833); Miller v. United States, 41 App. D.C. 52, 61 (D.C. Cir.), cert. denied, 231 U.S. 755 (1913). See Orfield, Pleadings and Motions Before Trial in Federal Criminal Procedure, 29 Fordham L. Rev. 1, 23-24 (1960).

The reason why a court must ex officio take notice of a pardon by act of Parliament, is that it is considered as public law; having the same effect on the case as if the general law punishing the offense had been repealed or annulled.[75]

Judicial notice will be taken that the United States is at war,[76] and of a joint resolution of Congress declaring war.[77] Judicial notice has also been taken that the President terminated hostilities in World War II on December 31, 1946,[78] and of the existence of a "cold war" after World War II.[79]

The courts are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts of the legislature and executive, although those acts are not formally put in evidence nor in accord with the pleadings.[80] Judicial notice should be taken of the legislative and executive attitude towards a new government in connection with a civil war.[81]

The federal courts take judicial notice "of the territorial extent of the general government, the local divisions of the country, its geography, its natural water courses, and of the boundaries of the same."[82] They will, therefore, judicially notice that a seagoing vessel carrying immigrants from France to the United States did not find a port of entry within the Northern District of Illinois.[83] Judicial notice has been taken of facts which vest the United States with exclusive jurisdiction over the place of the offense;[84] of federal jurisdiction as to murder on an Indian reservation;[85] that a bawdy house at a certain address is less than five miles from a military post;[86] and of the boundaries of an Indian reservation in the district.[87]

75. United States v. Wilson, 32 U.S. (7 Pet.) 150, 163 (1833).

76. Stilson v. United States, 250 U.S. 583, 587 (1919); Sonnenberg v. United States, 264 Fed. 327 (9th Cir. 1920).

77. Stephens v. United States, 261 Fed. 590, 591 (9th Cir. 1919).

78. United States v. Jaffe, 98 F. Supp. 191, 197 (D.D.C. 1951).

79. Gara v. United States, 178 F.2d 38, 41 (6th Cir. 1949), aff'd per curiam, 340 U.S. 857 (1950).

80. Jones v. United States, 137 U.S. 202, 214 (1890).

81. United States v. Palmer, 16 U.S. (3 Wheat.) 610, 634-35, 643 (1818).

82. Ex parte Lair, 177 Fed. 789, 794 (D. Kan. 1910). See also Weaver v. United States, 298 F.2d 496, 499 (5th Cir. 1962); Campbell v. United States, 221 Fed. 186, 188-89 (9th Cir. 1915); United States v. Carrillo, 13 F. Supp. 121, 122 (S.D. Cal. 1935).

83. Ex parte Lair, 177 Fed. at 795.

84. Brown v. United States, 257 Fed. 46, 49 (5th Cir. 1919), rev'd on other grounds, 256 U.S. 335 (1921). Compare Schoppel v. United States, 270 F.2d 413, 418 (4th Cir. 1959).

85. United States v. Black Spotted Horse, 282 Fed. 349, 351 (D.S.D. 1922). See also Azure v. United States, 248 F.2d 335, 337 (8th Cir. 1957).

86. Anzine v. United States, 260 Fed. 827, 829 (9th Cir. 1919).

87. Phelps v. United States, 160 F.2d 626, 627 (9th Cir. 1947).

Judicial notice will be taken that the State of Oregon is a representative and judicial district of the United States;[88] and that a particular city or place is in a certain federal district and division.[89] Judicial notice, however, is not taken that streets referred to in evidence are in any certain town,[90] but notice may be taken of the location of certain streets in a city.[91]

The incumbent of various public offices is judicially noticed, *e.g.*, the Commissioner of Patents, the office of Post Office Inspector[92] and assistants to the Secretary of Labor.[93] Judicial notice is taken that the Federal Works Agency is not a subdivision of the Treasury;[94] that farmers serving on Triple A Townships committees do not receive compensation for their services;[95] that a witness fee is four dollars and transportation allowance is seven cents per mile in the District of Columbia;[96] that the Director of the Bureau of Prisons has contracted for the use of certain state jails in the district, and that his directives allow temporary use of unapproved jails.[97] A district judge, on motion to vacate, will judicially notice the record of the Department of Justice as to actions of the Federal Parole Board before whom the defendant appeared.[98]

Judicial notice has been taken of the signature of the President on a trust patent.[99] Thus, where the word "Bonaparte" was signed to a telegram refusing a commutation of sentence, the court noticed that he was the United States Attorney General, Charles J. Bonaparte.[100] More-

88. United States v. Johnson, 26 Fed. Cas. 630, 631 (No. 15488) (D. Ore. 1873).

89. Dean v. United States, 246 F.2d 335, 338 (8th Cir. 1957); United States v. Jones, 174 F.2d 746, 749 (7th Cir. 1949); Herman v. United States, 48 F.2d 479 (5th Cir. 1931); Portman v. United States, 34 F.2d 406, 407 (8th Cir. 1929); Duree v. United States, 297 Fed. 70, 71 (8th Cir. 1924); Goldstein v. United States, 256 Fed. 813 (7th Cir. 1919); Bradley v. United States, 254 Fed. 289, 291 (8th Cir. 1918); United States v. Anderson, 60 F. Supp. 649, 650 (W.D. Wash. 1945), rev'd on other grounds, 328 U.S. 699 (1946); United States v. Tait, 6 F.2d 942 (S.D. Ala. 1925).

90. United States v. Jones, 174 F.2d 746, 749 (7th Cir. 1949).

91. Weaver v. United States, 298 F.2d 496, 499 (5th Cir. 1962).

92. Carroll v. United States, 16 F.2d 951, 955 (2d Cir.), cert. denied, 273 U.S. 763 (1927). See also Dropps v. United States, 34 F.2d 15, 17 (8th Cir. 1929), cert. denied, 281 U.S. 720 (1930).

93. United States ex rel. Petach v. Phelps, 40 F.2d 500 (2d Cir. 1930).

94. United States v. MacEvoy, 58 F. Supp. 83, 86 (D.N.J. 1944).

95. Kempe v. United States, 160 F.2d 406, 409 (8th Cir.), cert. denied, 331 U.S. 843 (1947).

96. United States v. Richardson, 113 F. Supp. 423, 425 (D.D.C. 1953).

97. In re Morgan, 80 F. Supp. 810, 816-17 (N.D. Iowa 1948).

98. United States v. Von Der Heide, 169 F. Supp. 560, 564 (D.D.C. 1959).

99. Estes v. United States, 225 Fed. 980 (8th Cir. 1915).

100. Perovich v. Perry, 167 Fed. 789 (9th Cir. 1909).

over, a federal court may take judicial notice of an investigation conducted by a state legislative committee.[101]

V. Miscellaneous Facts

Judicial notice is taken of matters of common knowledge. It has been held that the common knowledge concept may be extended to knowledge common to those in a particular trade. Thus, the maritime practice of making up manifests from bills of lading has been judicially noticed.[102] But judicial notice will not be taken of the practice of a steamship contractor, engaged in transporting cargo, in keeping a delivery record book.[103] It is common knowledge that numbers on an automobile are a ready method of identification and that changing numbers is a common expedient for concealing its ownership.[104] On a prosecution for counterfeiting United States coins, the court and the jury will take judicial notice that there are genuine coins, for example fifty cent pieces and twenty-five cent pieces.[105] In an income tax prosecution the trial judge took judicial notice of the general practice of corporations as to deductions for business entertainment.[106] It is common knowledge of which judicial notice will be taken that a brokerage account is not considered closed as long as funds remain on the books of the broker to the credit of the customer.[107] It is also common knowledge that peace officers find it helpful in the detection of crime to know as much as possible about known criminals and their associates, and thus, systems of registration are devised for that purpose.[108] On the retrial of an important criminal case, judicial notice was taken of public prejudice warranting a change of venue.[109] In granting a plea of abatement to an indictment against an attorney, the court took "judicial notice of the crushing effect of losing one's reputation. . . ."[110] A court of appeals has also stated that it "may take judicial notice of the fact that many an accused person on trial is found to be not guilty."[111]

The courts will take judicial notice of historical facts such as the

101. United States v. Trenton Potteries Co., 273 U.S. 392, 405 (1927).

102. United States v. Rappy, 157 F.2d 964, 966 (2d Cir. 1946), cert. denied, 329 U.S. 806 (1947). Compare McCormick, Evidence § 324 (1954).

103. United States v. Rappy, 157 F.2d at 966.

104. Donaldson v. United States, 82 F.2d 680, 681 (7th Cir. 1936).

105. United States v. Burns, 24 Fed. Cas. 1313, 1315 (No. 14691) (C.C.D. Ohio 1849).

106. United States v. Bridell, 180 F. Supp. 268, 279 (N.D. Ill. 1960).

107. Smith v. United States, 169 F.2d 118, 122 (6th Cir. 1948).

108. Smiley v. United States, 181 F.2d 505, 507 (9th Cir.), cert. denied, 340 U.S. 817 (1950).

109. United States v. Hoyt, 7 Alaska 276, 280 (1925).

110. United States v. Garvett, 35 F. Supp. 644, 647 (E.D. Mich. 1940).

111. Isaacs v. United States, 256 F.2d 654, 661 (8th Cir. 1958).

history of the building trades in an antitrust prosecution.[112] In one case it was judicially noticed that Sir Francis Drake died in 1596.[113] In a prosecution for using the mail to defraud, a court noticed that in the fall of 1928 many prominent businessmen and learned economists believed that the very prosperous business condition was permanently established.[114] A court of appeals judicially noticed "that the National Socialists are followers of Hitler, and that the notorious German Library of Information was an agency for the dissemination of Hitler's propaganda in this country."[115] Notice was taken that the Mormon Church for many years advocated polygamy and used the mails to disseminate its literature.[116] Judicial notice has been taken that the Communist Party is controlled by the party heads in the Soviet Union;[117] and that it seeks to obtain control of key labor unions in the United States in order to obtain control over the general economy.[118] In a prosecution for violation of the Smith Act, a court judicially noticed that the times and world conditions were such that there existed the "clear and present danger" necessary to the validity of the statute.[119]

The courts will judicially notice that beer is a fermented liquor, chiefly made of malt.[120] Facts of chemistry contained in the United States Pharmacopoeia will also be judicially noticed.[121] Thus, the Government need not prove that cocaine is a derivative of coca leaves, or that heroin and morphine are salts of opium.[122] Judicial notice is taken that opium is not commercially a domestic product;[123] and that whisky is intoxicating and fit for beverage purposes.[124] Hence, knowl-

112. United States v. Alexander & Reid Co., 280 Fed. 924 (S.D.N.Y. 1922).

113. Hartzell v. United States, 72 F.2d 569, 580 (8th Cir.), cert. denied, 293 U.S. 621 (1934).

114. Greenbaum v. United States, 80 F.2d 113, 118 (9th Cir. 1935).

115. United States v. Wernecke, 138 F.2d 561, 565 (7th Cir. 1943), cert. denied, 321 U.S. 771 (1944).

116. United States v. Barlow, 56 F. Supp. 795, 797 (D. Utah 1944).

117. Eisler v. United States, 176 F.2d 21, 24 (D.C. Cir.), cert. denied, 337 U.S. 958 (1949).

118. United States v. Flaxer, 112 F. Supp. 669, 672 (D.D.C. 1953). See generally on judicial notice as to issues involving Communism: Note, Judicial Notice and the Communist Party, 29 Notre Dame Law. 97 (1953); Note, Federal Anti-Subversive Legislation of 1954, 55 Colum. L. Rev. 631, 711 (1955).

119. United States v. Mesarosh, 13 F.R.D. 180, 187 (W.D. Pa. 1952).

120. United States v. Ducournau, 54 Fed. 138 (C.C.S.D. Ala. 1891).

121. Melanson v. United States, 256 Fed. 783, 786 (5th Cir. 1919).

122. Id. at 785-86.

123. United States v. Yee Fing, 222 Fed. 154, 156 (D. Mont. 1915).

124. United States v. Golden, 1 F.2d 543, 547 (D. Minn. 1923); United States v. Percansky, 298 Fed. 991, 995 (D. Minn. 1923).

edge of a liquor offense may be acquired through the sense of smell.[125] In one case, however, the court stated

> there was no evidence, expert or otherwise, to the effect that the use of morphine affects the credibility of a witness; and, if it be true that its use does have such an effect, that fact is not so generally true that courts would be warranted in taking judicial notice of it.[126]

A court will judicially notice that identification by fingerprints is about the surest method known, and that it is universally used in the detection of criminals.[127] Judicial notice was taken of the maximum and minimum temperatures in the District of Columbia on a certain date;[128] that 3.2 per cent by weight and four per cent by volume, when applied to alcoholic contents of beverages, are the same,[129] and that eggs have a peculiar propensity for the acquisition of odors from many and varied sources.[130] Notice is taken that "smoking opium" is not a remedy sold as a medicine;[131] that sugar has many uses other than food;[132] that illegal drugs commonly originate in foreign countries;[133] and that illicit drug vendors make great profits.[134] Moreover, judicial notice has been taken that motion picture films are of a highly inflammable nature;[135] and that sea water is impregnated with gold.[136] An appellate court has even taken judicial notice that a search warrant served at Baton Rouge at about 7:30 p.m. on April 4, 1931 was served at "nighttime," the sun having set at 6:25 p.m. according to official records.[137]

Judicial notice is taken of facts of common knowledge as to roads and highways.[138] Distances between points may be of such general knowledge as to warrant taking judicial notice. Thus, judicial notice has been

125. De Pater v. United States, 34 F.2d 275, 276 (4th Cir. 1929).

126. Weaver v. United States, 111 F.2d 603, 606 (8th Cir. 1940).

127. Piquett v. United States, 81 F.2d 75, 81 (7th Cir.), cert. denied, 298 U.S. 664 (1936).

128. McAffee v. United States, 111 F.2d 199, 203 (D.C. Cir. 1940).

129. Robason v. United States, 122 F.2d 991, 992 (10th Cir. 1941).

130. United States v. Commercial Creamery Co., 43 F. Supp. 714, 717 (E.D. Wash. 1942).

131. Chin Gum v. United States, 149 F.2d 575, 577 (1st Cir. 1945); Ng Sing v. United States, 8 F.2d 919, 922 (9th Cir. 1925).

132. United States v. Grunenwald, 66 F. Supp. 223, 227 (W.D. Pa. 1946).

133. Reyes v. United States, 258 F.2d 774 (9th Cir. 1958); Garcia v. United States, 250 F.2d 930, 932 (10th Cir. 1957); United States v. Bologna, 181 F. Supp. 705, 708 (S.D. Cal. 1960); United States v. Eramdjian, 155 F. Supp. 914, 918 (S.D. Cal. 1957).

134. Silverman v. United States, 59 F.2d 636, 638 (1st Cir.), cert. denied, 287 U.S. 640 (1932).

135. United States v. Wilson, 23 F.2d 112, 118 (N.D. W. Va. 1927).

136. Little v. United States, 73 F.2d 861, 867 (10th Cir. 1934).

137. Distefano v. United States, 58 F.2d 963 (5th Cir. 1932).

138. United States v. Holz, 103 F. Supp. 191, 196 (E.D. Ill. 1950).

taken of the distance from Washington, D.C. to various cities.[139] On the suggestion of the Government, a trial judge took judicial notice that United States Highway No. 101 is the main thoroughfare between Mexico and Los Angeles, running within one mile of the Pacific Ocean at certain points.[140] Notice has also been taken of the distance between California cities and the Mexican border.[141]

Judicial notice is taken of the meaning of words or terms in common usage such as "insect powder."[142] In one case, a court judicially noticed the meaning of bank stamps on the backs of checks.[143] On the other hand, a court will not take judicial notice that a particular bank is a federal reserve bank or member bank, and the indictment itself must show this fact.[144] Nor will judicial notice be taken that home brew is intoxicating.[145] On appeal, a court of appeals will not judicially notice a newspaper which was not put in evidence, even though the defendant claims jurors read the newspaper.[146]

A trial judge need not take judicial notice of facts claimed by the defendant as to the probability of identification of a voice.[147] Before filing a mandatory instruction that such was the fact, the judge would need to find that the fact could not fairly be disputed.[148] In a prosecution for receiving indecent books, it was held that the trial judge should not have taken judicial notice that the store of the defendant was located in a prostitution area, but the error was not prejudicial since the matter was not relevant.[149] The court offered two reasons for not taking judicial notice: (1) the fact was not a matter of common and general knowledge; and (2) it was not well and authoritatively settled, but was doubtful and uncertain.[150] A court of appeals cannot take judicial notice that the value

139. United States v. Richardson, 113 F. Supp. 423, 425 (D.D.C. 1953).

140. United States v. Hortze, 179 F. Supp. 913, 915 (S.D. Cal. 1959).

141. United States v. Orejel-Tejeda, 194 F. Supp. 140, 141 (N.D. Cal. 1961).

142. Parke, Davis & Co. v. United States, 255 Fed. 933, 935 (5th Cir. 1919).

143. United States v. McKay, 45 F. Supp. 1001, 1005-06 (E.D. Mich. 1942).

144. United States v. Dooley, 11 F.2d 428 (E.D.N.Y. 1926). See Garner v. Louisiana, 368 U.S. 157, 193-96 (1961) (Harlan, J., concurring).

145. Keen v. United States, 11 F.2d 260, 262 (8th Cir. 1926) ("intoxicating liquor" within National Prohibition Act of 1919, ch. 85, tit. II § 2, 41 Stat. 307-08). In United States v. Tot, 36 F. Supp. 273 (D.N.J. 1941), the court, faced with the question of taking judicial notice of the technical operation of firearms, stated: "It is obvious that this Court cannot take judicial knowledge of the technical operation of firearms which permits some of them to be equipped with silencers or mufflers and prevents others from being so equipped." Id. at 274-75.

146. Gicinto v. United States, 212 F.2d 8, 11 (8th Cir.), cert. denied, 348 U.S. 884 (1954).

147. United States v. Moia, 251 F.2d 255, 257 (2d Cir. 1958).

148. Id. at 258. The court cited 9 Wigmore, Evidence § 2568a (3d ed. 1940).

149. Alexander v. United States, 271 F.2d 140, 143-44 (8th Cir. 1959).

150. Ibid.

of seventy-two rifles stolen from an armory was more than one hundred dollars, since the degree of the offense depended on the value.[151]

A trial judge, in refusing to grant a severance, declined to take judicial notice that another defendant might sign a confession which would possibly not be admissible against the defendant.[152] In the first place, there was presently no evidence of any such confession, and secondly, the court could instruct the jury as to its admissibility.[153]

VI. Legislative Facts

In certain cases legislative facts are to be presented to the court.[154] Such facts may be social, economic, political, or scientific, and the question often arises how such facts are to be presented. The Supreme Court, in referring to this problem, has stated that:

> Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry . . . and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.[155]

The Court of Appeals for the District of Columbia abandoned the M'Naghten test of sanity because it "is inadequate in that (a) it does not take sufficient account of psychic realities and scientific knowledge, and (b) it is based upon one symptom and so cannot validly be applied in all circumstances."[156] The court acted without support in the evidence developed at the trial, but did not consider whether the facts outside the record of which it was taking judicial notice were disputable. In cases where the validity of a statute is attacked for want of due process, the court must often ascertain whether Congress had reasonable grounds for believing that social facts support the statute.[157] On this issue, the court may consider such data as the reports of legislative committees.[158]

VII. Conclusion

The federal courts should make greater use of judicial notice than they presently do in order to accelerate the normally slow trial pro-

151. United States v. Wilson, 284 F.2d 407, 408 (4th Cir. 1960).

152. United States v. Boyance, 30 F.R.D. 146, 148 (E.D. Pa. 1962).

153. Ibid.

154. McCormick, Evidence § 329, at 705 (1954).

155. United States v. Carolene Prods. Co., 304 U.S. 144, 153 (1938).

156. Durham v. United States, 214 F.2d 862, 874 (D.C. Cir. 1954). See discussion of the case by Davis, Judicial Notice, 55 Colum. L. Rev. 945, 953-54 (1955); Morgan, Maguire & Weinstein, Evidence 12-14 (4th ed. 1957).

157. Carolene Prods. Co. v. United States, 323 U.S. 18, 31 (1944).

158. Id. at 28.

cedure.[159] This could be accomplished by judicially noticing facts which are, at the time of trial, so notoriously true as to be incontrovertible in the community, and by resorting more frequently to available sources of indisputable accuracy. In those rare cases where there are pretrial proceedings, this would be especially true. In criminal proceedings, judicial notice could be employed at every stage so as to eliminate issues about which there can be no bona fide dispute.

However, one area where perhaps orthodox rules of judicial notice should not be applied is where the indictment or information fails to cite the statute making the conduct a criminal offense. If employed here, there is the possibility of unnecessary unfairness to the defendant, since the orthodox rule may, to a large extent, make Rule 7(c) of the Federal Rules of Criminal Procedure a dead letter.[160] In such cases the burden to cite the statute should be on the Government.

It would seem that a court is justified in making use of judicial notice in civil cases on the same principles as in criminal cases, and that notice to the parties that it is being utilized is often unnecessary.[161] In a recent case,[162] Mr. Justice Harlan pointed out that while procedurally it may be preferable to announce to the parties that the court is taking judicial notice, this prerogative should be within the reasonable discretion of the trial judge as to routine matters of common knowledge.[163] Finally, if the Supreme Court lays down rules of evidence, full account should be taken of the work already done in this area by the American Law Institute in its Model Code of Evidence[164] and in the Uniform Rules of Evidence.[165]

159. This approach is advocated by a number of authorities in the field of evidence. See McCormick, Evidence § 324, at 689 (1954); Morgan, Some Problems of Proof Under the Anglo-American System of Litigation 69 (1956); 9 Wigmore, Evidence § 2583, at 585 (3d ed. 1940).

160. See note 26 supra and accompanying text.

161. See, e.g., Garner v. Louisiana, 368 U.S. 157, 194 (1961).

162. Garner v. Louisiana, supra note 161.

163. Id. at 194. This view is supported in McCormick, Evidence § 330, at 708 (1954); Morgan, Some Problems of Proof Under the Anglo-American System of Litigation 48-59 (1956).

164. The Supreme Court should note the Model Code of Evidence rules 801-06.

165. Uniform Rules of Evidence 9-12 should also be considered in drawing up the Federal Rules of Evidence.