

These conclusions make it unnecessary for me to consider the several situations to which you specifically refer.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF THE TREASURY.

COMPROMISE OF CLAIMS UNDER SECTIONS 3469 AND 3229
OF THE REVISED STATUTES—POWER OF THE ATTORNEY
GENERAL IN MATTERS OF COMPROMISE

The opinion of the Attorney General to the Secretary of the Treasury dated October 24, 1933, relating to the power to compromise conferred by sections 3469 and 3229 of the Revised Statutes, is not to be construed as precluding the compromise of cases in which there is uncertainty as to liability or collection; nor is that opinion to be understood as involving or restricting the authority and discretion of the Attorney General in matters of compromise.

In cases referred to the Department of Justice, whatever powers of compromise were conferred by the above-mentioned sections are now vested in the Attorney General by virtue of section 5 of Executive Order No. 6163 of June 10, 1933.

The Attorney General has plenary power to compromise cases referred to the Department of Justice. This power is in part inherent, appertaining to the office, and in part derived from various statutes and decisions.

DEPARTMENT OF JUSTICE,

October 2, 1934.

SIR: In connection with my opinion of October 24, 1933 (38 Op. 94), dealing with the power to compromise conferred by Sections 3469 and 3229 of the Revised Statutes, I have given careful consideration to the class or group of cases outlined in your letter to me of January 30, 1934.

The conclusion reached in the opinion is that "where liability has been established by a valid judgment or is certain, and there is no doubt as to the ability of the Government to collect, there is no room for 'mutual concessions', and therefore, no basis for a 'compromise'". The word "certain" relates, of course, to claims which are liquidated or undisputed. Where there is a bona fide dispute as to either a question of fact or of law, certainty cannot be said to exist. In such cases there is room for mutual concession. The adequacy of the concession or consideration sufficient to justify the acceptance of an offer of compromise

is to be determined by the exercise of sound discretion. The opinion, therefore, should not be so construed as to preclude compromise settlement of such cases.

There appears to be no statutory authority to compromise *solely* upon the ground that a hard case is presented, which excites sympathy or is merely appealing from the standpoint of equity, but the power to compromise clearly authorizes the settlement of any case about which uncertainty exists as to liability or collection. Thus interpreted the opinion of October 24, 1933, will, I believe, enable you to determine whether the cases summarized in your letter of January 30, 1934, fall within or without its purview.

It should, also, be observed that the questions specifically considered in that opinion related only to the power to compromise conferred by Section 3469 of the Revised Statutes upon the Secretary of the Treasury and by Section 3229 upon the Commissioner of Internal Revenue. In cases referred to the Department of Justice, whatever powers were conferred by these Sections, whether general or special, broad or narrow, are now vested in the Attorney General by virtue of Section 5 of Executive Order No. 6166, of June 10, 1933. At the same time it should be observed that in no event was his prior and plenary power thereby curtailed.

This power is in part inherent, appertaining to the office, and in part derived from various statutes and decisions which need not be quoted at length, but I may point out that while their opinions have not always been harmonious, its exercise has long been asserted by my predecessors and upheld by judicial authority. Concerning it, Attorney General Taney said (2 Op. 486) :

“An attorney conducting a suit for a party has, in the absence of that party, a right to discontinue it whenever, in his judgment, the interest of his client requires it to be done. If he abuses this power, he is liable to the client whom he injures. * * * An attorney of the United States, except insofar as his powers may be restrained by particular acts of Congress, has the same authority and control over the suits which he is conducting. The public interest and the principles of justice require that he should have this power; for, why should the public be put to the

expense of preparing a suit for trial, and procuring evidence, when the attorney knows that, on principles of law, it cannot be supported? Why should he be required, on behalf of the United States, to harass a defendant with a prosecution, which, pending the suit, he discovers to be unjust and groundless?"

Attorney General Griggs in an opinion (22 Op. 491 494) distinguishing between the power of the Attorney General and that of the Secretary of the Treasury, as I now do, said:

"Nevertheless, it is advisable to add, under the circumstances, that the primary, broad, and general control by the Attorney General of suits in which the United States is interested, conferred by the statutes and established by decisions of the Supreme Court, of which the Confiscation Cases (7 Wall., 454), may be mentioned, fully authorizes such disposition of pending litigation of the Government, including the class of cases which embraces the one before us, as seems to him meet and proper. He exercises superintendence and direction over the United States attorneys and general supervision over proceedings instituted for the benefit of the United States, and to him is necessarily intrusted, in the exercise of his sound professional discretion and because of the nature of the subject, the determination of many questions of expediency and propriety affecting the continuance or dismissal of legal proceedings. (2 Op. 482, 486.) He may absolutely dismiss or discontinue suits in which the Government is interested; *a fortiori* he may terminate the same upon terms, at any stage, by way of compromise or settlement."

In 23 Op. 507, Acting Attorney General Beck made the same observation; and in the case of *New York v. New Jersey*, 256 U. S. 296, the Supreme Court held that in view of the authority of the Attorney General to control and conduct litigation in which the United States is interested, it was within his authority to agree that the United States would retire from the case on the terms stated in the stipulation. Probably the leading cases on the subject are the *Confiscation Cases*, 74 U. S. 454 (1868); and *United States v. San Jacinto Tin Company*, 125 U. S. 273.

284 (1888), but also equally emphatic on the power of the Attorney General are *United States v. Throckmorton*, 98 U. S. 61 (1878); *In re Neagle*, 135 U. S. 1, 67 (1890); *New York v. New Jersey*, 256 U. S. 296 (1921); *Kern River Company v. United States*, 257 U. S. 147 (1921); and *Ponzi v. Fessenden*, 258 U. S. 254 (1921).

In the *San Jacinto* case the Court said:

"We are not insensible to the enormous power and its capacity for evil thus reposed in that department of the Government (Department of Justice). * * * But it has often been said that the fact that the exercise of power may be abused is no sufficient reason for denying its existence" * * * [Interpolation supplied].

See also *Swift & Co. v. United States*, 276 U. S. 311.

There are also many decisions of the lower courts dealing with the same subject, chief among which are *United States v. Schumann*, Fed. Case No. 16, 235 (1866); *Conner v. Cornell*, 32 F. (2d) 581 (C. C. A. 8th) (1929); *Mars v. McDougal*, 40 F. (2d) 247 (C. C. A. 10th) (1930); *Sutherland v. International Insurance Co. of New York*, 43 F. (2d) 969 (C. C. A. 2d) (1930); and in *People v. Finch Pruyn & Co.*, 202 N. Y. S. 582, (affirmed 238 N. Y. 584) it was held that the Attorney General of the State of New York, under the common law, could compromise a case in which the State of New York was interested. "And although it has been said that there is no common law of the United States, it is still quite true that when acts of Congress use words which are familiar in the law of England they are supposed to be used with reference to their meaning in that law." *San Jacinto Case, supra*. See also the *Attorney General v. The Town of Farnham in Surrey*, Hardres 504 (1679); *Re v. Wilkes*, Burrows 2527, 2554, 2570 (1770); *Reg. v. Allen*, 5 L. T. R. 636 (1862); *The King v. Austen*, 9 Price 142. Further confirmation may be found in the well established rule that a power vested in a government officer carries with it necessarily authority to make that power effective, *McGrain v. Daugherty*, 273 U. S. 135, 173; *In re Neagle*, 39 Fed. 833, 851; *State v. Hildebrant*, 93 Ohio State 1; 34 Op. 320, 326; Opinion of May 22, 1934 (37 Op. 534), to the Secretary of War.

His statutory authority begins with the Judiciary Act of September 24, 1789 (c. 20, Sec. 35, 1 Stat. 92), includes the Act of June 22, 1870, c. 150, 16 Stat. 162, formally creating the Department of Justice, and is extended by the recent Economy Act of March 3, 1933 (c. 212, 47 Stat. 1489), as amended, by the Act of March 20, 1933, c. 3, 48 Stat. 8, further including, of course, the powers conferred by Sections 3469 and 3229, Revised Statutes, and transferred to him by Executive order.

Speaking of certain of his statutory powers, the Court of Claims in *Perry v. United States*, 28 C. Cls. 483, 491 (1893), said:

“These provisions are too comprehensive and too specific to leave any doubt that Congress intended to gather into the Department of Justice, under the supervision and control of the Attorney General, all the litigation and *all the law business* in which the United States are interested, * * *.”
[Italics supplied.]

At the same time, I have no hesitation in declaring that it is a power, whether attaching to the office or conferred by statute or Executive order, to be exercised with wise discretion and resorted to only to promote the Government's best interest or to prevent flagrant injustice, but that it is broad and plenary may be asserted with equal assurance, and it attaches, of course, immediately upon the receipt of a case in the Department of Justice, carrying with it both civil and criminal features, if both exist, and any other matter germane to the case which the Attorney General may find it necessary or proper to consider before he invokes the aid of the courts; nor does it end with the entry of judgment, but embraces execution (*United States v. Morris*, 10 Wheat. 246).

It follows, therefore, that the authority and discretion of the Attorney General are not to be understood as involved in or restricted by the opinion of October 24, 1933, to which this letter should be regarded as supplemental.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF THE TREASURY.