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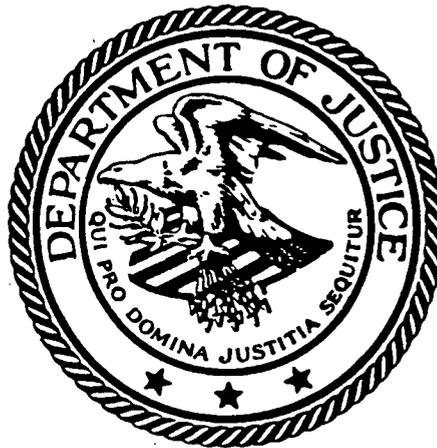
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August 31, 1956

**United States  
DEPARTMENT OF JUSTICE**

Vol. 4

No. 18



**UNITED STATES ATTORNEYS  
BULLETIN**

RESTRICTED TO USE OF  
DEPARTMENT OF JUSTICE PERSONNEL

# UNITED STATES ATTORNEYS BULLETIN

Vol. 4.

August 31, 1956

No. 18

## CREDITABLE LEAVE RECORD

The Department congratulates Mrs. Alice G. Cohn, employee in the office of United States Attorney Sherman F. Furey, Jr., District of Idaho, on having accumulated 1005 hours of sick leave to her credit.

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## JOB WELL DONE

The Acting Regional Coordinator, Office of Defense Mobilization, has written to United States Attorney George E. Rapp, Western District of Wisconsin, expressing appreciation for the services rendered by Miss Bessie Sweet, a stenographer in Mr. Rapp's office, whose services were made available to ODM during the recent Operation Alert. The letter stated that Miss Sweet's help in handling the heavy volume of teletypes and other important matters, as well as her courtesy, tactfulness, and spirit of friendly cooperation, played a prominent part in making the exercise a success.

United States Attorney Jack C. Brown, Southern District of Indiana, has received a letter from the Regional Attorney in Charge, Department of Agriculture, commending Assistant United States Attorney Stephen Leonard upon his extremely able and successful work in a recent case involving criminal conversion of grain. The letter stated that despite the complicated nature of the evidence Mr. Leonard, in his presentation, developed the testimony in a clear and lucid manner. A similar prosecution of the case in 1952 had resulted in an acquittal.

United States Attorney Henry J. Cook, Eastern District of Kentucky, is in receipt of a letter from the Special Agent in Charge, Federal Bureau of Investigation, commending Mr. Cook for his splendid work in a recent case involving violation of the Federal Train Wreck Statute. The letter stated that Mr. Cook's knowledge of the complex case, his presentation of it, and his handling of the final arguments were deserving of special commendation.

The District Supervisor, Bureau of Narcotics, has written to United States Attorney Walter E. Black, Jr., District of Maryland, expressing appreciation for the efforts of his office in the preparation for trial and prosecution of a recent narcotics violation case. The letter stated that the case was unusual, difficult, and involved a precedent in enforcement technique which was very ably and skillfully presented by Assistant United States Attorney John H. Somerville.

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## NEW UNITED STATES ATTORNEYS

M. Hepburn Many	Eastern District, Louisiana	Apptd. 8-14-56**
Albert Marcus Morgan	Northern District, West Virginia	" 8-18-56**
** Court Appointment		

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INTERNAL SECURITY DIVISION

Assistant Attorney General William F. Tompkins

SUBVERSIVE ORGANIZATIONS

Subversive Activities Control Act - Communist Front Organizations.  
Herbert Brownell, Jr., Attorney General v. Colorado Committee to Protect Civil Liberties. On August 9, 1956, the Attorney General petitioned the Subversive Activities Control Board for an order to require the Colorado Committee to Protect Civil Liberties, whose headquarters is in Denver, Colorado, to register as a Communist-front organization as provided in the Subversive Activities Control Act of 1950. This is the seventeenth case filed before the Board alleging an organization to be dominated, directed or controlled by the Communist Party, USA, and primarily operated for the purpose of giving aid and support to the Communist Party.

Staff: Troy B. Conner, Jr., and Daniel J. Donoghue  
 (Internal Security Division)

Subversive Activities Control Act - Communist Front Organizations.  
Herbert Brownell, Jr., Attorney General, v. Connecticut Volunteers for Civil Rights. On August 9, 1956, the Attorney General petitioned the Subversive Activities Control Board for an order to require the Connecticut Volunteers for Civil Rights, whose headquarters is in New Haven, Connecticut, to register as a Communist-front organization as provided in the Subversive Activities Control Act of 1950. This is the eighteenth case filed before the Board alleging an organization to be dominated, directed or controlled by the Communist Party, USA, and primarily operated for the purpose of giving aid and support to the Communist Party.

Staff: Troy B. Conner, Jr., and James C. Hise  
 (Internal Security Division)

Subversive Activities Control Act - Communist Front Organizations.  
Herbert Brownell, Jr. Attorney General v. Save Our Sons Committee. On August 9, 1956, the Attorney General petitioned the Subversive Activities Control Board for an order to require the Save Our Sons Committee, Argo, Illinois, to register as a Communist-front organization as provided in the Subversive Activities Control Act of 1950. This is the nineteenth case filed before the Board alleging an organization to be dominated, directed or controlled by the Communist Party, USA, and primarily operated for the purpose of giving aid and support to the Communist Party.

Staff: Troy B. Conner, Jr. and James L. Weldon, Jr.  
 (Internal Security Division)

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CRIMINAL DIVISION

Assistant Attorney General Warren Olney III

NARCOTIC CONTROL ACT OF 1956

Nature and Elements - Applicability - Procedure - Reports. The "Narcotic Control Act of 1956", approved July 18, 1956, and effective on July 19, amends many provisions of the Federal narcotic drug and marihuana laws, and includes a number of entirely new provisions applicable to such laws. It is suggested that the several United States Attorneys and their Assistants study this new law (Public Law 728 - 84th Congress, 2nd Session, H. R. 11619) a copy of which was furnished to their offices on July 30, so that proper application thereof may be made. Some of the more vital changes as they affect the work of the United States Attorneys are noted below.

The new or higher penalties provided by this law apply to all violations occurring on and after July 19, 1956. The new penalties provided in Section 7237(a) and (b) I.R.C. 1954; Section 2(c), (h) and (i), Narcotic Drugs Import and Export Act (21 U.S.C. 174) and 21 U.S.C. 184a, all as amended on that date, are mandatory; and except as to first offenders penalized by Section 7237(a), there may be no suspension of imposition or execution of sentence or probation and the parole laws do not apply. Except as to 21 U.S.C. 184a, these penalties also apply to conspiracies. As to violations occurring previous to July 19, 1956, the penalties in the prior laws still are applicable.

The new law imposes more severe mandatory penalties on those who sell or otherwise furnish narcotic drugs or marihuana to others in violation of Sections 4705(a) and 4742(a) I.R.C. of 1954, than on other violators of the Internal Revenue narcotic laws in the so-called possession cases i.e. those not involving trafficking. There are special provisions in the new law imposing even higher penalties on those who sell or otherwise furnish any narcotic drug or marihuana to juveniles and particularly on those who similarly traffic in unlawfully imported heroin with juveniles.

The smuggling of marihuana and the subsequent transportation, etc., of smuggled marihuana now are specific offenses subject to severe mandatory penalties and other provisions corresponding to those applicable to the smuggling, etc., of narcotic drugs.

There now is a maximum fine of \$20,000 for any of the above offenses. However, unlike in the prior laws, the imposition of any fine is now entirely discretionary with the court as to violations occurring on and after July 19, 1956.

To take care of certain venue problems in marihuana cases, Section 4744(a) I.R.C. of 1954 has been amended so that the transportation or concealment, etc., of unlawfully acquired marihuana, as well as the unlawful acquisition thereof, now are offenses. Also, the provisions in new 18 U.S.C. 1403 penalizing those who use communication facilities to further violations of the narcotic drug and marihuana laws should be noted.

The provisions in new Section 7607 I.R.C. of 1954 statutorily authorizing narcotic agents to carry arms, serve warrants, etc., and to make arrests, and in new 18 U.S.C. 1405, respecting the issuance and service of search warrants in narcotic drug and marihuana cases are designed to aid law enforcement. It is hoped they will eliminate some of the problems heretofore encountered in such matters.

The several United States Attorneys with districts bordering on foreign countries, particularly Mexico, should note the provisions of new 18 U.S.C. 1407, requiring narcotic drug addicts and unauthorized users of such drugs, or other Americans previously convicted of narcotic drug or marihuana law violations, to register before crossing our borders or become subject to the penalties provided in this section.

Of particular interest in prosecutions of narcotic drug and marihuana cases are the provisions in new 18 U.S.C. 1404 and 1406. The former permits appeals by the government, under the circumstances enumerated, from orders returning seized property and suppressing evidence on motions made before trial. The latter provides a procedure whereby compulsory testimony or the production of books, etc., may be obtained in such prosecutions. If these provisions are availed of, there should be strict compliance with all of the requirements of these statutes.

Note should be made that 8 U.S.C. 1182 and 1251 have been amended so as to include convictions for conspiracy to violate narcotic laws as grounds for exclusion or deportation of aliens and so that neither a recommendation of the court nor a pardon will bar deportation.

This new law represents the will of Congress and every effort should be made to carry out its intent, which is to suppress one of the most vicious traffics known to mankind. Where persons stand convicted of violations subject to the penalties provided therein, the courts should be fully advised of the penalties incurred. If a court should impose a sentence not in accord with its requirements, the Department should be immediately informed thereof by the United States Attorney. Of course where a recidivist violator of the narcotic or marihuana laws stands convicted again, the necessary information showing the previous conviction or convictions or sentencing must be filed, as under the prior law. Whenever the alleged offenders are traffickers in the drugs, particularly ones dealing extensively therein, especial emphasis on the prosecutions should be given.

As noted above this new law severely penalizes the unlawful importation of narcotic drugs and marihuana, and precludes the suspension of sentence, probation or parole, even as to first offenders. Border districts may be confronted with the problem of the disposition to be made of numerous violations by itinerant laborers or other casual and temporary entrants, not of United States citizenship, who at the point of entry are found in possession of very small quantities of narcotics or marihuana for their own use only. Conviction would require incarceration of approximately five years, and the cost thereof would be substantial. The Department, with the concurrence of the Bureaus of Narcotics and Customs, considers that expeditious deportation

of such offenders would be an appropriate disposition. However, the Department should be advised of all instances in which such disposition is made and of the circumstances which justified its employment. As illustrative of the type of violation referred to above is the following instance. On July 19 a Mexican laborer, married, and having six children in Mexico, upon being examined as one of a group of itinerant laborers seeking temporary entrance at a point along our southern border, was found to have in his pocket a fractional part of an ounce of marihuana. He was placed in jail in default of a \$350 bond. The Department has suggested that his prompt deportation be effected in lieu of prosecution. Of course, in the case of a repeated offender of this type, criminal prosecution may have to be undertaken. Also, care should be exercised to insure that this procedure is not employed in the case of any person known to the Bureau of Customs or the Bureau of Narcotics as a trafficker in these drugs.

Where an appeal from an order suppressing evidence, etc., as provided in new 18 U.S.C. 1404 is possible, the Department should be furnished immediately with the data required for consideration of same in view of shortness of time. Tentative or protective notices of appeal should be filed where necessary to preserve this right. Likewise where compulsory testimony is sought pursuant to new 18 U.S.C. 1406, the Department should be advised immediately since the approval of the Attorney General is required.

In view of the very severe penalties now placed upon narcotics crimes, and the further restriction of the courts' discretionary authority to suspend sentence and grant probation, the Department desires to be in a position to appraise the effectiveness of the new laws. For this reason all United States Attorneys, in addition to other reports required, are requested to submit to the Department monthly reports containing the following information as to narcotics and marihuana cases under the new law:

- (1) Number and type of cases received for prosecution.
- (2) Number of indictments returned and criminal informations filed and the type of violations charged.
- (3) Number and type of cases in which prosecution is declined.
- (4) Number of pleas of guilty, showing the charge to which the plea was entered and the counts, if any, dismissed.
- (5) Number of
  - (a) convictions after trial.
  - (b) acquittals after trial.
  - (c) dismissals other than those under (4) above.

The foregoing reports should be submitted to the Assistant Attorney General, Criminal Division, on or before the 10th of the month following that for which the report is submitted. The first report for the month of September, 1956, should include the period July 19 to August 31. At an early date a suggested form for reporting the desired information will be furnished.

There are being mailed to the United States Attorneys copies of a memorandum analyzing the above law in some detail and a copy of a chart

setting forth the penalties imposed by the new law as compared with those, if any, in the prior laws. It is hoped that these will be helpful.

#### STATUTE OF LIMITATIONS

This is a reminder that the period of limitations on prosecution of criminal offenses under Title 18, United States Code will again become a vital factor effective September 1, 1956.

As you know, an amendment to the general statute of limitations (18 U.S.C. 3282), effective September 1, 1954, increased the period of limitations from three to five years. This had the effect of adding two years to the limitation period on all Title 18 offenses committed subsequent to September 1, 1951. Consequently, for two years we have not had to worry about the statute of limitations.

Appropriate steps should now be taken to assure that this factor will be taken into account in consideration of new matters which come into your office, as well as those now pending.

#### FRAUD BY WIRE

Legislation (18 U.S.C. 1343). The Fraud by Wire Statute (18 U.S.C. 1343) was amended by the enactment of Public Law 688, 84th Congress, 2nd Session, approved July 11, 1956, to include a proscription against communications in foreign commerce. The amended statute now provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than \$1,000 or imprisoned not more than five years, or both. (Underscoring of new matter supplied)

#### DISMISSAL OF INDICTMENT

Fugitive Status of Defendant. United States v. James Cummings (S.D. N.Y.). On June 18, 1956, District Judge Weinfeld delivered the following memorandum opinion on the United States Attorney's request for dismissal of the indictment against defendant James Cummings because of his fugitive status since 1941:

The defendant has been a fugitive from justice since 1941 when he failed to appear to plead to an indictment charging him and three others with conspiracy to defraud the Government. The other defendants pleaded guilty and were sentenced.

The affidavit submitted by the Assistant United States Attorney states that efforts to locate the defendant since the return of the original indictment have been unsuccessful, but it appears that the last attempts to locate him were in January, 1954, two and a half years ago. Absent a statement as to what efforts have been made to apprehend the defendant since that date, and an expression by enforcement authorities that despite continued diligent efforts it is unlikely the defendant will be apprehended, I am not prepared to approve the proposed nolle prosequi.

Undoubtedly if the law catches up with the defendant prosecution will be difficult, particularly in view of the time lag (although proof of flight might readily overcome this), but it would be a strange reward to one who had brought about this situation by fleeing the jurisdiction to permit him to return free of the pending indictment. Unless it is established that the defendant cannot be apprehended by diligent effort, and even if he were a prosecution would be fruitless, the indictment should stand.

Motion denied with leave to renew.

The above decision emphasizes, in those cases involving dismissals because of the fugitive status of defendants, the necessity for ensuring that the investigative agency has exhausted all leads after timely inquiry.

#### FRAUD

False Statements; Denying Arrest Record in Application for Christmas Employment with Post Office. The United States Attorney, Buffalo, New York has advised that his office had referred to it some one hundred and fifty cases of falsification of arrest records in Christmas employment applications filed with the local Post Office. After the major portion of the cases were screened, indictments were returned against twenty-six defendants. One defendant died and another was incompetent. Of the remaining twenty-four defendants, twenty-one were convicted and one is expected to enter a guilty plea. The United States Attorney informs us that this series of prosecutions apparently has had a salutary effect upon the local post office operations insofar as the hiring of extra help is concerned, since no cases of this type have been referred to his office this year.

#### INTERSTATE COMMERCE ACT

Motor Carrier Safety Regulations. United States v. Industrial Cartage Company (N.D. Ohio). On May 8, 1956, an information in 40 counts was filed charging defendant with failing to have medical certificates for drivers, with permitting drivers to operate vehicles for excessive hours, with failing to file monthly reports of every instance in which drivers were on duty

or operated motor vehicles in excess of the hours prescribed, with failing to maintain systematic inspection and maintenance records, and with failing to require drivers to submit vehicle inspection reports--all in violation of the Motor Carrier Safety Regulations issued by the Interstate Commerce Commission pursuant to the Interstate Commerce Act. On June 8, 1956, defendant pleaded guilty to all counts of the information and on June 15, 1956, was fined in the total sum of \$2,000, \$1,900 of which was required to be paid, and \$100 of which was suspended.

Staff: United States Attorney Sumner Canary; Assistant  
United States Attorney Eben H. Cockley (N.D. Ohio)

Operating Motor Carrier in Interstate Commerce without Authority.  
United States v. Stevens Truck Lines, Inc. (W.D. N.Y.). On May 7, 1956, an information in 40 counts was filed charging defendant with operating as a motor carrier in interstate commerce without authority, in violation of Section 206(a) of the Interstate Commerce Act (49 U.S.C. 306(a)). On May 28, 1956, defendant pleaded guilty to all counts of the information, and on June 11, 1956, was fined in the sum of \$100 on each count, making a total fine of \$4,000. One thousand dollars of the fine was required to be paid and the balance was suspended.

Staff: United States Attorney John O. Henderson; Assistant  
United States Attorney Donald F. Potter (W.D. N.Y.)

#### CONNALLY "HOT OIL" ACT

Interstate Transportation of Contraband Oil. United States v. E. L. Porter (E.D. Tex.). An information in 24 counts charged defendant with shipping and transporting and causing to be shipped and transported contraband oil in interstate commerce in violation of the Connally "Hot Oil" Act (15 U.S.C. 715 et seq.). On July 9, 1956, defendant entered pleas of guilty to all counts of the information and was fined in the sum of \$900 as to each count, making a total fine of \$21,600.

Staff: United States Attorney William M. Steger; Assistant  
United States Attorney Harlon E. Martin (E.D. Tex.)

#### TRAIN WRECKING

Train Wreck Statute; Conspiracy. United States v. Jack Stanley, et al. (E.D. Ky.). An indictment was returned on January 13, 1956, in two counts, charging a violation of 18 U.S.C. 1992, and conspiracy to burn a railroad bridge with intent to derail, disable or wreck a train. Of the eight defendants, four were members of a railroad union then on strike and the others were non-union. The four union defendants entered pleas of not guilty and the non-union defendants pleaded guilty and testified for the Government.

According to the evidence introduced at the trial, the union defendants hired one of the non-union defendants to burn a Louisville and Nashville Railroad bridge. He, in turn, hired the other non-union defendants, two of

whom actually set fire to the bridge, which resulted in a loss of approximately \$100,000. All of the defendants who pleaded not guilty took the stand and denied participation in the conspiracy or that they took any part in the burning of the bridge. The jury found the four defendants on trial guilty on both counts and the Court sentenced each defendant, including those pleading guilty, to five years on each count, to run concurrently. A petition for bail pending appeal was denied by both the trial court and a circuit judge.

Staff: United States Attorney Henry J. Cook; Assistant  
United States Attorney R. Robert Stivers (E.D. Ky.)

MALICIOUS MISCHIEF

Conspiracy to Injure Communication System Operated by United States.  
United States v. Louis Joseph Abbate, Michael Louis Falcone, Charles G.  
Perry and James Shelby (S.D. Miss.). On June 22, 1956, the four defendants in this case were found guilty by a jury of conspiring to violate 18 U.S.C. 1362. On July 9, 1956, after denying motions for a judgment of acquittal and for a new trial, Judge Ben Dawkins sentenced Abbate to three years' imprisonment and \$1000 fine; Falcone was given one year's imprisonment; Perry was sentenced to two years' imprisonment and a \$1000 fine; and Shelby was sentenced to three years' imprisonment and a fine of \$1000.

The case grew out of a scheme worked up by Shelby, who is an official of the Communication Workers of America (CWA) and who directed the CWA strike against the Southern Bell Telephone and Telegraph Company during the Spring of 1955, to dynamite the coaxial repeater stations and radio micro-wave towers owned by the telephone company in the States of Mississippi, Louisiana, and Tennessee, but which were essential parts of communication systems operated by several Government agencies, including the Strategic Air Command. Perry was also an official of the CWA. Abbate and Falcone were Chicago hoodlums hired by Shelby to do the dynamiting. The strike is said to have been the longest and most violent in telephone history. There was evidence to show that the plan had been conceived to dynamite these installations over a year before the strike took place.

Staff: United States Attorney Robert E. Hauberg; Assistant  
United States Attorney Richard T. Watson (S.D. Miss.)

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C I V I L D I V I S I O N

Assistant Attorney General George Cochran Doub

UNEMPLOYMENT INSURANCE COMPENSATION CASES

Effective immediately the Criminal Division and Civil Division of the Department will no longer receive copies of Federal Bureau of Investigation reports in Unemployment Insurance Compensation cases whether arising under the Social Security Act or under Servicemen's Readjustment Assistance Acts. United States Attorneys have previously been delegated authority to handle the criminal and civil aspects of these cases within certain limits. (See paragraphs 4.B.(f) and 4.C.(b)3. of Order No. 103-55; and see also United States Attorneys' Bulletin, Volume 2, No. 15, pp. 5-6, July 23, 1954, and Volume 3, No. 11, p. 5, May 27, 1955.)

Since files will no longer be kept on these cases in the Department, United States Attorneys should forward the complete file, including all Federal Bureau of Investigation reports, in any case where consultation with the Department becomes necessary. This is essential with respect to requests made for the dismissal of indictments in such cases. The entire file will be returned when it has served its purpose in the Department.

COURT OF APPEALSCONTRACTS

Advance Payment Bond--Surety Discharged by Payments to Contractor Made after Cancellation of Contract. Century Indemnity Company v. United States (C.A.D.C., August 9, 1956). The United States advanced approximately \$245,000 to a contractor on a \$581,000 supply contract. The contractor furnished an advance payment bond with defendant as surety. By the terms of the contract, liquidation of the advance payment was to commence when the value of the material delivered plus the advance payment was equal to the full contract price. When performance of the contract was slightly more than half completed, the United States notified the contractor that it was cancelling the agreement. After this notification, three payments aggregating \$34,000 were made by the United States to the contractor for material delivered under the contract. The contractor defaulted on the advance payment obligation whereupon the surety repaid approximately \$200,000 of the advance, but refused payment of the \$34,000 paid to the contractor after the cancellation. The United States brought suit for the latter amount. The District Court entered judgment for the United States on the ground that the payments made after cancellation were through the negligence or mistake of Government employees and did not prejudice the Government's right against the surety on the advance payment bond. On appeal, the Court of Appeals reversed, holding, in effect, that the cancellation of the contract by the United States was a modification of the total contract price and at that point the Government should have withheld further payment to the contractor and applied the sum owing the contractor for material delivered toward liquidation of the advance

payment obligation. The Court further held the Government's obligation toward the surety was one of contract and the United States was bound to protect the surety in the same manner as a private contractor would have been bound in such circumstances.

Staff: John G. Laughlin (Civil Division)

COURT OF CLAIMS

FALSE CLAIMS ACT

Limitation Period--Counterclaim for Fraud Barred by Limitations Period of False Claims Act, though not Barred at Time of Filing of Complaint. Canned Foods, Inc. v. United States (C. Cls., July 12, 1956). This case was reported in Vol. 4, No. 11, United States Attorneys' Bulletin, May 25, 1956, at p. 360. Upon rehearing, the Court of Claims reversed its previous holding and ruled that the Government's counterclaim, based upon the False Claims Act, was barred by the statute of limitations because it was a separate statutory cause of action which did not have to be asserted as a compulsory counterclaim, although it arose out of the same transaction or occurrence upon which plaintiff's suit was based. The Court determined that the Government's action could have been prosecuted in a separate suit in a District Court and would not have been barred by the doctrine of res judicata. The rule calling for the tolling of the statute of limitations upon the filing of plaintiff's suit was deemed inapplicable.

Staff: Stanley M. Levy (Civil Division)

DISTRICT COURT

TORTS

"Foreign Country" Exception of Tort Claims Act--Island of Okinawa Held "Foreign Country" within Meaning of 28 U.S.C. 2680(k). Juanita Burna v. United States (E.D. Va., July 13, 1956). Plaintiff brought suit under the Tort Claims Act for injuries sustained in an accident involving an Army vehicle on Okinawa. Her complaint was filed in the Eastern District of Virginia where she resided at the time the action was commenced. The Government's motion to dismiss the complaint was sustained on the ground that Okinawa is a "foreign country" excepted from the operation of the Tort Claims Act. Plaintiff unsuccessfully argued that Okinawa was no longer a "foreign country" after the ratification of the Treaty of Peace with Japan under which the United States assumed all powers of administration and legislation over the Ryukyu Islands pending the establishment of a United Nations trusteeship. The Court agreed with the Government that, under the Treaty, Japan was deemed to have retained residual sovereignty over the Island in question.

Staff: United States Attorney L. S. Parsons, Jr. (E.D. Va.)  
and Thomas S. Schattenfield (Civil Division)

Negligence--United States not Liable to Railroad Employee for Injury Caused by Breaking of Post Office Mail Bag Neck Cord. Dee Titsworth v. United States v. Illinois Central Railroad (N.D. Iowa, Aug. 6, 1956). Plaintiff, an Illinois Central Railroad station agent, sustained serious injuries when he fell from the platform of a hand mail truck. He was standing on a tier of mail sacks on the truck platform about 4 or 5 inches from the side of the mail car. He attempted to lift a heavy mail sack from the mail car by the neck rope, but the rope broke and, losing his balance, he fell from the truck, striking the back of his head on the brick station platform. He sued the United States for \$51,456.38 in damages, impleading the railroad as third-party defendant. The Court found that he failed to prove negligence on the part of the United States; that the neck ropes of mail sacks were not designed for the purpose of providing means for the handling of such sacks; that undue strain was placed upon the neck ropes by lifting sacks in this manner; and that plaintiff failed to prove his freedom from contributory negligence. The Court has not yet passed on the liability of the railroad as to whom plaintiff is entitled to trial by jury. On the merits of the case, cf. Patterson v. Pennsylvania Railroad Co. v. United States, 197 F. 2d 252 (C.A. 2) where the court found liability on the part of the Government in similar circumstances.

Staff: United States Attorney F. E. Van Alstine, Assistant  
United States Attorneys Philip C. Lovrien and  
Theodore G. Gilinsky (N.D. Ia.), and Irvin M. Gottlieb  
(Civil Division)

#### VETERANS

National Service Life Insurance--Misrepresentations of State of Health in Application for Reinstatement of Lapsed Policy Held Material though Insured's Disability, Resulting from or Aggravated by Active Military Service, Was Less than Total. Frances M. Mooney v. United States (S.D.N.Y., June 5, 1956). Plaintiff, a widow beneficiary, moved for summary judgment in her action to enforce payment of NSLI benefits. Liability was denied by the Government on the ground that the insured misrepresented the state of his health in his application for reinstatement. The Court denied plaintiff's motion, rejecting her argument that the admittedly false statements were not material. Plaintiff had contended that the case came within the purview of 38 U.S.C. 802(c)(2), which provides that the Administrator shall not deny that an applicant is in good health because of any disability less than total in degree resulting from or aggravated by active service. The Court stated the case was not a proper one for summary judgment and the Government should be allowed to introduce evidence to show that had the true facts been known, the Administrator would have issued a policy materially different from the one which was here reinstated. The Administrator's statutory duty could have been met by the issuance of a policy on a non-participating basis, thereby excluding dividend payments from the NSLI Trust Fund. The reinstatement which the insured was entitled to was not necessarily a restoration of the lapsed policy in haec verba and with all of its financial and administrative implications.

Staff: United States Attorney Paul W. Williams and Assistant  
United States Attorney Foster Bam (S.D.N.Y.)

Reemployment Rights--Application of "Escalator Principle" of Section 8 of Selective Training and Service Act of 1940. Manuel Borges, et al. v. Art Steel Co., Inc. (S.D.N.Y., June 27, 1956). Upon discharge from military service, plaintiffs were reinstated in their jobs with full seniority rights, but at the same salary they were earning when they departed and without benefit of pay increases which had gone into effect while they were in the service. All such increases required that the employee must have been working on a specified date, and some had the additional requirement that on the specified date, the employee must have had a minimum period of actual working service. The Court granted plaintiffs' motion for summary judgment on the issue of liability, relying on the Supreme Court's decisions in Diehl v. Lehigh Valley R. Co., 348 U.S. 960 (United States Attorneys' Bulletin, Volume 3, No. 7, p. 7, April 1, 1955) and Oakley v. Louisville & N.R. Co., 338 U.S. 278. Section 8 of the Selective Training and Service Act of 1940 was interpreted in Oakley as requiring the employer to restore the returning veteran to "a position which, on the moving escalator of terms and conditions affecting that particular employment, would be comparable to the position which he would have held if he remained continuously in his civilian employment." This so-called "escalator principle" was codified by Congress in Section 9(c)(2) of the Selective Service Act of 1948, 50 U.S.C. App. 459(c)(2), which Act was continued in 1951 as the Universal Military Training and Service Act. The fact that treating the plaintiffs as continuously employed might violate the contract between defendant and the labor union was held by the Court to be of no significance, citing Fishgold v. Sullivan Dry Dock & Repair Corp., 328 U.S. 275.

Staff: United States Attorney Paul W. Williams and Assistant  
United States Attorney Foster Bam (S.D.N.Y.)

#### TAX COURT

#### RENEGOTIATION

Coverage--Contract Held to be Subcontract within Meaning of Renegotiation Act of 1943. Bittner, et al. v. United States (T.C., June 29, 1956). Petitioner, a partnership, entered into a contract with a manufacturer of machine tools in 1942 under the terms of which petitioner agreed to "prosecute the sales, service, engineering of the products as sold for the company" in named territories. Petitioner was given exclusive rights under the contract and was to be paid commissions in varying percentages of the value of the shipments made by the manufacturer. Petitioner contended it was not subject to renegotiation for the calendar year 1943 in that its contract was not a renegotiable subcontract within the meaning of Section 403(a)(5)(B) of the Renegotiation Act of 1943. Petitioner asserted that it, in fact, employed the prime contractor. The Tax Court held that petitioner was a subcontractor within the meaning of the statute in that part of the service performed included the "soliciting, attempting to procure, or procuring" of Government contracts. All other issues having been waived, the Tax Court entered its decision sustaining the administrative determination of excessive profits of \$21,000 for the calendar year 1943.

Staff: Harland F. Leathers (Civil Division)

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ANTITRUST DIVISION

Assistant Attorney General Victor R. Hansen

SHERMAN ACT

Decision on Motions for Summary Judgment. United States v. Insurance Board of Cleveland. (N.D. Ohio). On August 14, 1956, an opinion was rendered on cross-motions for summary judgment filed in this case by both parties.

The complaint, filed on February 27, 1951, alleged that the Board and its members conspired to restrain and monopolize interstate commerce in the business of selling and writing fire insurance; that they attempted to monopolize such trade and commerce, in violation of Sections 1 and 2 of the Sherman Act; and that the Board adopted and enforced regulations which prevented its members from (1) representing any insurance company that appoints agents who are not members of the Board; (2) placing or accepting brokerage or exchange business of agents of mutual fire insurance companies; (3) placing or accepting exchange or brokerage business with non-Board agents except on a discriminatory basis; (4) representing insurance companies that sell insurance at cut rates; (5) representing mutual insurance companies; and (6) representing insurance companies that operate branch offices and solicit or sell insurance directly to the insured or contribute to the overhead expense of agents. The Government claimed that these rules constitute boycotts that are illegal.

Although defendant contended that the rules and activities of the Board are entirely local in their operation and effect, the Court held that under the South-Eastern Underwriters decision the business of insurance conducted across state lines is interstate commerce subject to regulation under the Sherman Act, and that the McCarran Act did not suspend the prohibition of the Sherman Act against boycotts at any time.

The Court then considered defendant's contention that rules 1, 3, and 4 above (called the in-and-out rule, the reciprocity rule, and the non-deviation rule) are moot because they were abandoned by the Board. Citing several recent decisions on the mootness issue, the Court concluded that "where during the pendency of an action for injunctive relief the defendant has discontinued the alleged illegal practices and in good faith promises not to resume them and it is made clearly to appear that there is no reasonable expectancy of their resumption, a conclusion of mootness is warranted."

The Court discussed in detail the revisions made in these rules, the circumstances surrounding their abandonment, and the impracticability of reinstating them, and concluded that these issues were moot. He gave the following reasons for this conclusion: (1) the enactment of multiple line legislation in Ohio made the enforcement of these rules impracticable, for Board members would suffer substantial financial losses if they refused to do business with non-Board casualty companies; (2) the consideration by the

Board of revisions in these rules took place before the Government began its investigation preliminary to the filing of the suit; (3) defendant's disclaimer of intention to re-enact the rules is made in good faith, and a mere possibility of revival is not sufficient to warrant injunctive relief.

In considering the Government's position that the other rules constitute boycotts which are illegal per se, the Court concluded that this contention goes too far. It held that the rule of reason is still applicable to concerted refusals to deal, and that a group refusal to deal is not illegal if motivated by legitimate business reasons and if it exerts no coercion upon outsiders and results in no unreasonable restraint of trade. The application of the per se illegality rule should be limited to cases where a combination seeks by coercion, intimidation or threats to compel outsiders to do or refrain from doing that which the group approves or condemns, and where the purpose or necessary effect of the combination is to unduly restrain or monopolize interstate commerce.

In the light of this reasoning, the Court then considered the remaining three rules. The direct writer rule, which prevents Board members from representing insurance companies that operate branch offices and solicit or sell insurance directly to the insured, constitutes a concerted refusal to deal with certain insurance companies. The Court stated that insurance companies have the right to compete for the sale of insurance in the local market; that this rule of the Board was designed to prevent the companies against whom it is directed from engaging in such competition; and that since the rule relies upon coercion to effectuate its purpose, it imposed an unreasonable restraint on competition.

With respect to the rule prohibiting agents from accepting policy-writing or policy-recording services from insurance companies maintaining branch offices, the Court stated that the rule constituted a concerted refusal to deal with insurance companies who contributed to the overhead expense of agents. However, objectionable aspects of the rule were removed, and the Court found that while there is no branch office insurance company in the area furnishing such services to agents, it might be possible that companies will again establish branch offices solely for such purposes, and that the record does not make clear what effect, if any, this rule has upon competition. It therefore decided that this issue should go to trial on the merits.

The mutual rule limits membership in the Board to agents who represent stock insurance companies exclusively and constitutes an agreement among Board members to refrain from representing any mutual insurance company. The Court pointed out that this rule has no coercive effect upon mutual companies or their agents, who are entirely free to compete with Board members and solicit the clients of Board members; that the sole restraint imposed by the rule is upon those members of the Board who might wish to engage in the sale of mutual insurance; and that in those situations the Board member can resign from the Board and continue to deal in both mutual and stock insurance. Hence, the Court felt it was not unreasonable. While the rule is also an agreement among Board members not to represent mutual

companies, the Court felt that there was nothing in the record to indicate that mutual companies have been adversely affected by the rule or that the public interest was adversely affected by it. Although the Board's evidence was considered sufficient to repel the Government's attack, the Court said that it did not meet the standard of proof required to sustain the Board's motion for summary judgment, and because the rule raises genuine issues as to the effect of the rule on mutual companies and the public, the Court concluded that there should be a trial on the merits.

Staff: Robert B. Hummel and Norman H. Seidler. (Antitrust Division)

Motion for Construction of Judgment. United States v. Continental Can Company. (N.D. Calif.). On August 2, 1956 the Government filed a motion for an order of construction of the final judgment in the above-entitled case as to whether it enjoins Continental Can Company from acquiring the assets of a manufacturer of glass containers until Continental Can makes an affirmative showing to the Court that such acquisition may not be to substantially lessen competition. The motion was also for a temporary restraining order and preliminary injunction enjoining Continental Can from consummating its proposed acquisition of the assets of Hazel-Atlas Glass Company pending a final determination of the motion for construction. A memorandum of authorities was filed in support of the motion.

On the same date, the Court entered an ex parte order for Continental Can to show cause on August 6, 1956 why the restraining order should not be entered. On the return day of the order, counsel for Continental Can filed a memorandum in opposition to the motion for construction and the show cause order, and after argument on both questions, the Court entered an order restraining and enjoining Continental Can from acquiring the assets of Hazel-Atlas pending a final determination of the motion for construction.

Staff: Lyle L. Jones and Gilbert Pavlovsky (Antitrust Division)

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TAX DIVISION

Assistant Attorney General Charles K. Rice

CIVIL TAX MATTERS  
Appellate Decisions

Estate Tax - Transfer in Trust - Retention by Grantor of Income for Life Plus Contingent Power to Designate Beneficiaries of Principal or Income. Costin, Executor v. Cripe, Collector (C.A. 7, July 3, 1956). In 1923, decedent created a trust retaining income for life, thereafter to his wife and son for their joint lives, and to their survivor for life, with remainder to others. It was further provided that if decedent survived his wife and son, he could designate different beneficiaries of principal or income except that he could not designate himself or his creditors as beneficiary of the principal. He died in 1945, survived by his wife and son. It was stipulated that the value of his reversionary interest (power of disposition) in the trust immediately before his death was in excess of 5% of the value of the trust property. The Commissioner included the entire trust property in the gross estate for purposes of the federal estate tax and the District Court sustained the tax under Section 811(c)(1)(C)(2) of the 1939 Internal Revenue Code, as amended, relating to transfers taking effect at death.

The Court of Appeals affirmed, holding (1) that Section 811(c)(1)(C)(2) applies since decedent reserved the income for life and also expressly retained a reversionary interest of the required amount; (2) the contingent character of his power of disposition did not render it ineffective and it was sufficiently substantial to constitute a legal power of disposition equivalent to a reversionary interest within the meaning of Section 811(c)(1)(C)(2); (3) the life estates of the wife and son were not excludible for they could not come into enjoyment until after the decedent died inasmuch as he reserved the income for his natural life.

The Court of Appeals concluded that "since the son and wife could come into possession or enjoyment only by surviving the decedent and he retained a reversionary interest of the statutory amount, it is plain that the entire value of the trust property must be included in the gross estate."

Staff: Elmer J. Kelsey and Loring W. Post (Tax Division)

Income Tax - Partnerships - Distributive Shares Taxable to Withdrawing Partners as Ordinary Income despite Sale of Interests. Leff and Sindeband v. Commissioner (C.A. 2, July 31, 1956). This case presents the question as to the proper allocation of the net income of a partnership, for its fiscal year ended January 31, 1949, taxable to the partners for 1949. Prior to the close of the fiscal year, two of the partners (the taxpayers here) orally agreed to sell their interests in the partnership to the continuing partners; and there was a conflict

of testimony as to the date on which the agreement was to be effective with respect to computation of profits. The Tax Court found and concluded in effect that under the agreement the outgoing partners were not to share in profits after October 14, 1948; and that the partnership was actually dissolved as of that date, with only the formal dissolution and the agreed payments postponed until January 31, 1949. The Tax Court also held that the withdrawing partners' distributive shares of ordinary income which were reflected in the sales price of their interests were taxable to them as ordinary income.

The Court of Appeals affirmed, upholding the Tax Court's findings as adequately supported by the record, and also holding that the taxpayers "must pay an ordinary income tax on the sales proceeds of their partnership shares to the extent that such proceeds reflect items otherwise taxable to them at ordinary income rates, i.e., current shares of profits, salary and interest." And in this connection the Court of Appeals, cited the following authorities: Helvering v. Smith, 90 F. 2d 590 (C.A. 2); Le Sage v. Commissioner, 173 F. 2d 826 (C.A. 5) United States v. Snow, 223 F. 2d 103 (C.A. 9), cert. den. 350 U.S. 831; Hulbert v. Commissioner, 227 F. 2d 399 (C.A. 7th) (apparently overruling Swiren v. Commissioner, 183 F. 2d 656 (C.A. 7), cert. den., 340 U.S. 912, and Meyer v. United States, 213 F. 2d 278 (C.A. 7)). Thus the Court of Appeals recognized that there is uniformity in the Circuits with respect to the basic issue here.

Staff: Loring W. Post (Tax Division)

Time when Allocable Portion of Proceeds of Mortgage Salvage Operation Conducted by Trustee Is Taxable to Income Beneficiary of Trust. Estate of Robert L. Dula, Deceased v. Commissioner (C.A. 2, May 25, 1956). Decedent was life income beneficiary of a testamentary trustee owning interests in bonds and mortgages on two pieces of New York realty. On default, the trustee foreclosed, bidding in the properties, and, after conducting mortgage salvage operations for a number of years, sold the properties in 1944 and 1945 for less than the face amount of the original mortgages. The consideration received consisted partly of cash and partly of new purchase money bonds and mortgages. In May of 1945, the trustee, as required by the laws of New York, allocated a certain portion of the sales proceeds to decedent, a cash basis taxpayer. Decedent's death on November 15, 1945, terminated the trust. A petition for settlement of the trustee's final account was filed with the Surrogate in 1946. The Surrogate's final decree approving the account and ordering distribution was entered in 1947.

The Tax Court held that the portion of the proceeds allocated to decedent from the 1945 sale of one of the properties was taxable to him in his last taxable period, January 1, 1945 to November 15, 1945.

On appeal to the Second Circuit, the executrix of decedent's estate conceded that decedent's allocable share of the proceeds of sale of the property represented taxable income to him although the trustee had sold the property at a loss. The executrix contended, however, that portion

of decedent's allocable share of the sales proceeds which he did not actually receive in 1945 was not taxable to him in that year since he reported his income on a cash basis.

The Second Circuit rejected this argument and affirmed the decision of the Tax Court, holding that under Section 162(b) of the Internal Revenue Code of 1939 the entire portion of the proceeds of the 1945 sale allocable to the decedent was taxable to him in that year as currently distributable income whether distributed or not.

Staff: Joseph F. Goetten (Tax Division)

Net Worth Computation Involving Entire Family Group Upheld. Lias v. Commissioner (C.A. 4, August 10, 1956). Taxpayer and his wife, filed petitions for redetermination of income taxes, penalties and interest, for the years 1942 to 1948, inclusive, amounting to over two million dollars. The principal question was the correctness of the Commissioner's action in assessing taxes against taxpayer by use of the net worth expenditures basis. During the years involved he operated several enterprises as partnerships and corporations. His records were incomplete and record ownership of assets had been shifted and reshifted among members of his immediate family until it was almost impossible to determine real ownership. He was in complete control of the various enterprises and apparently shifted the family stock, assets and money around as he saw fit.

Revenue agents were faced with a difficult problem of determining his correct tax and, because of the circumstances, they made a net worth computation on the family group as a whole, including taxpayer's wife, brother, mother-in-law, and brothers-in-law, crediting against the amounts so determined the net income actually reported by all members of the group and giving credit for all taxes paid by them. As a result of the computations it was determined that taxpayer had failed to report large sums of income in the years involved. The Court of Appeals upheld the Tax Court which had sustained the Commissioner's determinations and further held that the imposition of fraud penalties was proper under the circumstances and that the statute of limitations did not apply since fraud had been established.

Staff: Homer R. Miller (Tax Division)

#### District Court Decisions

Income Tax - What Constitutes Waiver -- Accrual of Interest on Tax Deficiency after Offer to Stipulate Deficiency in Tax Court. Algodon Manufacturing Co. v. Gill (M.D. N.C.). Following a proposed assessment of additional income taxes for 1944 and 1945, taxpayer petitioned the Tax Court for a redetermination. While the case was pending, a settlement was reached pursuant to which taxpayer submitted an "Agreement to Stipulate" certain deficiencies, subject to acceptance by the Commissioner. This document was submitted June 19, 1951, but

was not accepted until May 30, 1952. The Tax Court thereupon entered judgment on the basis of the stipulation, which taxpayer paid. In addition, the Commissioner assessed interest up until the time of acceptance of the offer to stipulate. Taxpayer sued for a refund of this interest, contending that its agreement to stipulate constituted a waiver of restrictions on assessment and collection under Section 272 (d) of the 1939 Code, which terminates interest on a tax deficiency 30 days after submission of such waiver. The Collector argued that the agreement to stipulate, being conditional, could not constitute a waiver until accepted.

The Court sustained the Collector's motion for summary judgment, stating that the offer to stipulate remained outstanding until withdrawn or accepted, bringing the case within the rule of United States v. Goldstein, 189 F. 2d 752 (C.A. 1).

Staff: United States Attorney Edwin M. Stanley (M.D. N.C.)  
Carrington Williams (Tax Division)

#### State Court Decision

Priority of Liens - (1) Property Taxes not Entitled to Priority as Expense of Sale over Prior Federal Tax Lien; (2) United States by Merely Filing Notice of Appearance Does not Waive Right to Object to Referee's Report Following Sale. Highland - Quassaick National Bank and Trust Co. of Newburgh v. E. Totonelly Sons, Inc., United States et al. (Supreme Court, Orange County, New York)

In a mortgage foreclosure action, plaintiff joined the United States under 28 U.S.C. 2410 because of a federal tax lien which arose on March 19, 1953, and was recorded on July 22, 1953. The United States filed a Notice of Appearance and waived service of all papers except judgment of foreclosure, notice of sale, referee's report of sale, and papers concerning surplus money proceedings, notice of receiver's account, etc. A judicial sale was held and a referee's report was submitted proposing a distribution of the proceeds, inter alia, to the City of Newburgh for 1955-1956 real property taxes and water rates. This accorded with Section 1087, New York Civil Practice Act, which provided that taxes, assessments and water rates be paid as an expense of the sale, effecting an absolute priority. The Government objected to confirmation of the referee's report on the ground that such an absolute priority over the prior federal taxes was contrary to the "first-in-time, first-in-right" rule laid down by United States v. City of New Britain, 347 U.S. 81.

In a briefly worded order, the Court sustained the Government's objection holding that the Referee "had no power or authority to prefer local taxes over the Government's lien for taxes," citing the New Britain case.

This significant victory supports two propositions: (1) despite local practice, local taxes cannot be preferred over federal taxes as

a part of the costs of the action or an expense of the sale, but must take priority according to the New Britain rule; and (2) by filing a Notice of Appearance, the United States has not waived its right to object to the Referee's Report following a sale.

Staff: Assistant United States Attorneys William Koerner and James R. Lunney (S.D. N.Y.)

CRIMINAL TAX MATTERS  
Appellate Decisions

Validity of Section 145(b) of 1939 Code in View of Existence of Section 3616(a). The problem posed by the overlap between Sections 145(b) and 3616(a) of the Internal Revenue Code of 1939 has been discussed in two recent issues of the Bulletin (June 8, 1956, pages 403-405; June 22, 1956, pages 441-442). We now have three new opinions from the Courts of Appeals which bear upon this important question: United States v. Moran (C.A. 2), decided August 15, 1956; United States v. Achilli (C.A. 7), decided July 31, 1956; and Smith v. United States (C.A. 8), decided August 16, 1956.

1. In the Moran case the appellant contended that (1) he had been sentenced illegally under the felony provision, Section 145(b), and (2) sentence should have been imposed under the misdemeanor statute, Section 3616(a), despite the citation of Section 145(b) in the indictment. Although the point had not been raised in the trial court, the Second Circuit, citing Rule 52(b) of the Federal Rules of Criminal Procedure, relating to plain error, disposed of the contention on the merits. The Court stated that both the indictment and the proofs were sufficient to support convictions under either statute but held that the case is controlled by United States v. Beacon Brass Company, 344 U.S. 43 and United States v. Gilliland, 312 U.S. 86. In those cases it was held that where two statutes, each of which proscribe some conduct not covered by the other, overlap, a single act or transaction may violate both, at least where some different proof is required for each offense. The Court pointed out that only Section 145(b) requires proof that the tax evaded was an income tax and only Section 3616(a) requires proof that there was a delivery or disclosure of a false statement or return. This holding is not inconsistent with the Supreme Court's decision in Berra v. United States, 351 U.S. 131, in which it was held that the trial court was not required to instruct the jury that it might find the defendant guilty of the "lesser crime" proscribed by Section 3616(a). The rationale of the Berra decision is that the facts necessary to prove the felony in that case were identical with those required to prove the misdemeanor; hence there was no factual basis upon which the jury could discriminate between the two statutes. This is equally true of the Moran case. However, it is the indictment and the proof that must be looked to in determining whether there is a need to instruct the jury as to lesser offenses necessarily included in the crime charged. It is the overlapping statutes, examined without regard to the facts of any particular case, that must be looked to in deciding the propriety of prosecuting and sentencing a defendant under either statute. American Tobacco Co. v. United States, 328 U.S. 781, 787-788.

2. The Seventh Circuit's opinion in the Achilli case was in denial of a petition for rehearing. The appellant, who had been convicted under Section 145(b), contended that the trial court erred in imposing a sentence greater than that prescribed under Section 3616(a). He had not raised the point in the trial court or on the original appeal (see Bulletin, June 22, 1956, page 440). The Court refused to consider the contention on the merits on the ground that it is implicit in the Supreme Court's decision in the Berra case that the validity of a sentence under Section 145(b) must be challenged by an appropriate motion in the trial court. In other words, if the legal question was not preserved in Berra, where the existence of Section 3616(a) was at least called to the trial court's attention by a request for a lesser included offense instruction, a fortiori it was not preserved in the Achilli case "in which there was no intimation of error below in the imposition of sentence or on appeal until the petition for rehearing was filed." The Achilli case is in apparent conflict with the Moran case on the narrow point that the Seventh Circuit refused to consider the point on the merits while the Second Circuit, under identical circumstances, did so.

3. Smith was convicted under Section 145(b) and sentenced to imprisonment for a period of one year and one day and fined \$2,000. He contended that the District Court should have granted his motion to dismiss the indictment on the ground that, despite its citation of Section 145(b), it really alleged an offense under Section 3616(a) and therefore the general criminal statute of limitations, then three years, was applicable. The Eighth Circuit, following its decision in Dillon v. United States, 218 F. 2d 97, and Berra v. United States, 221 F. 2d 590, held the contention to be without merit on the ground that Section 3616(a) does not apply to income tax cases. The Court pointed out that in affirming Berra's conviction, the Supreme Court did not decide that the section is so applicable but merely assumed that it was for purposes of that case. We might point out that the Internal Revenue Code of 1939 contains a number of provisions making wilful attempted evasion of any kind of federal tax a felony, punishable by five years' imprisonment and a \$10,000 fine. Section 3616(a) overlaps not only Section 145(b) but all of these various felony provisions. We are of the opinion that if Section 3616(a) is not applicable to the income tax, it is not applicable to any other tax. It is anticipated that the confusion resulting from the majority and minority opinions in Berra v. United States, 351 U.S. 131, will be cleared up by the Supreme Court sometime during the coming term.

Staff: Moran: United States Attorney Leonard P. Moore and  
Assistant United States Attorney C. W.  
Wickersham, Jr. (E.D. N.Y.)

Achilli: Dickinson Thatcher, Vincent Russo and Richard B.  
Buhrman (Tax Division)

Smith: United States Attorney Harry Richards, Assistant  
United States Attorneys Robert C. Tucker and  
Charles H. Rehm (E.D. Mo.)

District Court Decision

Oath - Requisites for - Validity of Complaint to Toll Statute of Limitations. United States v. Louis Birnbaum and Paul Birnbaum (M.D. Pa., July 25, 1956). Defendants were charged in one count with attempting to evade and defeat 1949 income taxes in violation of Section 145(b). A complaint, signed by the special agent, was filed with the United States Commissioner one day before the statute of limitations would have barred prosecution. The indictment was returned several weeks later. The District Court granted defendants' motion to dismiss the indictment on the ground that the complaint was invalid, not having been orally sworn to by the special agent, even though it showed on its face that the agent was "duly sworn" and the jurat was executed by the United States Commissioner. The agent testified that he had not raised his hand nor taken any form of oral oath, but that he had signed the complaint in the presence of the Commissioner after comparing it with his work papers to verify its accuracy.

There is a dearth of authority in the federal courts as to whether the signing of a document under the circumstances here present is sufficient to satisfy the requirement of an oath. The general rule is that no exact formula is required so long as there is an unequivocal act by which the signer consciously takes upon himself the obligations of an oath. The District Court relied heavily upon Spangler v. District Court of Salt Lake County, 140 P. 2d 755 (Utah). The Spangler case is contrary to the weight of authority in the state courts. Farrow v. State, 112 P. 2d 186 (Okla.); Atwood v. State, 111 So. 865 (Miss.); Cincinnati Finance Co. v. First Discount Corp., 17 N.E. 2d 383 (Ohio); State v. Anderson, 285 P. 2d 1073, 1076-1078 (Kans.); Vaughn v. State, 177 S.W. 2d 59, 60 (Tex.).

Serious consideration was given to taking a direct appeal to the Supreme Court. It was concluded, however, that although the changes would favor a reversal, the question was not of sufficient general importance to warrant Supreme Court review. The Treasury Department is alerting its agents to the danger of a repetition of this type of case and all United States Attorneys should likewise keep in mind the advisability of making sure that some form of oral oath is administered whenever a complaint is filed. The oath need not be administered in any particular form. Holy v. United States, 278 Fed. 521 (C.A. 7); United States v. Mallard, 40 Fed. 151 (D. S.C.); Cf. United States v. Klink, 3 F. Supp. 208, 210 (D. Wyo.).

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ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

Departmental Orders & Memos

The following Memoranda applicable to United States Attorneys' Offices have been issued since the list published in Bulletin No. 17 Vol. 4 of August 17, 1956.

<u>ORDERS</u>	<u>DATED</u>	<u>DISTRIBUTION</u>	<u>SUBJECT</u>
130-56	8-2-56	U.S. Attys. & Marshals	Registration Section- Functions
126-56	8-13-56	U.S. Attys. & Marshals (except those in Alaska)	Use of Table of Distances In Computation of Mileage
103-55 Revision No. 1	8-17-56	U.S. Attys.	Delegation of Authority In Civil Division Cases.

<u>MEMOS</u>	<u>DATED</u>	<u>DISTRIBUTION</u>	<u>SUBJECT</u>
201	8-6-56	U.S. Attys. & Marshals	Civil Service Retirement Law Analysis
202	8-2-56	U.S. Attys. & Marshals	Expenses of Qualification to Perform Notarial Services
203	8-13-56	U.S. Attys. & Marshals (except those in Alaska)	Fees of Witnesses
205	8-16-56	U.S. Attys.	Permanent Indefinite Appropriation for the Pay- ment of Certain Judgments
124-Supp. 3	8-15-56	U.S. Attys.	Revision of U.S. Attys. Docket & Reporting System Manual
180-Supp. 1	8-17-56	U.S. Attys.	Delegation of Authority In Civil Division Cases.

Use of Department File Numbers

The Department frequently receives from United States Attorneys lists of cases that are being reported for various reasons, for example, cases on which the collection of outstanding fines have been paid. Immediately upon receipt of these lists the legal divisions request the Records Branch to furnish file numbers. Since the United States Attorneys' offices have before them the Department file number as well as the other information when listing cases, the inclusion of the Department file number when preparing these lists would result in a saving of considerable time in the processing of such matters in the Records Administration Branch, as well as the legal divisions.

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Judicial Review of Deportation Order and Denial of Voluntary Departure - Fairness of Deportation Hearing. Ramirez-Rangel v. Butterfield, (C.A. 6, July 5, 1956). Appeal from order of District Court dismissing petition for writ of habeas corpus. Affirmed.

Petitioner, an alien admitted to the United States as an agricultural laborer, was found deportable on the ground that he had failed to depart in accordance with the terms of his admission. At the deportation hearing, he applied for voluntary departure under Section 19(c) of the Immigration Act of 1917, as amended, and produced character witnesses to establish good moral character. Evidence of conduct reflecting upon petitioner's moral character was also received. In his order denying voluntary departure, the hearing officer referred to the evidence favorable to petitioner but held that in view of other circumstances it was his "opinion" that petitioner was not entitled to relief from deportation. The Board of Immigration Appeals dismissed petitioner's appeal.

Petitioner brought habeas corpus proceedings challenging the validity of the order of deportation on the ground that the hearing officer made no finding to support his conclusion that petitioner was not entitled to relief from deportation; that his "opinion" that petitioner was not entitled to the requested relief was not a finding of non-eligibility; and that in the absence of a finding of eligibility there had been a failure to exercise the discretion to which the petitioner was statutorily entitled.

The District Court dismissed the writ holding that the words "other circumstances" used by the hearing officer did not refer to matters outside of the record but to the facts adverse to petitioner shown by the evidence but not testified to by petitioner's character witnesses; that the hearing had been fair in every respect; and that the denial of discretionary relief was not arbitrary or capricious.

The appellate court affirmed, finding that the failure of the hearing officer to make an express finding on the issue of petitioner's moral character was not prejudicial to petitioner's rights and did not render the hearing unfair; that the denial of voluntary departure was fully supported by the evidence either on the ground that moral character had not been established, or, if established by the character witnesses, that petitioner's conduct was such as to justify the denial.

NATURALIZATION

Continuity of Residence. Petition of Holzer, (S.D. N.Y., July 26, 1956). Petition for naturalization under general provisions of Immigration and Nationality Act, section 316 of which requires five years continuous residence

preceding time of filing petition for naturalization.

Petitioner had been absent from the United States during the five year statutory period on seven occasions exceeding six months, one such absence extending for one year and eleven months. She claimed that financial and other reasons prevented her return. The Court denied her petition for naturalization, holding that under the statute an absence of more than one year, whether or not voluntary, was an absolute bar to naturalization unless the absence fell within one of the statutory exceptions not applicable in petitioner's case.

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