

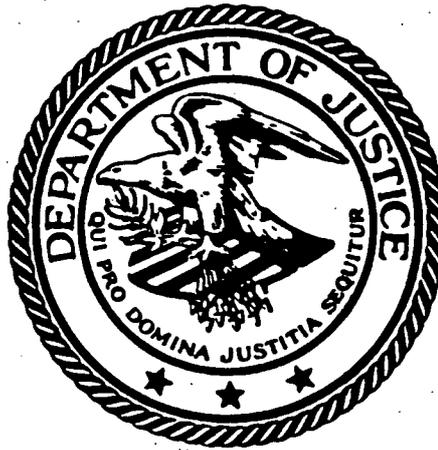
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**United States**  
**DEPARTMENT OF JUSTICE**

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**UNITED STATES ATTORNEYS**  
**BULLETIN**

RESTRICTED TO USE OF

DEPARTMENT OF JUSTICE PERSONNEL

REASSIGNMENT OF NEW CIVIL CASES  
INVOLVING INTERNAL SECURITY MATTERS

Effective February 14, 1957, Order No. 51-54 dated July 9, 1954, providing for the establishment in the Department of Justice of the Internal Security Division was amended as follows:

All new civil cases relating to internal security matters now assigned to the Civil Division are reassigned to the Internal Security Division.

\* \* \*

PRE-TRIAL PROCEDURES

The use of pre-trial procedures is an effective means to securing prompt disposition of cases. It appears, however, that the use of such procedures is not uniform throughout the Federal judicial districts. This may be due either to a lack of familiarity with such procedures or a disinclination to use them. To assist the Executive Office to ascertain to what degree pre-trial proceedings are being used, the United States Attorneys are requested to furnish their comments with respect to the following points:

- a. Are pre-trial procedures used in federal or state courts in your district?
- b. In what percentage of cases are such procedures used?
- c. If pre-trial is not used in your district, what is the reason therefor?
- d. If not now used, do you feel that its use would be of any material assistance in speeding up the disposition of cases?
- e. Do you believe the members of the Court would be agreeable to inaugurating such procedures at your suggestion?
- f. What are the objections, if any, to the establishment of pre-trial procedures for Government cases?

\* \* \*

STANDARDS OF CURRENCY

In the January 4, 1957 issue of the Bulletin appeared the standards of currency applicable to cases and matters in United States Attorneys' offices. In view of the fact that, in some districts, court is held only at stated intervals, cases which are completely prepared and ready for trial will be considered current. Accordingly under "Standards of Currency for United States Attorneys" on page 1 of that issue of the Bulletin, there should be added to paragraph (1) the following additional exception:

(g) those coded 211 - - "awaiting trial."

\* \* \*

REPORTS OF MONEYS COLLECTED

United States Attorneys are reminded that in reporting collections under Item 6 in the Financial Summary for the Month (Form DJS-5), only the amounts actually collected and which pass through the United States Attorney's office are to be reported. The item refers to payments made by debtors before suit is brought. It does not refer to cases of a specialized nature which are handled within the United States Attorney's district by Departmental attorneys without direct assistance from the United States Attorney. Judgments or compromise settlements in such cases should not be reported as collections by United States Attorneys.

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APPOINTMENT OF STUDENT ASSISTANTS

Attention is directed to the memorandum of December 16, 1955 from the Head of the Executive Office to all United States Attorneys on the subject of student assistant appointments. Paragraphs Nos. 3 and 5 of that memorandum specifically point out that entrance on duty will be delayed until completion of the character investigation and issuance by the Department of formal appointment papers. In two recent instances, entrance on duty was effected before issuance of the necessary formal appointment papers by the Department. This is in direct contravention of Departmental policy which directs that no new employee enter upon duty until appointment papers are prepared and issued. United States Attorneys are requested to abide by this regulation without exception.

\* \* \*

ECONOMY OF OPERATIONS

There are a number of ways in which United States Attorneys can exercise economy in their operations. One of these ways is a more judicious selection of both the number and types of witnesses. Where the testimony of a proposed witness, who lives outside the district, can be obtained by deposition, efforts should be made to obtain such deposition rather than incur the travel and subsistence expenses of the witness. Increased efforts should be made to obtain stipulations from opposing counsel as to the facts to be testified to by far-resident witnesses. An example of unnecessary expense occurred recently in a case in which the oral deposition of a Government witness was obtained under the conditions and safeguards prescribed by the Rules. Despite this, however, the witness was required to appear personally to testify and was requested to appear, not on the day of trial or the day before, but several days prior thereto, thus appreciably increasing the cost to the Government of this witness' travel and subsistence expense. No reason would appear why the personal appearance of this witness was required from half-way across the continent. Moreover, even if his deposition had not been available, his very brief testimony might well have been stipulated to by opposing counsel, had an effort been made to secure such stipulation. United States Attorneys should exercise the utmost care and forethought in the expenditure of Government funds and unnecessary expenditures such as illustrated above are to be avoided. In this connection, attention is directed to the item "Appropriation Trouble" in the Administrative Division section of this issue.

\* \* \*

CORRECT ADDRESSES

Addresses of witnesses, debtors, etc. furnished the Marshal for purposes of service of process should be as correct and current as possible. It appears that in some United States Attorneys' offices, old items are pulled from the files, with no attempt made to verify the addresses, and the Marshal is requested to serve process thereon. Correct addresses sometimes are available from the referring agency and also may be obtained from post offices through use of the post card request for correction of mailing list (Form USA-25). To avoid waste of time and effort by the Marshal and his staff, the addresses on all matter to be served should be carefully checked beforehand for currency and accuracy.

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STANDARDS OF CURRENCY

The Northern District of Iowa should have been included in the first section of the list which appeared in the February 15 issue of the Bulletin and which showed the number of districts in a current status as to criminal cases as of December 31, 1956.

\* \* \*

PRIOR AUTHORIZATION REQUIRED FOR ABSENCE FROM DISTRICT

The attention of all United States Attorneys is directed to the last paragraph under "Application for Leave," on page 24.1, Title 8, of the United States Attorneys Manual. That paragraph applies to United States Attorneys and requires that an application be submitted for leave in excess of two weeks or to cover any unofficial absence from the district. This instruction intends that prior authority will be obtained for any such absence and does not mean merely that notification will be made simultaneously with the beginning of the absence. United States Attorneys are requested to adhere to this Departmental requirement in all cases of such absence.

\* \* \*

IMPORTANCE OF DEPARTMENTAL FILE NUMBERS

Current instructions for the Litigation Reporting System require the United States Attorneys' offices to report Departmental file numbers on all items referred from the Department. It has been found, however, that there are many items on which such offices correspond with the Department, and to which file numbers are assigned, which apparently are not reported because the items are not really Department referrals. An example of this would be where suit is brought against the Government and service is received by the United States Attorney and the Department at the same, or approximately the same, time. Another instance would be a matter which has been referred directly to the United States Attorney's office by the agency concerned, and in connection with which the United States Attorney writes the Department, requesting information or instructions. On all such matters, the Departmental file numbers should be reported on the monthly machine listing.

\* \* \*

SURPLUS BOOKS

United States Attorneys' offices are at present furnished with volumes of "United States Treaties and Other International Agreements." Some offices have reported that these volumes are used very infrequently and that they occupy space which might be utilized more effectively. Such offices should write to the Procurement Branch of the Department, advising that they have no further use for the volumes and requesting instructions as to the proper disposition of the books.

\* \* \*

NEW UNITED STATES ATTORNEY

Mr. Ben Peterson, District of Idaho, was appointed by the Court February 24, 1957.

Mr. Leon H. A. Pierson, District of Maryland, was appointed February 22, 1957.

\* \* \*

JOB WELL DONE

The Federal Bureau of Investigation has commended Assistant United States Attorney Frank McGarr, Northern District of Illinois, on his successful opposition to a defense motion to suppress evidence in a recent case, and has expressed appreciation for his efficient handling of the difficult problem.

The work of Assistant United States Attorney Norman W. Neukom, Southern District of California, in the successful prosecution of a recent case involving armed robbery of a postmaster has been commended as outstanding by the Postal Inspector in Charge. The Inspector noted that defendants were represented by a formidable array of legal talent and that the lack of tangible evidence connecting defendants with the crime rendered the case more difficult to prosecute, but that Mr. Neukom succeeded in overcoming all such handicaps and secured conviction of all three defendants.

Assistant United States Attorney Richard H. Pennington, Southern District of Ohio, has received letters of commendation from the Commanding Officer, Ordnance Corps, Milan Arsenal, Tennessee, and from counsel for a large corporation engaged in Government defense work for his successful defense of three suits brought against the corporation.

The excellent work of Assistant United States Attorney Prim B. Smith, Jr., Eastern District of Louisiana, in a recent habeas corpus case brought by a Chinese seaman against the District Director, Immigration and Naturalization Service, has been commended by the Acting Regional Commissioner of that Service. Mr. Smith not only succeeded in having the original adverse ruling vacated but also successfully defended the District Director in a contempt proceeding involving false charges which impugned the actions and intentions of the District Director and his staff. The commendatory letter stated that by obtaining full refutation of the charges and by his outstanding defense of the Service's actions in the matter, Mr. Smith succeeded in informing the public of the baselessness of the charges made against the Service.

The District Chief, Food & Drug Administration has expressed appreciation for the splendid manner in which United States Attorney Heard L. Floore and Assistant United States Attorney Cavett Binion, Northern District of Texas, handled a recent case involving the illegal dispensation of drugs. The matter presented was novel in that there were no circuit court decisions on the particular issue involved. The letter stated that the verdict was evidence of the thoroughness with which the case was prepared and of the excellent manner in which the facts were presented to the jury.

Assistant United States Attorney Arnold G. Fraiman, Southern District of New York, has received from the General Counsel, Securities and Exchange Commission, an expression of appreciation and thanks for the very fine job done by him in a recent case involving violations of the SEC laws and tax laws. The case was an extremely complicated one which lasted 7½ weeks before the several defendants entered pleas of guilty or nolo contendere. In the trial, Mr. Fraiman was opposed by very experienced and able counsel, among which was a former United States Attorney for the district. The General Counsel stated that the results achieved are a tribute to the great skill and ability displayed by Mr. Fraiman in his handling of the difficult prosecution.

The General Counsel and the Regional Administrator, Securities and Exchange Commission, have written to United States Attorney Clifford M. Raemer, Eastern District of Illinois, extending congratulations and thanks for his splendid work in a recent case and expressing appreciation for the personal attention which he gave to the case. The letters also singled out for commendation, Assistant United States Attorney Charles R. Young who assisted in the preparation and trial of the matter. The case was a complicated one involving the sale of fractional interests in oil and gas leases scattered throughout numerous states. It required the examination of over 1,000 exhibits, the introduction of 406 exhibits by the Government and 296 by the defense, and the trial lasted for 28 days. The jury rendered a verdict of guilty on all counts against the defendant.

**INTERNAL SECURITY DIVISION****Assistant Attorney General William F. Tompkins****SUBVERSIVE ACTIVITIES**

**False Statement. United States v. Anthony Joseph Travis, (E.D.N.Y.)**  
On November 21, 1956, Anthony Joseph Travis was indicted for a violation of 18 U.S.C. 1001 based on his false denial of ever having been arrested in an application for Government employment which he submitted to the Department of the Navy.

On February 26, 1957, he entered a plea of guilty to the indictment. March 22, 1957 has been set for sentencing.

**Staff: Assistant United States Attorney Frances Thaddeus Wolff (E.D. N.Y.)**

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C I V I L   D I V I S I O N

Assistant Attorney General George Cochran Doub

S U P R E M E   C O U R TP U B L I C   W O R K S

Local Government Unit Held Liable to Repay Federal Funds Advanced Under War Mobilization and Reconversion Act of 1944 for Preparation of Plans for Public Works. United States v. City of Wendell, Idaho (Supreme Court, February 26, 1951). The Supreme Court denied a petition for certiorari in the above case. See Vol. 4 Bulletin, p. 700.

Staff: William Ross (Civil Division)

C O U R T   O F   A P P E A L SD E F A M A T I O N

Absolute Immunity - Army Personnel Official's Statements of Reasons for Discharging Former Army Employee Held Absolutely Privileged. Arthur W. Newbury v. Harold Robert Love (C.A. D.C., February 28, 1957). Love instituted this suit for defamation against Newbury, an Army personnel official, for allegedly slanderous remarks made by Newbury to Love's attorney. Love's attorney had called Newbury to inquire about the reasons for Love's discharge from his position with the Department of Defense. Newbury moved for a directed verdict on the ground that the remarks were qualifiedly and/or absolutely privileged. The district court denied the motion and the jury awarded plaintiff \$100. On appeal, the Court of Appeals reversed and remanded with instructions to dismiss on the ground that the remarks were absolutely privileged.

Staff: Joseph Langbart (Civil Division)

J U D I C I A L   R E V I E W

Judicial Review of Denial of Claim by Foreign Claims Settlement Commission Precluded by Statute. Paul Dayton v. Whitney Gilliland, et al. (C.A. D. C., February 14, 1957). Dayton brought this action against the members of the Foreign Claims Settlement Commission and the Secretary of the Treasury, seeking to compel reconsideration of the Commission's decision denying Dayton's claim to a share in the Yugoslav Claims Fund. The essential allegations of the complaint were similar to those in the case of de Vegvar v. Gilliland, 228 F. 2d 640 (C.A. D.C.), certiorari denied, 350 U.S. 993 (see 4 U. S. Attorneys' Bulletin 36), in which the Court of Appeals had ruled that Section 4(h) of the International Claims Settlement Act of 1949 (22 U.S.C. 1623(h)), precluding review of the decisions of the Commission "by any court by

mandamus or otherwise", required the dismissal of the complaint. Relying on the de Vegvar case, the district court dismissed the complaint for lack of jurisdiction over the subject matter, and also denied Dayton leave to amend his complaint so as to allege a "property right" in the Yugoslav Claims Fund of which he had been deprived by the Commission without due process of law. The Court of Appeals affirmed, holding that the "conclusory statements" of the proposed amendment did "not suffice to change the result called for by de Vegvar". Stating that Dayton could claim solely by virtue of his interest in the Fund created by the Act, and that under its terms he was not entitled to complain, the Court added that "certainly" there had been "no taking of plaintiff's property by the United States".

Staff: B. Jenkins Middleton (Civil Division)

#### NATIONAL SERVICE LIFE INSURANCE

Army's Failure to Deduct Premiums from Ex-Serviceman's Retirement Pay, as Authorized by Insured, Does Not Lapse Policy. Lawrence Gray, Administrator of Estate of Mildred Reed Wood v. United States (C.A. 9, February 14, 1957). The insured, on retirement from the Army on December 31, 1947, had authorized the payment of his NSLI premiums as a deduction from his retirement pay. Until the insured's death 13 months later, he received retirement pay without the deductions being made. The district court held that the policy lapsed. On appeal, the Court of Appeals reversed and permitted recovery by the beneficiary's administrator. The Court relied on the fact that the Army, which was the VA's agent to collect the premium payments, had a sufficient sum on the first of each month for premium payments. VA regulations provided that when premiums were deducted from retirement pay, they shall be treated as paid. In these circumstances, the Court said that the situation was within the spirit if not the letter of VA's regulations whose purpose is to prevent lapse of NSLI policies. The Court said the failure to collect was the negligence of the Army, the VA's agent, and the VA at all times had the power to make itself whole by deducting the premiums due from the amount of the policy.

Staff: United States Attorney Laughlin Waters, and  
Assistant United States Attorneys Max F. Deutz  
and Hiram W. Kwam (S.D. Calif.)

#### DISTRICT COURT

#### TORT CLAIMS ACT

United States Held "Insured" Under Automobile Liability Policy of Its Employees; Its Rights May Be Asserted Against Insurer by Third-Party Complaint Under Rule 14(a), F.R.C.P. Robert J. Irvin v. United States v. The State Automobile Insurance Association (D.C. S.D., February 4, 1957). Plaintiff sued the United States as sole defendant for injuries arising from a collision between plaintiff's automobile and one owned by Robert Troup, a rural mail carrier. Troup held a

liability policy covering his automobile. The policy declarations indicated Troup's occupation as "rural mail carrier" and his employer as "United States Government;" and that his automobile was to be used for "business and pleasure." The policy obligated the company to pay on behalf of its "insured" all damages for which he should become "legally obligated" and to defend him against suit. "Insured" was defined to include, in addition to the named policyholder, any "person or organization legally responsible for the use" of the automobile described in the policy. The United States asserted that it was such an "organization," therefore an "insured," and called on the insurance company to assist in defense of the action and to indemnify the United States. The company disclaimed responsibility and was impleaded as a third-party defendant. After trial, judgment was rendered against the United States in favor of the plaintiff but also in favor of the United States against the company for the full amount of plaintiff's judgment.

The company had contended, first, that the United States could not be regarded as an "organization"; second, that the policy was a "legal liability" policy on which the company could not be held unless liability were established against its policy holder (Troup); third, that since he could not be sued for indemnity by the United States (under United States v. Gilman, 347 U.S. 507), the company could not be sued by the United States in this action; and, finally, that, in any event, the assertion of a claim against the company before establishment of the insured's obligation to pay was barred by the policy's "no action" clause: "no action shall lie against the Association . . . until the amount of the insured's obligation to pay shall have been finally determined. . . ."

The Court, following Rowley v. United States, 140 F. Supp. 295, rejected all these contentions. It saw no reason, in principle, why the United States should not be regarded as such an "organization." It distinguished two apparently contrary state court decisions on the ground they had been decided before the Federal Tort Claims Act, when the sovereign immunity of the United States precluded tort liability against it. Furthermore, the policy had been issued with knowledge of the Tort Claims Act; and the policy language, together with the declarations, affirmatively indicated that the parties intended to provide for the United States precisely the kind of coverage now asserted. Whatever doubts there might be in that regard should be resolved against the company in accordance with the "strict construction" rule commonly applicable in such matters. As to the "no action" clause, the Court indicated that such a clause was inconsistent with the underlying purpose of Rule 14 to expedite the termination of litigation and should, in the public interest, yield to that rule.

Staff: United States Attorney Clinton G. Richards, and  
Assistant United States Attorneys Lyle E. Cheever  
and K. J. Morgan (D. S.D.); Harry N. Stein  
(Civil Division)

DECLARATORY JUDGMENT

Declaratory Judgment Procedure Held to Be Available in District Court of Virgin Islands. Ottley v. DeJongh (D.C. V.I., February 6, 1957). Plaintiff brought a taxpayer's suit against the Commissioner of Finance of the Virgin Islands for a declaratory judgment that an attempted partial veto of an Act of the legislature was ineffective for the reason that the Federal Authority granting the Governor a partial veto did not apply to this Act. The "vetoed" provision of the Act required the approval of a legislative committee before reimbursement for certain expenses could be made to officials. Although a specific instance of reimbursement to an official without such approval was described in the complaint, the expenses were incurred prior to passage of the Act. Defendant moved to dismiss on several grounds, including lack of a justiciable controversy and lack of jurisdiction in the District Court of the Virgin Islands to grant a declaratory judgment pursuant to 28 U.S.C. 451. The Court dismissed the complaint on the ground of lack of a justiciable controversy. The opinion, however, upholds the power of the District Court of the Virgin Islands to grant a declaratory judgment, by virtue of the purported applicability of Rule 57 to that court and also because of the court's asserted inherent power to adopt the procedure. (Compare Reese v. Fultz, 96 F. Supp. 449, holding that the District Court for the District of Alaska does not possess jurisdiction to grant a declaratory judgment.)

Staff: United States Attorney Leon P. Miller (Virgin Islands);  
David V. Seaman (Civil Division)

TAX COURTRENEGOTIATION

War Contracts Price Adjustment Board Had Authority to Reduce Sales Below \$500,000 by Renegotiation. Gamlen Chemical Company v. United States (T.C., January 31, 1957). Section 403(c)(6) of the Renegotiation Act of 1943, 50 U.S.C. App. 1191, provides that the Act is applicable to all contracts unless the aggregate of the amounts received or accrued by the contractor and all persons under common control with the contractor does not exceed \$500,000. A father and two sons operated a California partnership known as Gamlen Chemical Company and received or accrued \$400,955 in 1944 from renegotiable contracts. The same partners operated a second partnership known as Gamlen Marine Service Company and received or accrued \$157,335 from renegotiable contracts during 1944. The War Contracts Price Adjustment Board determined excessive profits of Gamlen Chemical Company in the amount of \$100,000 for 1944, thus reducing the combined sales after renegotiation of the commonly controlled partnership to less than \$500,000. A regulation issued under the 1943 Act by the Board had prohibited the reduction of sales by renegotiation of commonly controlled

contractors to less than \$500,000. However, in Wolff v. Macauley, 12 T.C. 1217, the Tax Court stated that the regulation was unauthorized by the statute and determined excessive profits in an amount which reduced sales below the statutory minimum. The Wolff case involved a 1942 renegotiation and arose under the Renegotiation Act of 1942, and the regulation technically was not applicable to the year 1942. In this case, the Board made its determination after the Court's opinion in the Wolff case. The Court, pointing out that the language of the two statutes was "not materially different", entered its decision sustaining the administrative determination of excessive profits of \$100,000. The contractor has indicated it will appeal.

Staff: James H. Prentice (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Warren Olney III

IMMUNITY  
18 U.S.C. 1406

Conspiracy to Import Narcotics. United States v. George Poole, et al. An eleven count indictment has been returned in the Northern District of California charging that eight waterfront employees engaged in a series of conspiracies to import narcotics from the Orient from early 1953 to the latter part of 1954. The indictment was brought about by the use, for the first time in the United States of a newly enacted statute permitting the granting of immunity to witnesses whose testimony is necessary to the public interest but who have refused to testify on the grounds that their testimony might tend to incriminate them.

As result of the testimony thus obtained, the Grand Jury charged seven seamen and one longshoreman with conspiracy to import, on eleven occasions, quantities of narcotics ranging from 20 to 30 ounces per voyage on various voyages of the S.S. PRESIDENT WILSON and the S.S. PRESIDENT CLEVELAND to Hong Kong between January 1953, and October, 1954. The testimony of the witnesses disclosed that prior to each voyage on which narcotics were to be smuggled into the United States, a group of seamen would agree together as to which of them was to make the trip and as to how much each was to invest. The seaman selected would then carry the money to Hong Kong and obtain quantities of heroin for about \$90 an ounce. The narcotics were then concealed in a quilted pillow case aboard the ship. Removal from the ship was effected by transferring the narcotics to the lining of a heavy coat, previously placed on board, which a longshoreman, who came aboard to pick up laundry, would exchange for a similar coat worn by him. After the narcotics were safely ashore, the conspirators would meet and divide the narcotics. It is estimated that the narcotics illegally imported in this manner had a wholesale value of \$80,000 and a possible retail value of 20 times as much.

NARCOTICS

Concealment of Narcotics Illegally Imported - Validity of Arrest without Warrant. Draper v. United States (146 F. Supp. 689). On September 21, 1956, an indictment was returned charging the defendant with the transportation and concealment of narcotics illegally imported. A plea of not guilty was entered on October 12, 1956. Thereafter, defendant filed a motion to suppress the evidence contending that the arrest and subsequent search were illegal. Noting that under the Narcotics Control Act of 1956 (26 U.S.C. 7607) narcotics agents may arrest without a warrant where a violation is committed in their presence or where the agent has reasonable cause to believe that the person to be arrested has committed or is committing a violation of the laws relating to narcotics, the

Court held that the arrest and subsequent search were lawful. Defendant alleged that the information on which the officer acted was hearsay and not sufficient to constitute probable cause. The information, which in this case came from an informer known to be reliable, was to the effect that a named individual, whose physical characteristics were described, would arrive by train in Denver, Colorado, with a quantity of narcotics. Agents located the defendant as he left the train, observed that he met the description in all respects and made the arrest. In overruling the motion to suppress, the Court held that where information by an informer was corroborated in part by the visual observations of the officer, probable cause existed to make an arrest although the information regarding the possession of narcotics was hearsay. After trial by the Court, the defendant was convicted and sentenced to ten years' imprisonment. A notice of appeal has been filed alleging error in the admission of evidence taken from the defendant at the time of the arrest.

Staff: United States Attorney Donald E. Kelley;  
Assistant United States Attorney John S. Pfeiffer  
(D. Colo.).

#### ANTIRACKETEERING

Extortion - Acceptance of Bribes. United States v. H. H. Hudson, (W.D. Ky.). On December 6, 1956, Herbert H. Hudson, Business Agent of Local 369, Electrical Workers Union, was found guilty by a jury, of having extorted \$3,000 from the Kvalsten Electric Company, Inc., in violation of 18 U.S.C. 1951. On December 20, 1956, in the same Court, Hudson entered a plea of guilty to an indictment charging him with extortion from the Gates Electric Company in violation of the same statute. This latter indictment had been returned by a Grand Jury in the Southern District of Florida and transferred under Rule 20 to the Western District of Kentucky. On this date he also entered a plea of guilty to an indictment in seventeen counts charging violations of Section 302(b) of the Labor Management Relations Act, and sentences were passed on all indictments. Hudson received terms of imprisonment totalling 10 years and was fined \$10,000.

As Business Agent for Local 369, Hudson had complete control of the supply of labor for the electrical work in the numerous large construction projects in the Louisville area over the past ten years. Contractors coming into the area had to do business with Hudson or else they could not perform their contracts. Hudson's usual "fee" for furnishing labor was 1% of the amount of the contract. In the Gates Electric Company case he collected \$3,500. In the seventeen count indictment under the Labor Management Relations Act it was charged in some of these counts that he received from one firm payments totalling over \$40,000 which he had caused the company to pay to his wife "for secretarial services."

When imposing sentences, Judge Shelborne described Hudson's crimes as "The rotting mudsills that will undermine the stability of business and the integrity of men engaged in it."

Staff: United States Attorney J. Leonard Walker (W.D. Ky.).

#### FRAUD

Procurement Frauds - False Statement - Conspiracy. United States v. Milton Marks Corporation (CA 3). This case concerned an attempt to defraud the government in the performance of a contract to furnish cartridge clips and involved charges that, on the instruction of the corporation's foreman, component parts of the clips, earlier rejected by government inspectors, were incorporated in articles ultimately shipped under the contract.

An indictment in two counts charged (1) the corporation, its president and foreman with conspiracy to defraud the United States and (2) the corporation and its president with filing a false claim in violation of Title 18 U.S.C. 287. Although a directed verdict of acquittal was entered as to the individual defendants, a jury convicted the corporation, whereupon a fine of \$5,000 and costs of \$719 were imposed. On appeal the defendant's principal contention was a lack of sufficient evidence to support the jury verdict.

The Court, however, in affirming the conviction, noted that the false claim was made in an invoice covering some 100,000 clips shipped in two lots on April 20, 1953, and that, in presenting said claim for payment, the corporation had represented goods as meeting contract specifications. Commenting upon the government's effort to establish the fraudulent nature of the claim by proving that the corporation, acting through its general foreman, had wilfully caused a large quantity of defective clips to be included in the lots mentioned above, the Court observed that, as a matter of law, proof of such misconduct on the part of the general foreman would sustain a charge of corporate criminality. On the question of whether the evidence did support a finding that the foreman wilfully caused the inclusion of substandard clips in the several shipments, the court first observed that said shipments did, in fact, contain substantial quantities of defective merchandise demonstrated by two inspections on the part of the government conducted one week and one year after delivery, respectively, and then concluded, with respect to the establishment of intentional inclusion of such defective clips, that there was evidence to the effect (1) the foreman had instructed other employees to put rejected clips at the bottom of boxes; (2) that he had been seen doing this himself; (3) that he had caused substitution in boxes already approved and (4) that he had, in the absence of the inspectors, instructed employees assembling the clips to substitute ill-fitting or rejected parts for those which articulated properly.

Staff: United States Attorney D. Malcolm Anderson, Jr.,  
Assistant United States Attorney Hubert I. Teitelbaum  
(W.D. Pa.).

## FOOD AND DRUG

Misbranded Drugs. United States v. Adolphus Hohensee, an individual; El Rancho Adolphus Products, Inc., a Corporation; Scientific Living, Inc., a corporation (Appellants) (CA 3). Appellants were indicted on nine counts for causing the introduction and delivery into interstate commerce of misbranded drugs contrary to the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 321 et seq. The indictment specifically alleged that the drugs were misbranded within the meaning of 21 U.S.C. 352(f)(1) at the time of introducing into interstate commerce because of the failure of the labels to bear adequate directions for use. The indictment further charged that one of the defendants, Adolphus Hohensee, had previously been convicted for a violation of the Act. Counts eight and nine were withdrawn by the Government in the course of the trial and nolle prossed. All three appellants were convicted on the remaining seven counts.

Among other points raised on appeal the appellants contended that they were prejudiced by the action of the court in submitting a copy of the indictment to the jury which copy did not include the portions relating to the prior conviction of the defendant Hohensee. The procedure followed in this case was the one outlined on page 13 of the United States Attorneys' Bulletin of November 26, 1954, Vol. II, No. 24, relating to the issue of charging a prior conviction.

The Court of Appeals rejected the above argument saying:

Hohensee had been convicted previously under the Federal Food, Drug and Cosmetic Act and that was pleaded in the indictment in order to call forth the second offender penalties under Section 303(a) of 21 U.S.C. Knowledge of the prior conviction was meticulously kept from the jury and reference to it was blocked out of the copy of the indictment which went to the jury room. We find that no prejudice to the accused resulted from the procedure followed.

While there are a number of other points involved in the case its significance from the standpoint of Food and Drug prosecutions lies primarily in the fact that the Court of Appeals examined and approved the procedure which was used in charging and proving the second offense. Because of the fact that the statute does not specifically provide the machinery by which second offenses should be established and due to the fact that a second offense under the Food and Drug Act not only increases the penalty but changes the character of the offense from a misdemeanor to a felony, there has been considerable concern in the past as to the proper method for charging and establishing this element. Although the procedure outlined in the Bulletin has been successfully followed for a number of years this is the first instance where it has been specifically approved by a Court of Appeals.

Staff: United States Attorney J. Julius Levy;  
Assistant United States Attorney Stephen H. Teller  
(M.D. Pa.).

Adulterated Food. United States v. Arthur Thomas Lelles, Appellant (C.A. 9). Appellant was charged in a two count indictment together with Cultured Mushroom Industries, Inc., with unlawfully causing the introduction into interstate commerce of adulterated food. Specifically the indictment alleged that the food was adulterated within the meaning of 21 U.S.C. 342(a)(3) in that it consisted in part of a filthy substance by reason of the presence therein of insect larvae and insect fragments.

After a jury trial the defendants were found guilty on both counts. However, the trial judge entered an order for judgment of acquittal as to Cultured Mushroom Industries, Inc., and Lelles was sentenced to 18 months' imprisonment on each count to be served concurrently and was fined \$1,000 on each count.

Among other points raised the appellant contended that the lower court erred in submitting to the jury the case as to both the corporation and the individual. It was claimed that this was a misjoinder of the parties defendant. During the trial evidence showed that the shipments involved were made by Washington Mushroom Industries, Inc. (not a party to the proceedings) and that payment for the mushroom salt was also made to this latter corporation. Testimony showed however that the appellant owned all the shares but two "quality" shares in both Washington Mushroom Industries, Inc., and Cultured Mushroom Industries, Inc., the business address and place of doing business of each was the same and the appellant was the president of each corporation.

It was the appellant's argument that if the corporation charged in the indictment, of which the individual was the president, did not make the shipment and the court so found by dismissing the action then its president could not be guilty. The Court rejected this argument saying that under the doctrine of United States v. Dotterweich (1943) 320 U.S. 277, a person who has responsibility in the business activities of a corporation may be personally liable and that the language of the indictment which said in pertinent parts "\* \* \* and Arthur Thomas Lelles, an individual, at the time hereinafter mentioned president of said corporation \* \* \*", was not merely descriptive but charged Lelles personally as an individual with the commission of a violation.

There was also involved in this case a second offense in which the procedure outlined in the United States Attorneys' Bulletin was followed. The issue was not specifically raised as to the propriety of the foregoing procedure but it might be said that the court gave it tacit approval when it referred to it in a footnote.

Staff: United States Attorney Charles P. Moriarty;  
Assistant United States Attorney John A. Roberts, Jr.  
(W.D. Wash.).

LIQUOR LAWS

Wholesale Illegal Shipments of Liquor in Interstate Commerce - Falsification of Records of Wholesale Liquor Dealers and Illegal Shipments of Liquor Into Oklahoma, a Dry State. United States v. Sidney S. Galler, Isadore Silverman, Al Povitsky, Julius B. Goldberg and Maicy's Liquor, Inc. (N.D. Ill.). On January 24, 1957, a Federal Grand Jury in Chicago returned a 21 count indictment charging the defendants with several violations of the liquor laws. One count charged a conspiracy commencing in 1948 and ending in 1955, wherein the above parties, as officers and managing personnel of the above and predecessor corporations in Chicago, Illinois, repetitiously and extensively sold a large quantity of distilled spirits at wholesale and retail, and illegally shipped the liquor in falsely labeled packages to persons in other states, particularly the "dry" state of Oklahoma. In addition to the conspiracy count, the indictment charges many substantive offenses including nine counts for transportation of liquor into Oklahoma, five for transportation of liquor in interstate commerce without labeling the packages to show the contents thereof, and seven for falsifying of wholesale liquor dealer records. As the scheme developed, the shipments increased in volume. To cover these shipments the books and records of the corporations allegedly were falsified and the shipments were made under false or fictitious names and addresses of the consignees. The packages of liquor shipped were falsely labeled as other types of merchandise.

The case is of importance due to its scope and the long time that the fraudulent operations continued. It is of further interest because of the devious methods used to conceal the true nature and destination of the shipments of liquor and the inclusion in the indictment of charges under a seldom used statute, 18 U.S.C, 1263, for the interstate shipment of the falsely labeled packages of liquor.

\* \* \*

ANTITRUST DIVISION

Assistant Attorney General Victor R. Hansen

SHERMAN ACT

Rate Fixing Conspiracy. United States v. North American Van Lines, Inc. et al. (D. N. Mexico). On March 1, 1957 a grand jury sitting in Albuquerque, New Mexico, returned an indictment charging 16 corporations and 6 individuals with having violated Section 1 of the Sherman Act (15 USC 1) by fixing rates for the interstate transportation by motor vehicle of household goods of military personnel transferred from United States military installations in and near Albuquerque. All of the defendants are engaged in the transportation of household goods, a number of them on a nationwide scale. The indictment charges that defendants and their co-conspirators agreed to submit identical price quotations to the above-mentioned military installations, with the effect of eliminating competition among them for the movement of the household goods of personnel transferred from these installations.

Staff: Willard R. Memler, Joseph V. Gallagher and Robert S. Burk (Antitrust Division)

Restraint of Trade by Stage Scenery and Costume Designers. United States v. United Scenic Artists, (S.D. N.Y.). On March 5, 1957 a complaint was filed against United Scenic Artists Local 829 of the Brotherhood of Painters, Decorators and Paperhangers of America.

The complaint alleges that the Union is conspiring with some of its members in restraint of the interstate commerce involved in the production and presentation of plays, musicals, ballets and operas in violation of Section 1 of the Sherman Act.

According to the complaint, the membership of the Union is composed of employees and also of designers of scenery and costumes who are not employees but who own and operate scenery or costume designing businesses for their own account and profit as independent entrepreneurs.

The complaint charges that the Union and those of its members who are independent entrepreneurs prevent any member of the Union from performing any work on scenery or costumes unless the designs have been made by Union members. It is also alleged that no member designer of scenery will commence work unless the producer of the attraction has entered into a contract with a designer of costumes who is also a member of the Union, and vice versa. In addition, it is charged that the Union had fixed minimum prices and fees to be charged by its members for designing scenery and costumes.

Staff: John D. Swartz, Morton Steinberg and Louis Perlmutter (Antitrust Division)

Sherman Act Held Applicable to Professional Football. Radovich v. National Football League (No. 94). On February 27, 1956, the Supreme Court reversed the decision of the Court of Appeals for the Ninth Circuit that professional football is exempt from the Sherman Act. Petitioner, a professional football player, sought treble damages and injunctive relief for alleged violations of Sections 1 and 2 of the Act. The United States filed a brief amicus curiae and presented oral argument in support of petitioner.

The Court (per Mr. Justice Clark) held that its prior decision in Toolson v. New York Yankees, 346 U.S. 359, reaffirming its prior ruling in the Federal Baseball case (259 U.S. 200) that baseball is not subject to the Sherman Act, was applicable only to "the business of organized professional baseball" and not, as the court of appeals held, to all "team sports". The Court further held that the complaint was not defective because it failed to allege that respondents' practices injured the public, since "[p]etitioner's claim need only be 'tested under the Sherman Act's general prohibition on unreasonable restraints of trade'".

Staff: Charles H. Weston (Antitrust Division)

#### FEDERAL TRADE COMMISSION

Power of Commission to Prohibit Individual Use of Zone Delivered Pricing System Whose Concerted Use Found to Be Unlawful. Federal Trade Commission v. National Lead Co., et al. (Supreme Court) (No. 63). The Federal Trade Commission found that for many years respondents had conspired to fix prices of lead pigments through a zone delivered pricing system. It entered a cease-and-desist order which not only prohibited respondents concertedly from using such a system, but enjoined each respondent individually from using such a system for the purpose or with the effect of "systematically matching" its competitors' prices. The Court of Appeals for the Seventh Circuit set aside the portion of the order directed against individual use of zone delivered pricing, on the ground that Section 5 of the Federal Trade Commission Act authorizes the Commission to prohibit conduct "found to be unlawful," and that the commission had held only that concerted use and not individual use of the system was illegal.

On February 25, 1957, the Supreme Court unanimously reversed. The Court (per Mr. Justice Clark) pointed out that the Commission has "wide discretion in determining the type of order that is necessary to bring an end to the unfair practices found to exist"; and it held that the Commission was "justified in its determination that it was necessary to include some restraint in its order against the individual corporations in order to prevent a continuance of the unfair competitive practices found to exist."

Staff: Charles H. Weston (Antitrust Division)

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T A X D I V I S I O N

Assistant Attorney General Charles K. Rice

CIVIL TAX MATTERS  
Appellate Decisions

State Exemption Provisions Ineffective Against Federal Tax Lien. Fried v. New York Life Insurance Co. and United States (C.A. 2, February 15, 1957). Taxpayer was the insured under several life insurance policies which, in consideration of additional premiums, provided for disability payments. In 1953, taxpayer became totally and presumably permanently disabled, and the insurance company was under contractual liability to make monthly payments to him so long as he remained disabled. In 1951, however, substantial income tax deficiencies had been assessed against taxpayer and notice of lien served on the insurance company, followed by warrants of distraint and final notice and demand for payment. Accordingly, the insurance company declined to make payments to the taxpayer who thereupon brought suit against the insurance company in a New York State court. Because the United States had been joined as a necessary party, the suit was removed to the United States District Court for the Eastern District of New York. The insurance company also declined to turn over any of the monthly payments to the Government; consequently, the United States sued the insurance company, under Section 3710 of the Internal Revenue Code of 1939, for non-compliance with the levy, notice and demand which had been served upon it. Taxpayer was joined as a defendant in this second suit and both actions were consolidated. The insurance company paid into court the disability benefit payments that had by then accrued.

Taxpayer and the United States each moved for summary judgment. The District Court granted taxpayer's motion on the ground that under Article 7, Section 166, paragraph 2 of the New York Insurance Law, the disability payments were exempt from execution under the federal lien. The state law provided that no money or other benefits payable or allowable under any policy of insurance for disability arising from accidental injury or bodily infirmity or ailment of the person insured shall be liable to execution for the purpose of satisfying any debt or liability of the insured, whether incurred before or after the commencement of the disability.

The Court of Appeals reversed. It concluded that the aforementioned provision of the state law was not declaratory of a substantive right--as was another provision of the same law which the Second Circuit had considered in Rowen v. Commissioner, 215 F. 2d 641--and that, as a state exemption statute, it was therefore, under well settled law, ineffective against a statutory lien for federal taxes.

See, e.g., Kiefferdorf v. Commissioner, 142 F. 2d 723, certiorari denied, 323 U.S. 733; United States v. Truax, 223 F. 2d 229, 233 (C.A. 5); 55 Col. L. Rev. 98,100. The Court of Appeals pointed out that Congress had enumerated the exclusively permissive exemptions from federal lien in Section 3691 of the Internal Revenue Code of 1939 (see Section 6334 of the 1954 Code); that state exemption provisions were applicable only if they had been specifically adopted as exemptions under the Code (Fink v. O'Neil, 106 U.S. 272; Custer v. McCutcheon, 283 U.S. 514); and that the legislative history clearly demonstrates that Congress did not intend provisions of state law to grant additional exemptions from federal levy (H. Rep. No. 1337, 83rd Cong., 2d Sess., pp. A 408-A 409; S. Rep. No. 1622, 83rd Cong., 2d Sess., pp. 577-578).

Staff: Meyer Rothwacks (Tax Division).

Declaratory Judgment - Jurisdiction of District Court in Reorganization Proceedings under Chapter X of Bankruptcy Act to Render Judgment Respecting Tax Incidence of Proposed Sale - Statutory Bar to Restraint Against Assessment and Collection of Tax - Post-Bankruptcy Interest.  
In re Inland Gas Corp., et al. (C.A. 6, February 14, 1957). After more than twenty-six years of receiver and trustee operation of the properties of the debtors (Inland Gas Corporation, Kentucky Fuel Gas Corporation, and American Fuel & Power Company), and after extensive prior litigation (see Columbia Gas & Electric Corp. v. United States, 151 F. 2d 461, modification denied, 153 F. 2d 101, certiorari denied, 329 U.S. 737; In re Inland Gas Corp., 187 F. 2d 813; In re Inland Gas Corp., 208 F. 2d 13; In re Inland Gas Corp., 211 F. 2d 381, certiorari denied, 348 U.S. 840; In re Inland Gas Corp., 217 F. 2d 207), the United States District Court for the Eastern District of Kentucky, sitting in reorganization proceedings under Chapter X of the Bankruptcy Act, as amended, was called upon (1) to determine the tax effect of a proposed sale of assets under a plan of reorganization, and (2) to enjoin the assertion and collection of any tax claimed to be owing if such sale occurred. An offer of \$8,000,000 having been received from the Tennessee Gas Transmission Company for the properties of the debtors, the District Court had previously directed the trustees to prepare a new plan of reorganization providing for the sale of the fixed assets at public auction, with the Tennessee offer as a fair upset price, for the distribution of the net proceeds of the sale to creditors, and for the complete dissolution of the debtor corporations. The Commissioner of Internal Revenue had ruled, with respect to a prior offer, that such a sale would result in taxable gain. Accordingly, the trustees, after an unsuccessful application for a reconsideration of the ruling (which, on the basis of the Tennessee offer, indicated a potential tax liability exceeding one million dollars), petitioned the District Court for the relief mentioned above.

The District Court held that the petition in effect was an application for a declaratory judgment, and that it was therefore without jurisdiction to entertain it because of the provisions of the Federal

Declaratory Judgment Act (28 U.S.C., Sec. 2201) which, in cases of actual controversy, permits any court of the United States, upon the filing of an appropriate pleading, to declare the rights and other legal relations of any interested party seeking such declaration, except with respect to Federal taxes. The Court of Appeals agreed, and supported the District Court's denial of the petition on the additional grounds that, absent a showing of "special and extraordinary circumstances" (Miller v. Nut Margarine Co., 284 U.S. 498, 509), Section 7421 of the Internal Revenue Code of 1954 barred any suit to restrain the assessment or collection of any tax. In this connection, the Court of Appeals pointed out that it had been advised, some time after the hearing in the case, that the Tennessee offer had been withdrawn. That action, in its view, destroyed any claim that the failure to sell the debtors' assets without tax incidence would result in irreparable injury.

The Court of Appeals did not reach what it characterized as a "meritorious question", namely, whether the sale of the assets, if consummated, would be governed by Section 337 of the 1954 Code, which provides that where a corporation adopts a plan of complete liquidation on or after June 22, 1954, and all of its assets are distributed within one year from the adoption of the plan, no gain or loss shall be recognized from the sale or exchange of its property. The Government contended, following the rationale of the Commissioner's ruling, that despite the apparent literal applicability of Section 337 to the instant situation, that statute, aimed at the specific problems exemplified by Commissioner v. Court Holding Co., 324 U.S. 331, and United States v. Cumberland Pub. Serv. Co., 338 U.S. 451, was intended to eliminate the necessity of determining whether a corporation or its shareholders effected a sale of assets, and to provide some tax relief in such cases by eliminating a tax at the corporate level where there would also be a tax at the shareholder level. In the instant case, the shareholders, as such, would have received nothing in the liquidation in payment for their stock.

In another phase of the case, Judges Miller and Martin agreed with the District Court that post-bankruptcy interest should not be allowed to the public holders of the bonds and debentures of one of the debtors, the Kentucky Fuel Gas Corporation, under the general rule that post-bankruptcy interest is not payable on an unsecured claim as long as other claims which have been allowed remain unsatisfied. Chief Judge Simons dissented. He apparently considered that the creditors in question were secured creditors; and even if they were not, Judge Simons was of the opinion that on a balancing of equities as between creditors, the Kentucky Corporation bondholders would be entitled to post-bankruptcy interest in preference to the claims of other unsecured creditors. See Vanston Committee v. Green, 329 U.S. 165; Sampsell v. Imperial Paper Corp., 313 U.S. 215; In re Deep Rock Oil Corp., 113 F. 2d 266 (C.A. 10), certiorari denied, 311 U.S. 699; In re Taylor v. Standard Gas & Electric Co., 306 U.S. 307.

Staff: Meyer Rothwacks and C. Stanley Titus, Jr.  
(Tax Division)

CRIMINAL TAX MATTERS  
Appellate Decisions

Motion to Dismiss Indictment on Constitutional Grounds - Lay Experts - Effective Assistance of Counsel - Due Process - Initiation of Criminal Prosecution During Pendency of Jeopardy Assessment. United States v. Sidney A. Brodson (C. A. 7, February 7, 1957). Upon rehearing en banc, the Court of Appeals, in a three to two decision, adhered to the prior ruling of a panel of the Court (See Bulletin, November 23, 1956, pp. 763-765) and reversed the order of the district court dismissing the indictment on the grounds that the initiation of criminal prosecution for tax evasion during the pendency of a jeopardy assessment and accompanying tax liens deprived defendant of the right to effective assistance of counsel and due process of law as guaranteed by the constitution. The district court had held that as a result of the jeopardy assessment defendant was without funds to secure the services of accountants, and that in a prosecution for tax evasion based upon net worth proof, accounting services are essential to the effective assistance of counsel and due process of law.

The majority of the Court adopted the prior opinion filed by Judge Schnackenberg (See Bulletin, *supra*) and held that the decision of the District Court was premature and without precedent, observing that "we have been unable to find a case in which any court has held that a trial to be held at some time in the future will not be a fair trial and hence dismissed an indictment without a trial," and that "it is illogical for a court to speculate in advance of a trial on the question of whether a defendant will or will not receive a fair trial without the assistance of an accountant." The Court, pointing to loans received by defendant during the pendency of the indictment, part of which were paid directly to his former attorney, also agreed with the Government's contention that the record failed to show that the jeopardy assessment had rendered defendant destitute and had made it impossible for him to secure accounting services.

Although the majority of the Court disposed of the appeal on the above grounds and did not reach the merits of the constitutional question, it expressed an awareness of the far reaching implications of the holding of the district court, and in this respect it agreed with the Government's position that if constitutional guarantees require the services of accountants, lay experts, for the defense of this case, the rule would prevail in other criminal cases and extend to the services of many other kinds of specialists. In the language of the majority:

Such a policy, if now established, would as a matter of consistency be subject to extension to experts in other fields--psychiatrists, ballistics experts, chemists, physicians, and an unlimited number of other specially trained persons. It is this natural consequence of such

a policy which, in addition to the reasons above stated, dictates that, if established, it must be based upon a record containing the actual proceedings at a trial, rather than the inferences drawn from pretrial affidavits.

The majority opinion did not reach or comment upon the Government's argument that if the services of an accountant were deemed essential to the defense, the trial court could appoint an accountant as an expert witness under Rule 28, Federal Rules of Criminal Procedure.

The two dissenting judges (Chief Judge Duffy and Judge Finnegan) agreed with the holding of the district court, that in a net worth prosecution accounting services were essential to the effective assistance of counsel and due process of law.

Staff: United States Attorney Edward G. Minor and  
Assistant United States Attorney Howard W.  
Hilgendorf (E.D. Wisc.);  
John J. McGarvey (Tax Division)

Net Worth - Proof of Likely Source - Extra Judicial Admissions Relating to Pre-Indictment Years. Massei v. United States (C. A. 1, February 27, 1957). The Court of Appeals, in a split decision, reversed a conviction of income tax evasion based upon net worth proof mainly on the ground that the prosecution failed to prove a likely source to which the net worth increases could be attributed. The majority held that "the only direct evidence of likely source was extra judicial admissions of defendant; that these admissions were irrelevant and immaterial and should have been stricken from the jury's consideration; and that, in addition, the admissions were uncorroborated and therefore could not serve as proof of a vital element of the prosecution's case.

Defendant was a police officer of Worcester, Massachusetts, from 1923 until 1951. The prosecution years were 1946 through 1950, and the Government established net worth increases and expenditures for the five year period aggregating \$90,000 in excess of reported income. The Court agreed that the opening net worth and the increases in net worth during the prosecution years "were sufficiently grounded in the evidence". There was also evidence to negative non-taxable receipts by defendant during the prosecution years. As to source, the prosecution contended that the net worth increases were attributable to graft. There was no direct evidence of graft taking in the indictment period, but the Government relied strongly upon extra judicial admissions of defendant, made through his attorney after the investigation had commenced, to the effect that defendant had taken graft in pre-indictment years. (The admissions were made to Internal Revenue Service personnel in an effort to convince them that the net worth increases

disclosed by the investigation were attributable to assets on hand at the beginning of the indictment period which were the fruits of graft.) In this connection, the prosecution adduced proof of defendant's salary in pre-indictment years and proof of his possession in the pre-indictment years of sums far in excess of his salary.

The Government contended on appeal that the admissions were properly received in evidence, as relevant to the question of source and in addition to starting point net worth and to the element of intent; that the admissions were corroborated; and that the proof of defendant's position as a police official and of his admissions as to graft taking in prior years, when coupled with evidence establishing opening net worth with reasonable accuracy and evidence negating non-taxable receipts in the indictment period, was sufficient to take the case to the jury.

In rejecting the Government's argument, the majority reiterated the view expressed by the same Court in an earlier decision (Thomas v. Commissioner; 232 F. 2d 520) that proof of a likely source is an indispensable element of net worth proof, and it clearly indicated that there must be direct proof of source during the tax period. If this is a correct interpretation, the decision is in conflict with the views of the Second Circuit in Ford v. United States, 237 F. 2d 57 (C. A. 2), certiorari granted, February 25, 1957, which case bears a striking similarity to the instant case. See also, Ford v. United States, 233 F. 2d 56 (C. A. 5), certiorari denied, 352 U. S. 833, which involved a police officer in Texas. Also it appears that the majority holding that the admissions were irrelevant and immaterial and, in addition, were not corroborated is not in accord with the authorities.

The Government acquiesced in the petition for certiorari in the Second Circuit Ford case on the grounds that there was a conflict in the decisions of the Courts of Appeals, compare, the Second Circuit Ford case with Thomas v. Commissioner, 232 F. 2d 520 (C. A. 1) and Kashat v. Commissioner, 229 F. 2d 202 (C. A. 6), and because of the importance of the question presented in the administration of the revenue laws. The Department is presently considering whether to petition for certiorari in this case.

Staff: United States Attorney Anthony Julian and  
Assistant United States Attorney Daniel  
Needham, Jr. (D. Mass.)

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ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

Typewriter Repair Contracts

We have had complaints concerning mandatory typewriter repair and maintenance under GSA contracts. Apparently the quality of the work is poor and the contractors insist on overhauling typewriters when only a minor adjustment is necessary. We would like to have the benefit of your experience with such contractors for the repair and maintenance of typewriters and any information that may be helpful will be appreciated.

Appropriation Trouble

Funds for operation of the offices are running extremely short. Projected as of the first week in March, our obligations and expenditures will exhaust the appropriation long before June 30 1957, requiring a drastic curtailment of activities. Prospects for supplemental funds are very poor.

No obligations should be incurred that are not absolutely essential. Travel and communication expenses offer the best fields for economy. Projects leading to expenditures should be scrutinized very carefully and, if not urgent, should be abandoned or deferred, if possible, according to their importance.

Order for Dismissal Form

The Order for Dismissal (Form No. USA-22) publicized in the Bulletin of August 17, 1956 has been finally approved and stocked by the Department. It may be requisitioned in the usual manner.

We believe this new form will contribute to uniform practices as well as effect savings in those districts where the volume is sufficient to warrant use of a form. Any district now using a special form and unable to adopt the new general form should request an exemption from the Forms Control Unit.

Departmental Orders and Memos

The following Memoranda applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 5 Vol. 5 dated March 1, 1957.

<u>ORDER</u>	<u>DATED</u>	<u>DISTRIBUTION</u>	<u>SUBJECT</u>
92-55	8-22-55	U.S. Attys & Marshals	Promotion Program
144-57	2-13-57	U.S. Attys & Marshals	George S. Leonard designated Acting Assistant Attorney General, Civil Division
<u>MEMOS</u>	<u>DATED</u>	<u>DISTRIBUTION</u>	<u>SUBJECT</u>
124 Supp. 5	2-13-57	U.S. Attys	Revision of Docket and Reporting System Manual
214	2-28-57	U.S. Attys & Marshals	Promotion Program - Order 92-55 attached
214 Supp. 1	3-1-57	U.S. Attys & Marshals	Promotion Program Instructions
216	3-1-57	U.S. Attys & Marshals	Reports Control System

Satisfaction of Judgment

United States Attorneys were instructed in Memo 207, Item 11, to file an appropriate satisfaction with the Clerk of the Court when judgments are paid.

The Department proposes to adopt a form for general use, copy of which is printed on the next page.

Will you please advise the Forms Control Unit not later than April 8, 1957, as to:

1. Whether the proposed form can be used by your office?
2. How is such notice now handled?
  - (a) By form (if so, give Inventory Form No.).
  - (b) By individual notices typed as required.
  - (c) Orally.
3. Approximately how many Judgment Satisfactions did you file last calendar year?
4. Suggestions or comments concerning the proposed form.

The final form will be printed on legal size paper. Space will be left on the lower half for addition of an affidavit in those districts which require it.

IN THE UNITED STATES DISTRICT COURT

\_\_\_\_\_ District of \_\_\_\_\_  
\_\_\_\_\_ Division

UNITED STATES OF AMERICA )

Plaintiff )

vs. )

Defendant(s) )

CIVIL ACTION NO.

SATISFACTION OF JUDGMENT

Judgment was rendered for the plaintiff, United States of America and against the defendant(s) \_\_\_\_\_ in the above-entitled cause, on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_ for the sum of \_\_\_\_\_.

Plaintiff in the above-entitled cause does hereby acknowledge full satisfaction of the above judgment this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

The said judgment and costs having been paid, the Clerk of the United States District Court for the \_\_\_\_\_ District of \_\_\_\_\_ is hereby authorized and empowered to satisfy said judgment of record.

\_\_\_\_\_  
Plaintiff

BY: \_\_\_\_\_  
Attorney for Plaintiff

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Suspension of Deportation—Applications Under 1917 Act Acceptable Until Effective Date of Immigration and Nationality Act. Ferreira v. Shaughnessy (C.A. 2, February 13, 1957). Appeal from order dismissing petition for judicial review of denial of application for suspension for deportation. Affirmed.

Deportation proceedings were instituted against this alien because of his illegal presence in the United States and a hearing was conducted on October 30, 1952. At that hearing he applied for suspension of deportation under the Immigration Act of 1917, which was denied. The Board of Immigration Appeals ordered the proceedings in his case reopened to permit the introduction of new evidence and at a new hearing on May 15, 1953, the alien again applied under the 1917 Act for suspension of deportation which was denied. In 1955, after a warrant for his deportation had been issued, he moved to reopen his case to reconsider his application for suspension under the 1917 Act, or in the alternative, for leave to apply for such suspension under the Immigration and Nationality Act of 1952. He urged that he had been granted an award by the Workmen's Compensation Board of the State of New York and that he was entitled to certain of the benefits of that award only so long as he remained within New York State. He contended that because of the requirements of his compensation award, deportation would cause him exceptional and extremely unusual hardship. His motion was denied.

The principal contention made by the alien was that by reason of the savings clause provisions of section 405(a) of the 1952 Act, the refusal to entertain his application for suspension under that Act constituted a denial of due process of law. He argued that the savings clause created a "cut-off" period for suspension applications between June 27, 1952, the date of enactment of the statute and December 24, 1952, the date it became effective, during which no valid application could be filed, either under the new or old law. He claimed, therefore, that between those dates a hiatus was created during which the immigration authorities were without jurisdiction to entertain an application for suspension of deportation and, therefore, that that part of the proceedings in which his original application was denied on October 30, 1952, was rendered null and void.

The appellate court stated that this statutory construction, if accepted, would have a disruptive impact upon the administration of the immigration laws and would impair the harmony of transition that Congress sought to preserve while enacting the new legislation. The Court said that it was reluctant to approve an interpretation that would withdraw the availability of suspension of deportation even temporarily. It held,

therefore, that in the absence of express statutory language to the contrary, the provisions of the 1917 Act relating to suspension of deportation were in force until December 24, 1952, and that the immigration officials were empowered to entertain an application for suspension under the 1917 Act until that date.

The Court also said that if the hearing officer and the Board of Immigration Appeals erred in applying the proper substantive law in the case, the error, if any, was in favor of the petitioner because the more lenient standards of the 1917 Act were invoked in denying his application. The Court concluded that there had been no error in the disposition of his case and that it was not its function to review the exercise of administrative discretion in denying suspension of deportation.

Staff: United States Attorney Paul W. Williams (S.D.N.Y.)  
Special Assistant United States Attorney Roy  
Babitt and Assistant United States Attorney  
Harold J. Raby of counsel.

Discretionary Relief—Voluntary Departure—Refusal to Answer Questions Concerning Communist Affiliations. Moutsos v. Shaughnessy (S.D.N.Y., February 19, 1957). Motion for temporary injunction to stay deportation of plaintiff.

The alien in this case conceded his deportability but contended that he should have been entitled to make a voluntary departure. That privilege was denied him by the hearing officer and the alien urged that his hearing was arbitrary and that the record did not contain any evidence to support a finding that he was not deserving of the favorable exercise of administrative discretion.

The Court held that his hearing was not arbitrary. He was given full opportunity to present his case and was represented by experienced counsel. A request for adjournment was denied but this was done only after counsel indicated that he did not know whether there would be any evidence for him to present at the adjourned hearing. The Court stated that no party has an inflexible right to adjournment, but his only right is not to be deprived of an opportunity to present testimony.

The Court also said that it was not correct that the hearing record did not contain any evidence to support denial of the favorable exercise of administrative discretion. The alien admitted that he had deserted his ship and that he was a member of an organization of Greek seamen declared to be illegal by the Greek Government. He refused to answer questions as to whether he was a member of the Communist Party or sympathetic to the Communists. His refusal to answer may not have been evidence that he was a member of the Communist Party but his refusal certainly was evidence of unwillingness to answer inquiries which are proper and which are put to all aliens seeking lawful residence in the United States. His refusal to answer bore directly upon the issue whether he was entitled to discretionary relief. It was not necessary

to find that the alien was a Communist. He had the burden in his application for discretionary relief of establishing a basis which would move the Attorney General to exercise favorably the discretionary privilege of voluntary departure. This he failed to do and the conclusion to deny such relief was not, on the record, either arbitrary or capricious. Therefore it is not a matter in which the court can substitute its judgment for that of the immigration authorities.

Staff: United States Attorney Paul W. Williams (S.D.N.Y.)  
Special Assistant United States Attorney Roy  
Babitt of counsel

#### EXCLUSION

Country to Which Alien Is to Be Deported—Habeas Corpus to Test Issue—Suspension of Deportation and Claim of Physical Persecution not Available to Excluded Alien. Petition of Milanovic (S.D.N.Y., February 21, 1957). Petition for writ of habeas corpus to review exclusion order and to test destination to which alien had been ordered deported following exclusion.

The alien in this case was born in Yugoslavia. During the war he served in the Royal Yugoslav Navy and also fought the so-called Titoists in Yugoslavia. After the war he could not return to Yugoslavia and spent some time in displaced persons camps. He subsequently entered the United States as a deserting seaman from an Italian vessel. He later was employed on a Panamanian vessel which was sold in a Belgian port where he was not permitted to remain. The owners of the vessel transported him to New York in 1949 where he was excluded from admission, although subsequently he was paroled to give him an opportunity to become admitted by private Congressional bill. This effort failed, as did other attempts to adjust his status in this country. Immigration authorities then undertook to execute the order of exclusion against him and to deport him to Yugoslavia as the country "whence he came".

The Court rejected contentions by the alien that he was entitled to apply for withholding of his deportation on the grounds of physical persecution as authorized by section 243(h) of the Immigration and Nationality Act and for suspension of deportation under section 244 of that Act. The Court held that an excluded alien was not entitled to the benefits of either of those sections of law, under such circumstances as are present in this case.

The alien also argued that he could not be deported to Yugoslavia because it was not the "country whence he came" as specified in section 237 of the Immigration and Nationality Act. After reviewing previous authorities interpreting that language, the Court concluded that Belgium was the proper country to which the alien should be deported on the theory that the country which the alien left to come to the United States is the "country whence he came".

The Government urged, however, that habeas corpus proceedings were not available to test the destination to which this excluded alien was to be deported. The Court conceded that an alien seeking entry is not entitled to the protection of the Bill of Rights except to test the validity of his exclusion. However, the Court held that because an excluded alien cannot stand on the Bill of Rights does not mean that he is powerless to seek judicial protection where he had a valid basis for asserting that he is aggrieved by the completely arbitrary action of Government officials. In this case the Court felt the immigration authorities were not adhering to procedures established by Congress. It was therefore concluded that, under the circumstances in this case, the alien could not be ordered deported to Yugoslavia.

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OFFICE OF ALIEN PROPERTY

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Action by Trustee of Inter Vivos Trust to Recover Property Under Section 9(a) - Eligibility of Trustee to Sue When Trust Beneficiaries Are Enemies. Kober v. Brownell (D.C.N.Calif. February 21, 1957). This action was instituted by the trustee of an inter vivos trust to recover the trust res which had been vested under the Trading with the Enemy Act. Under Section 9(a) of that Act, only persons who are not enemies and who have an "interest, right or title" to the property may bring suit. The beneficiaries of the trust were all residents of Germany and enemies under the Act, although the trustee was not. The Government accordingly moved to dismiss for lack of jurisdiction upon the ground that the trustee alone does not have a sufficient interest to maintain the action and may sue only if the beneficiaries are also nonenemies. The Court, following a consistent line of decisions, granted the motion, holding that the trustee alone may not sue, even though a nonenemy, unless the beneficiaries are also nonenemies. Since it appeared from the face of the complaint that the beneficiaries were residents of Germany and enemies, the Court held that no action could be maintained by them or on their behalf by the trustee under Section 9(a) and the Court accordingly lacked jurisdiction under the statute.

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(Office of Alien Property)

Enemy Status Resulting from Repatriation; "Resident". Oehmichen v. Brownell, (C.A.D.C., February 28, 1957). Plaintiff and her husband, German nationals, entered the United States as permanent residents in 1934. Shortly after the declaration of war with Germany they were arrested as enemy aliens. After a hearing the husband was interned; the wife was released. Plaintiff later joined him in the internment camp as a voluntary internee. Beginning in 1942 they filed several requests for repatriation. They were repatriated to Germany in January, 1945. Mr. Oehmichen died in Germany in 1948. Shortly thereafter plaintiff obtained a visa in Switzerland and immigrated to the United States. She is now an American citizen.

In 1947, 1950 and 1951 the Alien Property Custodian vested cash and stock of a corporation controlled by the Oehmichens. In 1954 plaintiff instituted suit in the United States District Court for the District of Columbia to recover the vested property, contending that she had never intended to leave the United States permanently and that her household furnishings, etc., had been left here in storage. The Government contended that the Oehmichens were enemies within the meaning of Section 2 of the Trading with the Enemy Act since they were resident within Germany while the United States was at war with Germany.

The District Court found that the Oehmichens were well treated in the camp, that they were not residents of Germany within the meaning of the Act because they had always intended to return to the United States, and "the requests for repatriation to Germany by plaintiff and her husband were made solely to escape internment and the emotional problems created thereby".

The Court of Appeals in an opinion by Circuit Judge Prettyman reversed the District Court, holding that as a legal matter "we are of the opinion that mere discontent with conditions in a well-run internment camp is not the compulsion which would translate otherwise repatriation into departure under duress. Internment is the established international treatment of resident enemy aliens by all civilized countries. The Oehmichens chose to return to an enemy country rather than undergo that established treatment.

"If the argument of Mrs. Oehmichen were valid, all German citizens in the United States at the outbreak of war could have returned promptly to Germany, exercising a wish not to be interned here, live there until the war's end, and return here to claim that they had never been resident in Germany. Under her argument no German national residing in the United States prior to the war, and moving by choice to Germany during the war, would have become resident in Germany, as every such person was faced with the possibility of internment here. We think the statute reflects no intention to achieve such a result."

Chief Judge Edgerton dissented.

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