

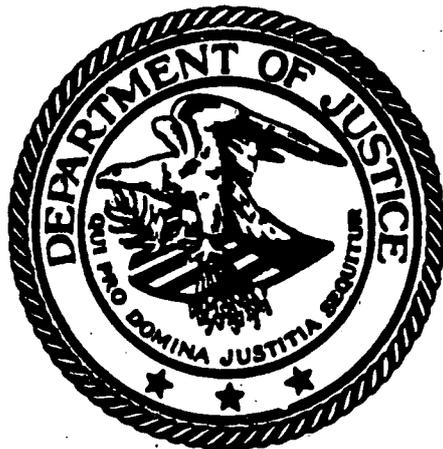
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UNITED STATES ATTORNEYS
BULLETIN

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CHECK OF GRAND JURY REPORTERS

Before any official salaried federal court reporter is used to take testimony before a grand jury, the United States Attorney should submit Department of Justice Form DJ-52 to the Security Officer, Department of Justice, and await advice before proceeding with the hearing.

A similar name check, using Form DJ-52, is also required before any contract or free-lance reporter may be employed for grand jury reporting. In these cases, the Form DJ-52 will be forwarded as indicated above.

The forms should also be used for any person associated with the reporter in turning out the grand jury minutes.

Form DJ-52 can be obtained on requisition from the Department.

DISTRICTS IN CURRENT STATUS

As of February 28, 1958, the total number of districts meeting the standards of currency were:

<u>CASES</u>				<u>MATTERS</u>			
<u>Criminal</u>		<u>Civil</u>		<u>Criminal</u>		<u>Civil</u>	
	change from		change from		change from		change from
	1/31/58		1/31/58		1/31/58		1/31/58
71	+2	60	-3	49	-5	68	-4
75.5%	+2.1%	63.8%	-3.2%	52.1%	-5.2%	72.3%	-4.2%

IMPORTANT NOTICE

In Matles v. United States; Lucchese v. United States; Costello v. United States, on petitions for writs of certiorari to the Second Circuit, the Supreme Court, on April 7, 1958, held, per curiam, that "An affidavit showing good cause is a prerequisite to the initiation of denaturalization proceedings. The affidavit must be filed with the complaint when the proceedings are instituted. United States v. Zucca, 351 U. S. 91, 99. 100." Accordingly, the Court reversed the judgments below and remanded the cases with directions to dismiss the complaints, even though affidavits were filed after the actions were instituted and before trial. A like result was reached the same day on the Government's petition for certiorari to review the judgment of the Ninth Circuit in United States v. Diamond.

In view of these decisions, United States Attorneys should immediately move for the dismissal without prejudice of all pending denaturalization cases initiated on affidavits executed by employees of the

Immigration and Naturalization Service where the affidavits were not filed with the complaints. The Service files should be returned as soon as possible to the Criminal Division for appropriate disposition.

Instructions will be issued in the near future relative to the procedure to be followed in pending denaturalization suits initiated on the basis of certificates of consular officials under Section 340(d) of the Immigration and Nationality Act (8U.S.C. 1451(d)).

INTERNAL SECURITY DIVISION

Assistant Attorney General William F. Tompkins

Conspiracy to Violate "National Firearms Act" and "Federal Firearms Act." United States v. Stanley J. Bachman, et al., (Dist. Col.). On April 2, 1957, a federal grand jury, returned a three count indictment against Stanley J. Bachman, Jerome H. Bachman, Bernard Sidney Bachman and the Stanbern Aeronautics Corporation. The Bachmans, the individual defendants, are brothers who control the Stanbern Aeronautics Corporation as a family owned enterprise. Count I of the indictment charges that all of the defendants, throughout the period from July 1957 to the present, conspired with other persons to violate the "National Firearms Act," 26 U.S.C. 5801, et seq., and the rules and regulations promulgated thereunder, and the "Federal Firearms Act," 15 U.S.C. 901, et seq., and the rules and regulations promulgated thereunder. Count I alleges that it was part of the conspiracy for the conspirators, among other things, to procure a special tax stamp to establish them as a registered dealer in automatic weapons, conceal the transfer of automatic weapons to an unregistered person, effect the transfer of weapons without payment of tax, rent vehicles to illegally transport weapons in interstate commerce and maintain false and incomplete records to cover the existence of the conspiracy. Eleven overt acts performed in the District of Columbia and elsewhere are alleged. Count II of the indictment charges that Stanberg Aeronautics Corporation and Stanley J. Bachman, its President, attempted to evade payment of the federal tax of \$200 for each firearm transferred in the United States through filing a fraudulent document with the Treasury Department, in violation of 26 U.S.C. 7201. Count III charges the same two defendants as charged in Count II with executing false documents with the Treasury Department in connection with the transfer in violation of 26 U.S.C. 7206(1). The individual defendants named in the indictment were arraigned on April 4, 1958, at which time they entered pleas of not guilty. Judge McGarraghy set bail at \$2500 for each individual defendant and the case was set down for trial on May 26 of this year.

Staff: Marvin B. Segal, Joseph T. Eddins, Jr., and
William A. Carey (Internal Security Division)

False Statement; National Labor Relations Board; Affidavit of Non-communist Union Officer. United States v. Lee Brown (E.D. La.). On March 27, 1958, in New Orleans, Lee Brown, former First Vice-President of Local 207, International Longshoremen's and Warehousemen's Union, was convicted on both counts of a two-count indictment brought under 18 U.S.C. 1001. The indictment, returned on March 13, 1957, charged him with falsely denying membership in and affiliation with the Communist Party in an Affidavit of Noncommunist Union Officer filed with the National Labor Relations Board on July 21, 1952.

Staff: United States Attorney M. Hepburn Mary (E.D. La.);
Robert A. Crandall and Donald M. Salsburg
(Internal Security Division)

Smith Act; Conspiracy. United States v. Wellman, et al. (E.D. Mich.). On February 16, 1954, six defendants were convicted of conspiracy to violate the Smith Act. Their convictions were affirmed by the Court of Appeals on November 18, 1955. On June 24, 1957, the Supreme Court granted petitioners' motion to proceed in forma pauperis and their petition for a writ of certiorari; the judgment of the Court of Appeals was vacated and the case was remanded for consideration in light of the Yates case. After the submission of supplemental briefs to the Court of Appeals, oral argument was held on October 16, 1957. On October 23, 1957, the Government filed a supplemental memorandum on the impact of the Yates case to the instant case. In an opinion filed on March 25, 1958, the Circuit Court rejected the government's argument that submission of the "organizing" charge to the jury was not prejudicial in view of the trial court's instruction that the jury must find a conspiracy with a double objective and the overt act must be in furtherance of both. Accordingly, applying the standards of review prescribed in Yates, the Court ordered a new trial as to all appellants.

Staff: United States Attorney Fred W. Kaess (E.D. Mich.);
William G. Hundley, Lawrence P. McGauley and
John C. Keeney (Internal Security Division)

Suits Against the Government. Barney Dean Wellman v. Marion B. Folsom (S.D. N.Y.). The summons and complaint in this case, which was served on the Attorney General on March 24, 1958, alleges that plaintiff was illegally discharged on April 9, 1954 from his position as a Claims Examiner (Adjudication Reviewer), Department of Health, Education and Welfare, in violation of the Act of August 26, 1950, 64 Stat. 476, Executive Order No. 10450, the Veterans' Preference Act of 1944, 5 U.S.C. 851 and the Rules and Regulations of the United States Civil Service Commission. Plaintiff seeks reinstatement to his former position, full pay and allowances from April 9, 1954 to the date of his restoration to employment with interest, costs and disbursements of this action and for such other and further relief as to the Court may seem fitting and proper.

Staff: Oran H. Waterman and Raymond A. Wescott
(Internal Security Division)

Suits Against the Government. Paul Robeson v. John Foster Dulles (Dist. Col.). The summons and complaint was served on the Attorney General on March 3, 1958. Plaintiff seeks a declaratory judgment and other equitable relief to declare that the Passport Regulations of the Secretary of State (22 C.F.R. 51.135 et seq.), as applied to plaintiff, are unauthorized, unlawful and invalid. Plaintiff further prays that defendant be enjoined from interfering with plaintiff's travel outside the United States, from continuing to refuse to grant a passport to plaintiff and to direct defendant to issue a passport to plaintiff forthwith. The defendant refused to grant a passport to plaintiff based upon his refusal to answer questions concerning present and past membership in the Communist Party which are contained in the passport application form.

Staff: James T. Devine and James L. Weldon, Jr.
(Internal Security Division)

CRIMINAL DIVISION

Assistant Attorney General Malcolm Anderson

MAIL FRAUD, FRAUD BY WIRE

Check Kiting. United States v. Jack Donald Hubbard, et al. (N.D. Texas). This case involved what is believed to be the largest check-kiting scheme ever uncovered in the United States. The scheme which operated for approximately ten and one-half months involved funds in excess of \$80,000,000. In connection with the scheme 52 accounts in 13 banks were used and a total of 2,289 kited checks were deposited in various accounts, approximately 100 of which were unpaid when the scheme broke. As a result of this scheme, seven of the banks involved suffered a loss of \$882,029.88, the largest loss \$541,947.66 was sustained by the River Oaks State Bank, of which Hubbard was president and which was forced to close as a result of this loss.

Since the use of the mails was an integral part of the scheme to defraud, Hubbard and four of his associates were charged with violation of 18 U.S.C. 1341 in eighteen counts, and in two counts with violation of 18 U.S.C. 1343. They were also charged in a twelve-count indictment with violation of Sections 656, 1005 and 371, Title 18 U.S.C. for misapplication of funds and false entries in the books of the River Oaks State Bank and conspiracy to commit these offenses. Hubbard was also charged with violation of 18 U.S.C. 1010 in connection with F.H.A. loans negotiated while he was vice-president of the Ridglea State Bank.

On March 3, 1958 defendants entered pleas of guilty and were sentenced as follows: Jack Donald Hubbard pleaded guilty to Count II (mail fraud) and Count XIX (fraud by interstate wire) of the principal indictment, and Count II of the F.H.A. indictment. He was sentenced to four years on Count II, four years on Count XIX and two years on Count II of the F.H.A. indictment, all sentences to run concurrently. Burton E. Ellis, James C. Mount, Robert L. Preissinger and Maxine Woodall pleaded guilty to Counts II and V (mail fraud) and Count XIX (fraud by interstate wire) of the principal indictment. Ellis and Mount received a four-year general sentence on all three counts, and Preissinger and Woodall received an eighteen-month general sentence on all three counts.

After sentence the remaining counts in the mail fraud and F.H.A. indictments were dismissed as were all counts of the Federal Reserve Act indictment.

In the presentence data supplied to the court the United States Attorney stated that defendants had been extremely uncooperative which resulted in the consumption of thousands of hours in investigation and preparation for trial at an estimated cost to the government of approximately \$152,000. It was further indicated that the government had assembled 16,915 exhibits for presentation at the trial. The United

States Attorney stated that defendants, having waited until the government was completely prepared for trial at a great expenditure of time and money, before entering pleas of guilty, were not in a position to use such pleas of guilty as the basis of a request for leniency.

Staff: United States Attorney Heard Floore; Assistant United States Attorney W. B. West III (N.D. Texas).

BANK ROBBERY

United States v. William Reace Johnston; Fred Charles Riley (D. Kansas). On February 24, 1958, defendants were found guilty on two indictments charging them with violations of 18 U.S.C. 2113. The cases were consolidated for trial and both defendants received sentences of 15 years and a fine of \$2,250 in each case with the terms to run consecutively so that each received a sentence of 30 years and fine of \$4,500. On August 20, 1957, Riley, Johnston and one Lyle Richard Johnson, who drove the get-away car, robbed the Twin City State Bank, Kansas City, Kansas, of \$12,000. Returning on September 25, 1957, to the same bank, Riley and Johnston, alone, took more than \$11,000, but when apprehended three days later had only \$10,500 in their possession. Johnson, who has been indicted for his participation in the first robbery, has not as yet been tried. One Lola Murray has pleaded guilty to an indictment charging her as an accessory after the fact (18 U.S.C. 3) in the robbery on August 20, 1957.

Staff: Assistant United States Attorney Milton P. Beach;
Assistant United States Attorney E. Edward Johnson
(D. Kansas).

KIDNAPING

United States v. Dois Ray Smith; Kayles Edward Noel (W.D. Kentucky). On February 4, 1958, a jury, in approximately 12 minutes, returned a verdict against defendants for kidnaping one Lonnie Clark in Chicago, Illinois and transporting him against his will to Henderson, Kentucky. Defendants, white men, in order to obtain transportation, seized the victim, a Negro, as he was leaving a hospital and forced him into his own car at gun point. During the 300 mile ride, the victim was badly beaten and his life threatened before he was released when the car ran out of gas. Clark was taken to a State Police Post by a passing motorist and Noel and Smith were arrested within two hours.

Defendants were given sentences of 15 years each and have filed a Notice of Appeal. A complaint charging defendants with a violation of 18 U.S.C. 2312 (Dyer Act) is still outstanding.

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

BRIBERY

Extortion. United States v. Thomas Anthony Bertone (D. N.J.). Thomas A. Bertone, a former employee of the Department of State, was convicted in the District of New Jersey on all counts of a fifteen-count indictment charging various violations of the bribery and extortion statutes. Bertone had been stationed in India and Iran where his duties gave him supervision over large numbers of local employees in the handling of purchases, leases and supply contracts for the government, running into hundreds of thousands of dollars. The charges against Bertone were based upon transactions where it was proved that he had demanded and received a share of the proceeds of contracts awarded to local contractors. The indictment was returned in the District of New Jersey under the provisions of 18 U.S.C. 3238 because Bertone was found in that district.

It was necessary in the trial of this matter to bring witnesses to this country from India and Iran and to arrange for the services of interpreters to assist in their questioning. Arrangements had to be made, too, for their lodging and, because of language difficulties and their unfamiliarity with the country, for their safe-being. In December 1957 the government successfully defended the conviction against the fifth appeal filed by defendant. Bertone was sentenced to five years' imprisonment and fined \$6,000.

Staff: United States Attorney Chester A. Weidenburner;
Assistant United States Attorney Albert P. Trapasso
(D. N.J.).

FOOD, DRUG, AND COSMETIC ACT

Dispensing of Dangerous Drugs Without Prescription by Physician; Amphetamine ("Dexedrine"). Thomas Guy Brown v. United States (C.A. 5). On January 3, 1958, the Court of Appeals for the Fifth Circuit affirmed the conviction of a licensed physician for violating the provisions of the Food, Drug, and Cosmetic Act that prohibit the dispensing of dangerous drugs, transported in interstate commerce, without a prescription. The defendant had been indicted in the District Court for the Northern District of Texas on three counts for having dispensed large quantities of dangerous dextro-amphetamine hydrochlorine tablets (sold, for example, under the trade name "Dexedrine," sometimes referred to as "goof balls" or "pep pills") without a prescription. 21 U.S.C. 353(b)(1) provides, in effect, that dangerous drugs may be legally dispensed only upon the prescription of a licensed physician; otherwise the drug is misbranded while held for sale. 21 U.S.C. 331(k) prohibits misbranding of articles held for sale after shipment in interstate commerce. Defendant, a licensed physician, on two occasions had given written prescriptions for quantities of Dexedrine upon the request of a Food and Drug inspector, who posed as a truck driver, even though no physical examination of any kind was made or consultation had with the "patient." When the inspector returned for a third prescription, the defendant stated that he could supply the drugs himself and then sold the inspector 1,000 tablets of an

amphetamine preparation. Subsequently, two more such sales were made, and these three sales were the basis of the three counts of the indictment. No physical examination of the "patient" was made, no directions or prescriptions for use of the drugs were given, and no inquiries concerning intended uses were made by defendant. Overruling the defense arguments, the Court of Appeals held that the drugs in issue were, within the meaning of and in violation of the statute, dispensed without any prescription even though dispensed by a licensed physician. This is the first appellate decision on the point and is considered to be a significant contribution toward enforcement of the law.

Staff: United States Attorney Heard L. Floore (N.D. Texas).

FEDERAL TRAIN WRECK STATUTE

Constructive Intent. United States v. Frank Stuart (D. Montana). On January 21, 1958, defendant received a three-year sentence on a plea of guilty to a violation of 18 U.S.C. 1992 by attempting to wreck a train by placing his automobile on the Northern Pacific Railroad track. Stuart, after purchasing the automobile and experiencing engine difficulty which he could not afford to repair and make the payments, decided to have a train wreck it. Within one week, defendant placed his automobile on the railroad tracks four times before it was struck by a train. The first two attempts failed and the third time Stuart removed it himself when the train slowed down. However, on the fourth occasion, defendant chose a curved track and a predawn hour and achieved his purpose. While the intent of defendant under these circumstances could not be, affirmatively to wreck a train, prosecution under the statute, upon such facts, could be justified on the theory that a person is presumed to intend the natural, necessary and probable consequences of his acts.

Staff: United States Attorney Krest Cyr (D. Montana).

THEFT FROM INTERSTATE SHIPMENT

Receiving Goods Known to Have Been Stolen from Interstate Shipment. United States v. Richard V. Perry (W.D. N.Y.). Defendant was charged with having received two adding machines which had been stolen while in transit from Ithaca, New York to two points in Louisiana. He denied the charges and consented to a search of his apartment and automobile, with negative results, and the machines were never recovered. A tavern keeper testified that he had received two adding machines from defendant and had returned them to defendant upon learning that they had been stolen, but he could only describe the machines in general terms. The key witness was a man to whom the tavern keeper had offered to sell the machines, and who, under pretext of trying out the machines, secured tapes with numbers thereon struck by the keys of each machine, and recording the serial number of each. Investigation of the serial numbers revealed that these were the stolen machines. In proving the non-receipt of the machines by the consignees, it was necessary to have the consignees from Louisiana appear at the trial in New York. Although such non-receipt is usually proved by

the business records of the shipper, such was impossible here because the employee of the shipping company, who had amassed the records in advance of trial, had left the state with his secretary, and in the absence of the employee and his secretary the records could not be located.

Despite the scarcity of evidence and the difficulties of trial, the defendant was convicted, fined \$1,000, and was given a two years' suspended sentence. Although the sentence was relatively light, the conviction has received much publicity among local employees of railroads and express companies, and it is felt that the conviction will have a deterring effect as to such thefts in the future.

Staff: United States Attorney John O. Henderson;
Assistant United States Attorney John T. Elfvin
(W.D. N.Y.).

WIRE TAPPING

Unauthorized Publication or Use of Communications by Private Detective; Applicability of Wire Tapping Statute to Intrastate Communications. Lipinski v. United States (251 F. 2d 53; C.A. 10, January 8, 1958). Defendant, a private detective, was convicted in the District Court for New Mexico on 2 counts of an indictment charging a violation of the "Wire Tapping Statute," (47 U.S.C. 605), for having intercepted and recorded telephone calls and then divulging their contents to his clients in domestic relations matters. Defendant appealed, arguing that the statute does not apply to intrastate communications. Rejecting this contention, the Court held that the second clause of §605 applies to the interception and divulgence of the substance of intrastate, as well as interstate, communications. As to the validity of the exercise of such power by Congress, the Court said (p. 55):

" . . . Congress has plenary power to enact appropriate legislation for the government of interstate commerce, for its protection and advancement, and for its growth and safety; and within the range of that power lies power to regulate intrastate activities when it is necessary for the protection of interstate commerce...."

Staff: United States Attorney James A. Berland;
Assistant United States Attorney Ruth C. Streeter
(D. N.M.).

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CIVIL DIVISION

Assistant Attorney General George Cochran Doub

COURTS OF APPEALADMIRALTY

Appeal Will Be Stayed While Evidence Newly Discovered While Appeal Is Pending Is Developed Before District Court. Staples, et al. v. United States (C.A. 9, March 11, 1958). Three crew members aboard the U.S.N.S. Escambia were logged for desertion after they failed to return to their ship from shore leave in Sasebo, Japan. Their accrued wages were declared forfeited and were deposited in the registry of the district court. 46 U.S.C. 701, 706. Following the filing of a petition by the seamen for the return of their wages, the government requested a continuance of the proceedings to enable it to investigate the circumstances of the alleged desertion. The request was denied and, after a short hearing during which the seamen offered no explanation for their failure to return to their ship, the district court entered an order returning their wages on the ground that the government was not prepared for trial.

The United States appealed. While the appeal was pending, the government received information from Japan indicating that the seamen had not intended to rejoin. It thereupon moved in the Court of Appeals for letters rogatory for the examination of witnesses there. The Court of Appeals held that the new evidence from Japan was material to an essential issue, and that there had been no lack of diligence by the United States in discovering it. It also recognized that it had jurisdiction to issue letters rogatory, but it declined to do so. The better practice, in admiralty, as well as in civil cases, is to leave the taking of evidence to the district courts. The district court was therefore ordered (1) to issue process for the taking of the testimony of the witnesses in Japan, (2) to take such further evidence as may be necessary, and (3) to make findings. The Court of Appeals retained jurisdiction and stayed the appeals pending completion of proceedings before the district court.

Staff: Graydon S. Staring (Civil Division)

GOVERNMENT EMPLOYEES

Wilful Concealment of Veterans Status Deprives Employee of Veterans Preference Eligibility. Vigdor v. Young, et al. (C.A. D.C., March 13, 1958). Blossom Vigdor enlisted in the WAVES on February 3, 1944, and was discharged under honorable conditions on March 16, 1944. This service made her a veterans preference eligible. In 1946 she filled out a civil service form in which she denied having ever served in the Armed Forces; she was thereafter employed as an Educational Therapist by the Veterans Administration. She was removed on May 10, 1954 after proceedings under Civil Service Commission Regulations. During the hearing accorded her in the removal proceedings, her counsel advised her of her right to the protection of the Veterans Preference Act. Nevertheless, she continued to

deny her military service. After removal, she appealed to the Seventh Civil Service Region claiming that she was in fact entitled to veterans preference. The Regional Office sustained her contention and ordered her restoration, but this ruling was reversed by the Civil Service Commission on the ground that she was estopped from asserting her veterans status.

The Court of Appeals in affirming a district court judgment sustaining the Commission, held that the employee's flagrant refusal to disclose her status rendered the action of the Civil Service Commission clearly correct.

Staff: Assistant United States Attorney Fred L. MacIntyre
(Dist. Col.)

FEDERAL TORT CLAIMS ACT

Scope of Employment; Proof of Government Ownership of Vehicle Driven by Soldier Creates Presumption He Is Within Scope of Employment. Morris Mandelbaum v. United States (C.A. 2, January 17, 1958). Plaintiff sustained personal injuries when an Army truck driven by a soldier crashed into the rear of his horsedrawn wagon. The government's principal defense was that, at the time of the accident, the soldier was not acting within the scope of his employment but was on a frolic of his own. The district court held that plaintiff had the burden of proof on this issue and did not have the benefit of any presumption based upon proof of government ownership of the vehicle. The Court of Appeals reversed and remanded the case for further findings, holding that under Section 59 of the Vehicle and Traffic Law of New York, plaintiff made out a prima facie case by proving government ownership of the truck. Although Section 59 is a typical permissive-use statute enlarging the field of responsibility of vehicle owners beyond the master-servant relation, the Court failed to note that suits under the Tort Claims Act are governed by the doctrine of respondeat superior and that the government is liable only for the negligence of its employees and officers.

Staff: United States Attorney Cornelius W. Wickersham, Jr. and
Assistant United States Attorney Margaret E. Millus
(E.D. N.Y.)

FEDERAL TORT CLAIMS ACT

Tort Claims Act Does Not Waive Government's Defense Against Suit by Municipality Which Cannot be Asserted by Private Person. Newark v. United States (C.A. 3, March 20, 1958). An ambulance owned by the City of Newark collided with a United States mail truck. The City sued the United States under the Tort Claims Act, and the United States counter-claimed for damage to the truck. The district court found that both drivers were negligent and dismissed both complaints. However, the City's complaint against the United States was not dismissed on the ground of contributory negligence; instead it was held that the Newark driver was

guilty of "active wrongdoing", which under New Jersey law, is imputed to his employer. The district court refused to allow the United States to invoke contributory negligence as a defense because, under New Jersey law, a private person cannot raise contributory negligence as a defense to a suit by a municipality.

On appeal by the City of Newark, this judgment was affirmed. The Court of Appeals, however, expressly held that even though contributory negligence is not a defense in a suit by a municipality against a private person, it is a defense when the municipality sues the United States under the Tort Claims Act. Read literally, the Act prevents the United States from asserting any defense which cannot be asserted by a private person under state law. The immunity of New Jersey municipalities, to the doctrine of contributory negligence, however, is simply a form of sovereign immunity derived from their parent state. By the nature of the federal system, neither states nor subordinate instrumentalities have sovereign immunity from suits by the United States. Congress did not intend to change this when it measured the liability of the United States in Tort Claims suits by that of private persons in like circumstances. It did not, therefore, deprive the United States of the right to assert a defense in an action by a state or municipality, even though the state doctrine of sovereign immunity might bar a private person from asserting the same defense.

Staff: Morton Hollander (Civil Division)

PUBLIC UTILITIES

United States May Recover Overcharges for Water Service to Government Housing Project. Kingman Water Co. v. United States (C.A. 9, March 18, 1956). Between 1944 and 1951 the Kingman Water Co. furnished water to a 120 unit government housing project in Mojave County, Arizona and billed for this service as if there were a meter in each unit. In fact, there were only four meters in the whole project. The water company's rates on file with the Arizona Corporation Commission scheduled charges at a minimum rate of \$2.50 per 3,000 gallons for all connections metered. The government sued to recover the difference between the amount paid, and the amount due under the rate filed with the Corporation Commission, and was awarded a judgment of \$15,824.

On appeal by the water company this judgment was affirmed. The company was acting as a public utility, not as a private supplier, when it furnished the water, and it was bound by the rates it filed with the Commission. These rates did not clearly permit a charge "as if" each unit were metered. To the extent that ambiguity in the rate schedule left its meaning open for conjecture, the ambiguity must be resolved against the water company, which drafted it. Finally, the rule, that money voluntarily paid by mistake of law cannot be recovered, does not operate in a suit for recovery of moneys erroneously paid by the United States.

Staff: United States Attorney Jack D. Hays (D. Ariz.)

DISTRICT COURTSADMIRALTY

Preferred Ship Mortgage; United States as Creditor May Foreclose Notwithstanding Prior Pending Reorganization Proceedings. United States v. SS TMT Carib Queen, et al. (S.D. Fla., February 6, 1958). In July 1957, an involuntary petition in reorganization was filed against TMT Trailer Ferry, Inc. A stay order was issued enjoining all persons from commencing proceedings against the debtor corporation or its assets. Pursuant to Title 11 of the Merchant Marine Act, 1936, the United States had previously insured a preferred ship mortgage on the SS TMT CARIB QUEEN, the principal asset of the debtor corporation. Upon default by the mortgagor in the working capital covenants of the mortgage, the mortgagee demanded payment of the insurance by the United States and, in November 1957, assigned the mortgage and the bond secured thereby to the United States in accordance with the provisions of the insurance contract. As assignee of the preferred ship mortgage, the United States instituted foreclosure proceedings against the vessel and the debtor corporation, relying on 11 U.S.C. 1103. The Court entered a final decree declaring the mortgage a valid first lien on the TMT CARIB QUEEN, ordered the vessel condemned and sold therefor and awarded a deficiency judgment for the excess of the mortgage lien above the net proceeds of the sale.

Staff: William E. Gwatin (Civil Division)
Assistant United States Attorney E. Coleman Madsen (S.D. Florida)

ANTI-KICKBACK ACT

Joint and Several Liability to United States of Subcontractor and Recipient, for Amount of "Kickback" Payments Made by Subcontractor. United States v. James Gemmell, Jr., et al. (E.D. Pa., February 10, 1958). The government sought in this action to recover amounts paid in violation of the act commonly known as the Anti-Kickback Act (41 U.S.C. 51 and 52). A subcontractor, Kunzig, who had furnished materials and services to two prime contractors, General Engineering and Pioneer Engineering, made payments of \$25,871.90 to Gemmell, an officer of General Engineering, and payments of \$28,902.78 to Pioneer Engineering (formerly a co-partnership). Gemmell also shared in payments of \$2,111 made by a second subcontractor, Peacock, to Milbury, an employee of General Engineering. The parties to the action as tried were Gemmell, Kunzig and Peacock. At the outset of the trial the government admitted it had no claim against General Engineering and requested an order of dismissal as to this defendant. Milbury was not a party to the action because he could not be served. Pioneer Engineering was dissolved and was not a party.

The Court found that the payments by Kunzig and Peacock were made either as inducements for the award of subcontracts by General Engineering and Pioneer Engineering, or as acknowledgment of subcontracts previously awarded, and were "kickback" payments within the prohibition of the Anti-Kickback Act. The Court concluded that Kunzig and Gemmell were

jointly and severally liable in the amount of \$25,871.90 for the "kickbacks" made by Kunzig to Gemmell; that Kunzig was liable in the amount of \$28,902.78 for the "kickbacks" made by him to Pioneer Engineering; that Gemmell was liable in the amount of \$730.50, for one-half of "kickbacks" of \$1,461 paid by Peacock to Milbury (which Milbury had divided with Gemmell); that Gemmell and Peacock were jointly and severally liable in the amount of \$325 for one-half of additional "kickbacks" of \$650 made by Peacock to Milbury; and that Peacock was liable in the amount of \$325 for the other half of the "kickbacks" of \$650 made by Peacock to Milbury.

Staff: United States Attorney Harold K. Wood and Assistant
United States Attorney Louis C. Bechtle (E.D. Pa.).

FALSE CLAIMS ACT

Surplus Property Act and False Claims Act Held Not Penal So That Actions Thereunder Do Not Abate Because of Death; Surplus Property Act Is Constitutional. United States v. United Auto, Inc., et al. (W.D. Mo., March 14, 1958). The United States instituted actions against defendants under the Surplus Property Act and the False Claims Act. After the complaint had been amended to include as party defendant the estate of a former deceased officer of the defendant corporations, the executor of the estate moved to dismiss both actions on the grounds that the actions, being penal, abated by reason of the death of his testator; that the Surplus Property Act is unconstitutional; and that as an officer of the corporation testator could not conspire with the corporation. The executor contended further that the estate could not be held liable for a breach of the corporations' contracts.

The Court held that neither statute is penal so that actions thereunder would not abate by reason of death, citing United States ex rel. Marcus v. Hess, 317 U.S. 537 and Rex Trailer v. United States, 350 U.S. 148. In regard to the constitutionality of the Surplus Property Act, the Court stated that there is no question out that Congress is empowered under Article IV, Section 3, Clause 2, of the Constitution, to dispose of government property. "Though there has been no specific ruling as to the Act's constitutionality, the fact that the Supreme Court, as well as many other courts, have had the Act before it for consideration and interpretation, tends to support the plaintiff's argument that the Surplus Property Act is a proper exercise of the government's right to prescribe regulations in regard to the disposal of government property." With regard to defendant executor's last two contentions, the Court stated that the government was entitled to make its proof in light of its allegations that defendants acted as a de facto entity without regard to corporate structure.

Staff: United States Attorney Edward L. Scheufler and Assistant
United States Attorney Horace W. Kimbrell (W.D. Mo.);
William T. Becker and Zalman A. Kekst, (Civil Division)

INJUNCTION

Taxpayer Lacks Standing to Maintain Suit to Enjoin Secretary of Agriculture from Carrying Out His Interpretation of Soil Bank Act. Reuss v. Benson (Dist. Col., March 5, 1958). Plaintiff, Congressman Henry S. Reuss, appearing pro se, brought an action to enjoin Secretary of Agriculture Benson from entering into contracts and making payments based upon Secretary Benson's interpretation of the so-called Reuss amendment to the Soil Bank Acreage Program (71 Stat. 329). Congressman Reuss charged that Secretary Benson's interpretation of the word "producer" permitted too large payments to certain individuals or corporations. Congressman Reuss sued "as a taxpayer and as representing constituents who are taxpayers" to obtain a declaratory judgment. Plaintiff also moved for a preliminary injunction and the government moved to dismiss the complaint. The motion to dismiss and the motion for preliminary injunction were heard together by Judge F. Dickinson Letts who by memorandum opinion filed March 5, 1958 denied the motion for preliminary injunction and granted the motion to dismiss upon the ground that plaintiff as a federal taxpayer had no standing to maintain the action and that the suit was an unconsented suit against the United States.

Staff: Assistant United States Attorney E. Riley Casey
(Dist. Col.); Harland F. Leathers (Civil Division)

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ANTITRUST DIVISION

Assistant Attorney General Victor R. Hansen

SHERMAN ACT

Complaint Filed Under Section 1. United States v. Retail Floor Covering Association of Greater Philadelphia, et al., (E.D. Pa.). A civil antitrust suit was filed on April 2, 1958 charging a trade association, three corporations and three partnerships with violating Section 1 of the Sherman Antitrust Act in connection with the sale and distribution of floor covering materials in the Philadelphia, Pennsylvania area.

Floor covering materials, such as carpets, linoleum, rugs and tiles are purchased by floor covering wholesalers and retailers in the Philadelphia area from manufacturers located throughout the United States, and are resold to retail outlets, flooring contractors and the consuming public. In 1956 retail sales of floor covering materials in the Philadelphia area amounted to approximately \$31,000,000.

The complaint alleged that floor covering wholesalers in the Philadelphia area agreed with defendants and co-conspirators to sell their merchandise to retail floor covering stores only and to refuse to sell to others. The complaint further alleged that defendants and co-conspirators agreed to boycott or to threaten to boycott floor covering manufacturers who sell or distribute their merchandise to persons other than floor covering wholesalers and retailers, such as the large food chain stores.

Staff: William L. Maher, Donald G. Balthis, Morton M. Fine
and John J. Hughes (Antitrust Division)

Complaint and Final Judgment Filed Under Section 1. United States v. The B. F. Goodrich Company, et al., (S.D. N.Y.). A civil complaint was filed on March 31, 1958 charging the B. F. Goodrich Company, Akron, Ohio, and Dayton Rubber Company, Dayton, Ohio, with violating Section 1 of the Sherman Act in the manufacture and sale of sponge rubber. A consent judgment terminating the case was entered on the same day by the court.

Sponge rubber is widely used as a cushioning material in the manufacture of pillows and mattresses, and in furniture and automobile upholstery. It is also used as a rug or carpet filler, as rug or carpet pads, and it has a number of other industrial and military uses.

Named as co-conspirators in the suit were two firms and two individuals, collectively known as the English Group, who are engaged in the acquisition and licensing of sponge rubber and allied product patents on a world-wide basis.

The complaint alleged that defendants conspired with the English Group to allocate world markets for the manufacture and sale of chemical process sponge rubber; that defendants conspired to prevent the entry of domestic

competitors into the chemical process sponge rubber market; that the offense began in 1938; and that Goodrich became a party when it entered into the manufacture and sale of sponge rubber in 1954 by its purchase of the Sponge Rubber Products Company.

The judgment enjoins defendants from allocating world markets, and from engaging in joint action to prevent competitors from entering this field and to determine who shall be licensed in this country to manufacture and sell sponge rubber under the patents. Other provisions of the judgment require defendants to grant licenses under specified patents to all applicants upon conditions at least as favorable as are contained in any license agreement to any third person.

Staff: Philip L. Roache, Jr., Charles F. B. McAleer, Joseph J. O'Malley and Stanley R. Mills, Jr., (Antitrust Division)

ELKINS ACT

Court Denies Government's Motions in Pipe Line Cases. United States v. The Atlantic Refining Company, et al., (Dist. Col.). On March 24 and 25, 1958 Judge Keech denied three motions, filed by the government on October 11, 1957 against three defendant common carrier pipelines and two defendant oil company shipper-owners, for orders carrying out the judgment entered in the above entitled case under the Elkins Act, on December 23, 1941.

In the motion against the Arapahoe Pipe Line Company, a common carrier pipeline whose shipper-owners are the Sinclair Pipe Line Company and the Pure Oil Company, the government had charged defendant with violation of the judgment in computing its shipper-owners' permissible dividend on the basis of its entire valuation, without deducting that part of its valuation which was the result of third party loans. On February 5, 1958 two other defendant pipeline companies, Interstate Pipe Line Company and Tuscarora Pipe Line Co., Ltd, filed a motion to construe the judgment in respect to the point raised in the Arapahoe motion and the two motions were jointly heard on March 24, 1958. The government argued that the Court should apply the judgment as construed by the government, otherwise paying dividends based on valuation attributable to borrowed money constituted an illegal rebate under the Elkins Act. However, the Court ruled that defendants' construction was in conformity with the clear language of the judgment and further that if any ambiguity were present, that ambiguity was resolved by defendants' full disclosure of their practices and the government's acquiescence for sixteen years.

The motion for an order carrying out the judgment against Tidal Pipe Line and its shipper-owner, The Tide Water Oil Company, concerned Tidal's inclusion of leased property in its valuation base whereas, as the government contended, the judgment provides that permissible shipper-owner dividends were to be based on the valuation of carrier property "owned and used" for common carrier purposes. In denying the government's motion Judge Keech ruled that the judgment must be read as a whole and that there was no indication of an intent by the parties to the judgment to utilize only the I.C.C. valuation of property "owned and used." Again the Court held, if ambiguity exists, the practice through the years has shown an acquiescence by the government to the Tidal construction.

The motion against the Service Pipe Line Company and its shipper-owner Standard Oil Company (Indiana) charged that defendant Service had computed its shipper-owner's dividends on a valuation which included pro-rata values for additions, betterments and retirements occurring during the year for which the report was made. The motion charged that this was contrary to the judgment provision that valuation was to be computed "as of the close of the next preceding year" to the one being reported. The denial of the government's motion was based on inequities which would result from a too literal interpretation of the judgment since, the Court held, the purpose of the judgment was to allow a return to the companies based on the property producing the earnings. The Court felt that no violence was being done to the judgment by its ruling particularly in view of the full disclosure by Service and the lapse of time before the filing of the government's motion.

No decision has yet been made with regard to appeal from the denial of these motions.

Staff: Alfred Karsted and Don M. Stichter (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

Deductions; Fines Paid by Motor Vehicle Carriers for Violations of State Weight Limitation Laws; Rents and Wages Paid by Illegal Gambling Enterprises. Tank Truck Rentals, Inc. v. Commissioner (Sup. Ct. No. 109 - October Term, 1957); Hoover Motor Express Co., Inc. v. United States (No. 95 - October Term, 1957); Commissioner v. Sullivan, Ross, Mesi (No. 119 - October Term, 1957). The question presented in all of these cases is whether the above indicated expenditures were deductible as ordinary and necessary business expenses within the meaning of Section 23(a)(1)(A) of the Internal Revenue Code of 1939.

The Tank Truck and Hoover Motor cases.

The expenditures involved in these cases were fines imposed for violations of the maximum weight laws of several states. In the Tank Truck case, in which most of the fines were incurred for violation of the Pennsylvania law, the taxpayer, transporting bulk liquids, operated its trucks throughout Pennsylvania and five surrounding States, with nearly all the shipments originating or terminating in Pennsylvania. The Pennsylvania law permitted a maximum weight of 45,000 pounds per load; the other states permitted maximum weights approximating 60,000 pounds. This situation made it impossible for Tank Truck, as well as other bulk liquid carriers, to operate profitably and also observe Pennsylvania law. Confronted by this dilemma, taxpayer (as did the industry as a whole) deliberately operated its trucks overweight in Pennsylvania in the hope, and at the calculated risk, of escaping the notice of the state and local police. Thus, its violations in Pennsylvania were willful. Its violations in New Jersey were also willful (the New Jersey statute contained reciprocity provisions subjecting trucks registered in Pennsylvania to Pennsylvania weight restrictions while traveling in New Jersey). The violations in the remaining states were unintentional.

In the Hoover Motor case, most of the fines were incurred in Tennessee and Kentucky; the remainder in seven other states. During the relevant period, both Tennessee and Kentucky imposed maximum weight limitations of 42,000 pounds over-all and 18,000 pounds per axle, considerably less than those in the other seven states. Hoover Motor's fines resulted largely from violations of the axle weight limits rather than from violations of the over-all weight limits. The violations usually occurred because of a shifting of the freight load during transit; they were all inadvertent and unintentional.

Following the so-called public policy rule foreshadowed in Textile Mills Securities Corp. v. Commissioner, 314 U.S. 326, and significantly referred to in Commissioner v. Heininger, 320 U.S. 467, and Lilly v. Commissioner, 343 U.S. 90, the Supreme Court held that deduction of the

finer in question would "frustrate state policy in severe and direct fashion by reducing the 'sting' of the penalty prescribed", and must therefore be denied. The Court would "not presume that the Congress, in allowing deductions for income tax purposes, intended to encourage a business enterprise to violate the declared policy of a State". And whether the violations for which the fines were paid were innocent or willful was considered immaterial, since, as the Court observed, "the statutes involved here do not differentiate between innocent and willful violators". (Emphasis supplied.)

An additional ground for disallowance of the deductions was stated with respect to the fines involved in the Hoover Meter case. Wholly apart from the possible frustration of public policy, the Court indicated that the payment of the fines in that case was not "necessary" to the operation of the taxpayer's business, since nothing in the record indicated that the taxpayer could not have avoided the major causes of the violations (the shifting of lead during transit, and reliance on weight designation in bills of lading).

The Sullivan, Ross, and Mesi cases.

The taxpayers in these cases operated Chicago bookmaking establishments, illegal enterprises under Illinois law. The Sullivan and Ross cases involved deduction claims for rents and for wages paid to employees who, in the main, performed services related to the bookmaking, including the recording of bets. The Mesi case involved only the question of deduction for wages. In all of the cases, both the acts performed by the employees and the payment of rent for the use of the premises for the bookmaking purposes were crimes under Illinois law.

In holding that the rent and wage payments were "ordinary and necessary expenses" in the accepted meaning of the words, and therefore deductible, the Court pointed to the Regulations permitting a deduction for the federal excise tax on wagers as an apparent recognition of gambling enterprises as businesses for federal tax purposes--a policy "sufficiently hospitable to allow the normal deductions of the rents and wages necessary to operate it." The Court also considered that application of the so-called public policy doctrine to deny the deductions in these cases "would come close to making this type of business taxable on the basis of its gross receipts, while all other business would be taxable on the basis of net income." In the Court's view, "If that choice is to be made, Congress should do it."

Staff: Meyer Rothwacks (Tax Division)

Collapsible Corporations; Gain on F.H.A. Housing Project and on Shopping Center Taxed as Ordinary Income. Burge v. Commissioner (C.A. 4, March 3, 1958); Weil v. Commissioner (C.A. 2, March 6, 1958). In Burge v. Commissioner taxpayer and others formed a corporation to construct apartment dwellings and obtained an F.H.A. guaranteed loan in excess of the cost of construction. When the project was completed and before the corporation had realized any income the corporation

distributed the unspent loan proceeds and shortly thereafter the shareholders sold their stock. In the first appellate decision construing Section 117(m) of the 1939 Code the Fourth Circuit, in an opinion by the late Judge Parker affirming the Tax Court, held the gains taxable as ordinary income. (A prior effort to tax such gains under Section 22(a), Commissioner v. Gross, 236 F. 2d 612, had failed.) The Court said that while the basic type of transaction which gave rise to the legislation involved use of "temporary" corporations and the corporation here was not dissolved, the statute was drawn in sufficiently broad terms to reach abuse, whatever form it might take.

In Weil v. Commissioner a building contractor and plumber formed a corporation to erect a shopping center, leased the premises and upon completion sold their stock to third parties. The Second Circuit affirmed the Tax Court decision, holding the corporation to be a collapsible one in a per curiam opinion, stating it was in "full agreement" with the opinion below. The Court further stated that a principal motive of tax avoidance did not have to be shown to invoke the statute.

Staff: Thomas N. Chambers (Tax Division)

District Court Decisions

Tax Lien; Prior to Attachment and Judgment Where Notice of Tax Lien Was Recorded After Date of Attachment but Before Attaching Creditor Secured Judgment. W. Jack Howard, Sheriff, etc. v. Western Machinery Company; United States, Intervenor. (D. Ariz.) In April, 1956, Western Machinery Company, a corporation, instituted action in a state court against Raymond Craig and AMS Company, a limited partnership, and at the same time had a writ of attachment issued and levied upon certain machinery belonging to defendants. On May 11, 1956, notice of federal tax lien against those defendants, in a sum of about \$11,000, was filed with the County Recorder, as provided for by state statute. Three days later Western Machinery secured a default judgment in its action, in a sum in excess of \$10,000. The judgment was recorded on June 4, 1956. Pursuant to execution order issued by the court, the Sheriff, in July, 1956, sold the machinery which had been levied upon, and also sold an automobile belonging to defendants, which had been attached in June, 1956. During the course of the sale notice was served upon the Sheriff by the District Director, notifying him of the outstanding tax liens and demanding satisfaction thereof from proceeds of the sale. Total proceeds amounted to \$3,035.

After the sale the Sheriff instituted this interpleader action, seeking to have the Court determine the rights as between the government under its tax lien and Western Machinery Company under its attachment and judgment.

The Court held that the attachment lien was inchoate at the time the notice of tax lien was filed; that the filing of the notice of tax lien was valid and in accordance with state statute, although not recorded with the Motor Vehicle Division of the state, or with the State Highway

Department; that since the tax lien was recorded prior to the time the attaching creditor secured its judgment, the tax lien was entitled to priority (citing United States v. Security Trust & Sav. Bank, 340 U.S. 47, and United States v. Acri, 348 U.S. 211). The Court ordered the entire proceeds of sale paid to the United States.

Staff: United States Attorney Jack D. Hays and Assistant United States Attorney Mary Anne Reimann (D. Ariz.); Mamie S. Price (Tax Division).

Tax Lien; Attached to Cash Surrender Value of Insurance Policy Subject Only to Prior Assignment Made to Secure Loan. United States v. Equitable Life Assurance Society, Mary Sue Hurt Campbell, et al. (E.D. Tenn.) Taxpayer had assigned various policies of insurance to a bank as security for a loan. Subsequent to the assignment, tax liens arose against him. On taxpayer's death, the government sued to collect the cash surrender value of the policies. Defendant moved for summary judgment which was denied and the government was permitted to file an oral motion for summary judgment. The government's motion was granted to the extent of the difference between the amount outstanding on the bank's loan and the cash surrender value at taxpayer's death.

Staff: United States Attorney John C. Crawford, Jr. and Assistant United States Attorney John F. Dugger (E.D. Tenn.); Stanley F. Krysa and Robert Coe (Tax Division).

Income; Whether Funds of Corporation Deposited by Officer in Secret Bank Accounts Without Knowledge of Other Officials Constituted Taxable Income to Officer or Was Exempt from Taxation as Embezzled Funds Under Commissioner v. Wilcox, 327 U.S. 404. United States v. Henry E. Peelle, et al. (E.D. N.Y.). This was an action to recover \$1,583,856.04, income taxes for the years 1944 to 1949. The Court handed down an opinion on February 4, 1958, which was partly in favor of and partly against the government.

Prior to the beginning of the suit taxpayer had been declared an incompetent. A receiver was appointed by the United States District Court at Brooklyn, New York, under Section 7403(d), Internal Revenue Code of 1954. Taxpayer was alleged to be the real owner of stock in the Peelle Company which was engaged in the manufacture of elevators, escalators and similar products. For many years he had been depositing checks representing income of the company in secret bank accounts without the knowledge of the company's officers with the exception of a bookkeeper. In 1950 and 1951 he made restitution in cash and securities of this money. The income involved was taxed to the corporation and in a separate action by the United States against the corporation the Government secured a judgment of nearly one million dollars which was paid after a comparatively small adjustment was made. As to the monies in the so-called secret bank accounts which were controlled by Peelle the District Court held that they did not constitute taxable income to him under the decision of Commissioner v. Wilcox,

327 U.S. 404. The Court was of the view that the acts of Peelle amounted to embezzlement.

It was necessary for the government to establish fraud with respect to most of the taxable years or otherwise the tax claims would have been barred by the statute of limitations. The Court held as it held in the case of United States v. Peelle Co., 137 F. Supp. 905 (E.D. N.Y.), involving the corporate tax, that the evidence of incompetency was insufficient to relieve taxpayer from fraud either as to his own income taxes or those of the corporation. The Court held that the returns reeked with fraud and that interest and penalties should be added and that the statute of limitations was not a defense.

The Court held that certain trusts which had been set up by the taxpayer could be reached by the government and subjected to the payment of his tax deficiencies because of the reserved power in him to control investments and to alter, modify, amend, or revoke the trusts. Other trusts were held not subject to the government's lien for the reason that taxpayer divested himself of all right of ownership in or dominion over them. It is estimated that at least one-half of the taxes sued for can be recovered under the Court's decision. The question of appealing the portions of the decision adverse to the government are under consideration.

Staff: United States Attorney Cornelius W. Wickersham, Jr.,
Assistant United States Attorneys Robert J. Grimmig and
Irwin J. Harrison (E.D. N.Y.), Homer R. Miller (Tax Division).

Deductions; Nonbusiness Legal Expenses; Legal Fees Expended for Services in Connection With Divorce and Financial Settlement Held Deductible Under Sec. 212(2), 1954 Code. James A. Fisher v. United States (W.D. Pa., December 27, 1957). Taxpayer in claiming deduction for legal fees contended that they were not rendered to prevent payment to wife, but, rather that most of the attorney's services were devoted to working out the terms of a property settlement, with a view to enabling taxpayer to hold on to a large block of income-producing stock in a corporation of which he was the vice-president, and that consequently the portion of the fee allocable to such services qualified as an expense incurred for the "conservation or maintenance of property held for the production of income" within the meaning of Section 212(2).

The government contended that under the rationale of Lykes v. United States, 343 U.S. 118, legal fees paid by a husband in resisting his wife's monetary demands incident to a divorce are not deductible under the terms of Section 212(2). In the alternative, the government argued that even if Baer v. United States, 196 F. 2d 646, which held that attorney fees incurred prior to the actual divorce action were deductible as long as the controversy between the parties did not go to the question of liability, were followed, the instant case was distinguishable since before the divorce action was filed the taxpayer possessed convincing proof that his wife was the guilty party. Consequently, the question of liability was very much in issue between the parties.

In holding for the taxpayer, the District Court held that all of the legal fees incurred prior to the filing of the divorce action were deductible. In so deciding, the Court held that the legal services rendered to the taxpayer were devoted almost entirely to adjusting taxpayer's liability to his wife so as to prevent the breakup of his stock holdings in a particular company which would have reduced his income-producing property and jeopardized his income-producing position with that company.

Staff: United States Attorney D. Malcolm Anderson and Assistant
United States Attorney Thomas J. Shannon (W.D. Pa.)
David R. Frazer (Tax Division)

Losses; Embezzlement; Time for Claiming Deductions. Interstate Financial Corporation v. United States (N.D. N.Y.). Plaintiff taxpayer is a holding corporation, owning stock of various subsidiary corporations engaged in the business of making small loans. On June 11, 1952, the manager of the Quaker State Finance Corporation of Scranton and Allentown, Pennsylvania, one of such subsidiaries, disclosed that commencing in the fiscal year ending June 30, 1949 and continuing through 1950, 1951 and 1952, through the medium of fictitious loans and forgeries, he had misappropriated or embezzled large sums of money from plaintiff which had been used for three purposes - (1) to make periodic payment upon said loans; (2) to make payment upon valid loans which had become in default; and (3) for his own purposes. Payments made upon the valid loans were for the purpose of hiding the financial situation of the company, thereby avoiding an audit which might well have disclosed the fictitious loans.

Upon the discovery of the loss, plaintiff filed claims for tax refunds for the years ending June 30, 1949, June 30, 1950 and June 30, 1951 and a tax return for the year ending June 30, 1952. In the claims for the three years and the return for the fourth year the loss was allocated among the years involved. These allocations were not claimed to be complete or wholly accurate, but were computed upon the same percentage basis as the total fictitious loans for the year bore to the total gross amount embezzled.

The claim for refund for the year ending June 30, 1949, was denied because taxpayer had previously executed a closing agreement for that year pertaining entirely to other issues. The claims for refunds for the years ending June 30, 1950, 1951 and 1952 were allowed. Checks were mailed to plaintiff who held the same subject to disposition of this case.

At the time of the filing of the above claims for refunds, the case of Alison v. United States, 344 U.S. 167 had not been decided. Prior to this decision Section 23(f) of the Internal Revenue Code of 1939 had been rigidly interpreted to require that a deduction must be taken in the year in which the theft occurred rather than in the year the embezzlement was discovered.

Subsequent to the Alison decision, plaintiff filed an amended return for the year 1952 deducting the total net loss in the tax year ending June 30, 1952 and claimed a refund based thereon. The claim was denied and this suit was seasonably brought.

Following the rule stated in the case of Ismert-Hincke Milling Co. v. United States, 246 F. 2d 754, the Court determined that the exact amount of the loss could not have been determined prior to the year 1953. It further accepted the rule of Alisen, supra, in determining that the arbitrary allocation of the loss to the embezzlement years would create a hardship upon the taxpayer because the taxpayer would be foreclosed from the recovery of any losses occurring in the fiscal year 1949.

The Court further rejected the government's contention that the attempted allocation to the years 1949, 1950, 1951 and 1952 and the filing of claims for those years constituted an election by the taxpayer and determined that no estoppel resulted by reason thereof.

Staff: Assistant United States Attorney Kenneth P. Ray (N.D. N.Y.)
William A. Miner (Tax Division)

Tax Lien Foreclosure. In re United States v. Daniel J. Leary, Sadie D. Leary, Frank A. Leary, Margaret Braheney, et al. (D. Conn.) Among other things, a certain tract of land was included as the subject matter of this federal tax lien foreclosure proceeding. Daniel J. Leary and Sadie D. Leary are the taxpayers. It was alleged that Frank A. Leary had or claimed to have some interest in the property. About February 21, 1938, the property had been deeded from the taxpayers to Frank A. Leary and his sister, Margaret Braheney. Later Margaret Braheney conveyed her interest by quitclaim deed to Frank A. Leary. About the time the property was conveyed by the taxpayers, Daniel J. Leary, as Comptroller of the City of Waterbury, was in trouble, which later resulted in his conviction.

In November, 1953, Daniel J. Leary commenced an action in the Superior Court at Waterbury against Frank A. Leary, et al., claiming to be the owner of the property in question and sought a reconveyance. Judgment was entered September 27, 1957, for the defendants. The instant matter arose upon Frank A. Leary's filing of a motion for summary judgment.

In the State Court proceeding Daniel J. Leary contended that at the time the property was conveyed to Frank A. Leary, et al. it was the understanding between the parties that the amount received by Daniel J. Leary was not a purchase price but, instead, a loan and a deed absolute upon its face was nevertheless intended as a mortgage. However, the Court looked upon the transaction as having been entered into with the purpose of defrauding creditors with full understanding of all of the parties of its purpose. Accordingly, the Court entered judgment on January 21, 1958, for the United States.

Staff: United States Attorney Simon S. Cohen and Assistant
United States Attorney Henry C. Stone (D. Conn.)
F. A. Michels (Tax Division)

CRIMINAL TAX MATTERS
Appellate Decision

Accuracy of Books of Taxpayer Relied Upon to Prove Unreported Income. Paul and Viola Moore v. United States (C.A. 5, March 18, 1958). Appellants owned and operated an automobile agency. Both were active in the business and Mrs. Moore did most of the bookkeeping. Their conviction for willful attempted evasion of their 1950-1952 individual income taxes was based mainly on a standard set of books (as prescribed by General Motors) maintained by them, which disclosed net profits about three times as large as those reported in the returns. The underreporting of income appeared to have been accomplished by overstating the amounts claimed on the returns as cost of goods sold and operating expenses. One of the primary defense contentions on appeal was that it was not enough for the Government to show a disparity between the reported profits and those shown on the books, and that the prosecution had not sustained its burden of proving that the books were correct and the returns wrong. The revenue agent testified that he had found the books in agreement with periodic reports filed with General Motors by appellants. Moreover, appellants' own witness, a certified public accountant, admitted that with the exception of two items the books were correct. The Court of Appeals rejected the defense argument in the following broad language:

Where taxpayers obtain essential credit and procure the very inventory of merchandise which is the main stock in trade on the basis of books and records regularly kept in accordance with accepted accounting principles, the jury is entitled to conclude that such books are an accurate reflection of the business. It is not required, as defendants seem to assert, that the Government go back and reconstruct the books item by item, sale by sale, check by check, to establish anew that the books and records are correct.

Staff: United States Attorney Russell B. Wine; Assistant United States Attorneys John R. Locke, Jr. and John E. Banks (W.D. Tex.)

State Court Decision

Liens; Federal Liens Accorded Priority Over State Tax Claims Which Had Not Been Perfected. John R. Fletcher v. Air Conditioning, Inc. of Maryland and United States, Intervenor. (Circuit Ct., Md.) The trustees in a receivership proceeding in Maryland paid into the state court the proceeds from the bulk sale of certain assets of taxpayer. The United States intervened, asserting priority of its tax claims in opposition to some forty other claimants including the State of Maryland. The contest narrowed down to one solely between the United States and the State of Maryland. The total of their claims was in excess of the amount paid into court.

In holding that all of the federal liens were entitled to priority over those of Maryland except one, the Court pointed out (Sections 3670 and 3671 of the 1939 Code) "it is not necessary for the United States to

do anything beyond depositing the assessment list with the District Director * * * in order for the lien to attach to all personal and real property." -Since under Maryland statutes a judgment is not a lien on personal property until execution has been issued, the Court ruled that those tax claims of the State on which a fieri facias had not been issued prior to the dates on which the federal liens arose were inferior to such federal liens. Only one such Maryland lien had been perfected by fieri facias and this claim was accorded priority as to some of the federal liens but was inferior to still other federal liens which had arisen prior to the date of execution under the fieri facias.

Staff: United States Attorney Leon Pierson; Assistant
United States Attorney Jefferson Miller II (Md.);
Clarence J. Nickman (Tax Division)

* * *

LANDS DIVISION

Assistant Attorney General Perry W. Morton

Condemnation; Right to Take. The attention of anyone who may be faced with an objection to the right to condemn is called to an article written by Roger P. Marquis, Chief of the Appellate Section, in 43 Iowa Law Review, No. 2, pp. 170-190, entitled "Constitutional and Statutory Authority to Condemn", which collects the authorities and discusses most alleged defenses to takings. This issue is a condemnation symposium dealing with other condemnation problems.

Real Property; Validity of Lease Determined by Comptroller General to Exceed 15% Limitation of Economy Act. Evelyn S. Meyer, as Trustee v. United States (Ct. Cls., March 5, 1958). In 1951, plaintiff's predecessor in title leased a 10-story building in Chicago to the United States. The Economy Act of June 30, 1932, 47 Stat. 382, 412, provides that rents cannot be paid by the United States which exceed 15% of the fair market valuation of the property. The regulations of the GSA in 1951 provided a number of methods whereby the fair market value of leased property could be established. One of these was by reference to existing appraisals for insurance purposes. Prior to execution of the lease, an employee of the Chicago office of the GSA signed a certificate, based on insurance appraisals, declaring the fair market value of the property was \$4,295,000.00. The executed lease called for a rental of \$500,000.00 a year which would require a fair market valuation of about \$3,300,000.00.

In 1954, the Comptroller General ascertained that the landowner had acquired the property in September 1949 for the sum of \$1,500,000.00, plus the obligation to pay ground rentals of \$43,200 per year. GSA then had a detailed appraisal made which showed a valuation of \$2,500,000 as of the date of the lease. The Comptroller General thereupon informed GSA that the reserved rental exceeded the limitations of the Economy Act. GSA ceased paying rent after August 1955. In December 1955, the United States filed a condemnation suit wherein it requested that the reasonable rental of the premises be determined from the date of the lease. In the same proceeding, steps were taken to acquire the fee. A declaration of taking, passing title to the United States, was filed on June 18, 1956. In the meantime, the lessor filed suit in the Court of Claims to recover the unpaid rentals from September 1955 to June 1956. On March 5, 1958, that Court granted plaintiff's motion for partial summary judgment, holding that officials of GSA had sufficiently complied with their own regulations with respect to the provisions of the Economy Act at the time the lease was entered into. The Court refused to review this determination or to take evidence as to the true market value of the property. It rejected the government's contention that GSA employees exceeded their authority and also refused to hold the case in abeyance pending the outcome of the same issue raised in the condemnation court in Chicago.

Staff: Thos. L. McKevitt (Lands Division)

Res Judicata. The Advertising Checking Bureau, Inc., v. United States (Ct. Cls., March 5, 1958). In 1951, the United States leased a building in Chicago which at the time was in the possession of other tenants. Arrangements were made whereby a majority of the tenants moved out voluntarily. Three refused to move, however, and condemnation proceedings were instituted to acquire their interest. One of these, The Advertising Checking Bureau, Inc., had an "eminent domain" clause in its lease which provided that the lease would terminate in the event the premises were "taken or condemned by any competent authority for any public use or purpose." The condemnation court held that, by reason of this clause in the lease, the tenant was not entitled to compensation in the condemnation proceeding. This holding was affirmed by the Court of Appeals for the Seventh Circuit. United States v. Advertising Checking Bureau, Inc., 204 F. 2d 770.

The tenant then instituted an action in the Court of Claims in which it alleged that, some time prior to the institution of the condemnation proceeding, the United States had entered the premises and by its actions had constructively evicted the tenant. On March 5, 1958, the Court of Claims sustained defendant's motion for summary judgment based on the doctrine of res judicata. The Court held that the claim of a taking at an earlier date was one which could have been raised in the condemnation case.

Staff: Thos. L. McKeivitt (Lands Division)

Condemnation; Witnesses; Offer of Proof. Bert Ruud and Emma Ruud v. United States, (C.A. 9, March 18, 1958). In a condemnation proceeding involving farm land in Idaho, the trial court refused to allow two farmers, who testified they were acquainted with the land in question and with farming practices and values in the vicinity, to testify as to the highest and best use to which the land could be put, and as to its value. The government had objected to such evidence on the ground that the witnesses were not qualified as expert appraisers. The Court of Appeals held this was error, but in this case it was not prejudicial error, and affirmed the judgment. The Court stated that if the trial court had gone no further than to say that the witnesses did not have sufficient qualifications to testify, the ruling would have been within its discretion. No offer of proof was made. Appellant produced three other witnesses, who were expert appraisers, one of whom was also a farmer, and appellant also testified. They all testified as to the highest and best use to which the land could be put and as to market value. The Court stated that the excluded testimony of the farmers would have been cumulative.

In a dissenting opinion it was asserted that the trial court's refusal to allow the farmers to testify was prejudicial error.

Staff: Elizabeth Dudley (Lands Division)

Oil and Gas Leases; Secretary's Power to Allow Amendment of Application Without Loss of Priority; Scope of Review of Secretary's Determination. McKenna v. Seaton (C.A. D.C., March 20, 1958). Oil and gas leases to public domain are issued under the Mineral Leasing Act of 1920 while leases on acquired lands, that is, lands which have been acquired over a period of years for various purposes, are issued under the Acquired Lands Act of 1947. The regulations under these two acts are very similar. On and after January 28, 1951, the regulations for public lands were changed to eliminate an itemization of existing holdings by an applicant for a lease. The regulations on acquired lands continued to require such listing. Thereafter DeArmas filed an application on acquired land which met the public land regulation but did not give the listing required by the acquired land regulation. Three years later McKenna filed on the same land an application which gave the listing. In October 1954, in another case, the Secretary had ruled that, since the Bureau of Land Management practice, after the change in regulations, had been to treat applications on acquired lands without the listing as meeting the regulations, such practice was erroneous, but allowed a period of grace for amendment of acquired land applications without loss of priority. DeArmas complied. The Secretary, in line with the prior decision, held DeArmas' application effective as of the date first filed, and thus prior to McKenna's, and awarded him a lease. McKenna brought a proceeding in the nature of mandamus in the District of Columbia seeking issuance of a lease to him and cancellation of the DeArmas lease. The district court dismissed and the Court of Appeals affirmed. It held that it could not say that the issuance of the lease to DeArmas was arbitrary, capricious or otherwise illegal. It distinguished United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, and Service v. Dulles, 354 U.S. 363, relating to the binding effect of regulations upon the administrative officer, on the ground that here the Secretary was deciding which of two applicants was the first qualified applicant entitled to receive the same right. It said: "Moreover, there is a long line of decisions of the Supreme Court, of this court, and of other courts, that the primary responsibility for the solution of such questions as this, arising in the administration of the land laws, is with the Secretary of the Interior, whose decision will not be superseded by the courts except under limited conditions," and that the limited conditions do not exist here. Judge Prettyman dissented on the ground that the Secretary had no power to depart from his regulations.

Staff: Fred W. Smith (Lands Division)

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ADMINISTRATIVE DIVISION**Administrative Assistant Attorney General S. A. Andretta****Court Reporting Rates**

The session of the Judicial Conference held during March of 1958 authorized the courts to increase the maximum transcript rates for ordinary transcript by 10¢ a page for the original and 5¢ for copy.

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

CITIZENSHIP

Right to Trial De Novo to Determine Issue in Action Under Section 10 of Administrative Procedure Act; Action Under section 360 of Immigration and Nationality Act Not Exclusive. Frank v. Rogers (C.A., D.C., March 20, 1958). Appeal from decision granting summary judgment for government in deportation case. Reversed.

The alien in this case was ordered deported, and brought a proceeding under section 10 of the Administrative Procedure Act challenging not only the validity of the deportation order but also moving that the issue of his citizenship be determined in the court proceeding. The lower court upheld the validity of the deportation order and ruled that the issue of citizenship could not be tested in the proceeding under the Administrative Procedure Act but could only be resolved by an action under section 360 of the Immigration and Nationality Act.

The appellate court disagreed. It pointed out that until the claim of citizenship is resolved, the propriety of the entire proceeding is in doubt. Review under section 10 of the Administrative Procedure Act would be inadequate indeed if it were too narrow to test de novo the issue of citizenship--going as it does to the heart of the administrative proceeding, the agency's very jurisdiction. If a plaintiff must bring two suits to gain relief--one under section 360 to establish his citizenship and another under section 10 to test the agency's action--the section 10 suit would logically have to await final decision in the section 360 suit since no sound decision could be made in it until the jurisdictional issue of citizenship had been decided. Neither justice nor efficient administration would be well served by such procedure, and the statutory language does not in the Court's view compel or even suggest such a result.

Furthermore, the Court found nothing in the language of section 360 to support the argument that appellant could obtain a trial de novo of his claim of citizenship only in a suit under the latter section. In a habeas corpus proceeding the issue of the citizenship of a person sought to be deported has always been subject to inquiry, and on such an issue the petitioner in habeas corpus is entitled to a judicial trial de novo. While the present suit was brought under section 10 of the Administrative Procedure Act, the same considerations should govern.

The Court concluded that the issue of citizenship, properly raised, is to be tried de novo in a suit under section 10, if plaintiff so requests.

Staff: Assistant United States Attorney Fred L. McIntyre (Dist.Col.)
United States Attorney Oliver Gasch and Assistant United
States Attorney Lewis Carroll on the brief.

DEPORTATION

Crimes Involving Moral Turpitude; Income Tax Evasion; Single Scheme of Criminal Misconduct; Applicability of Immigration and Nationality Act. Khan v. Barber (C.A. 9, March 11, 1958). Appeal from decision upholding validity of deportation order. Affirmed.

The alien in this case was ordered deported on the ground that he had been convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct. He had been convicted of wilfully attempting to defeat and evade his income tax for the years 1946 and 1947 by filing two separate "false and fraudulent income tax returns".

The court said that the first question involved was whether the crimes of which the alien was convicted involved moral turpitude, and held that they did, since intent to defraud the government was charged in the indictment and found by the jury.

The second question presented was whether the convictions arose out of a single scheme of criminal misconduct. The appellate court said that the alien pointed to no facts supporting his assumption that the two years of evasion could have been the result of a single plan or scheme. Fraudulent returns in two different years could, or could not, be one plan or scheme but the Court said it had no facts to prove such a scheme. In the absence of all evidence to the contrary, complete crimes committed on differing dates or in differing places are considered separate and different crimes, and support separate charges.

The mere assumption that evidence of a crime alleged in the first count might be admissible in a prosecution under the second count does not necessarily prove that if two somewhat similar crimes are committed a year apart, they are part of a common scheme.

Finally, the alien urged that since he was convicted in January, 1952, and the Immigration and Nationality Act was passed June 27, 1952, that Act could not be used against him. However, the Court pointed to the provision of the Act which reads that an alien shall be deported under it at any time after entry if convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct and said that the very inclusion of the words "at any time after entry" makes the Act applicable to any conviction occurring after entry.

Res Judicata; Effect of Prior Decision in Habeas Corpus Based on Same Issues. Anselmo v. Hardin (C.A. 3, February 25, 1958). Appeal from decision upholding validity of deportation order. (See Bulletin, Vol. 5, No. 7, p. 207; 150 F. Supp. 293). Reversed.

This was an appeal from a judgment by the district court dismissing the alien's action for a declaratory judgment and for review under the Administrative Procedure Act. The question involved was whether the doctrine of res judicata applied with respect to a previous judgment by another United States District Court granting a writ of habeas corpus in a prior

deportation proceeding which was premised on the judicial determination that the rights of the alien were governed by the Immigration Act of 1917 and that he was not deportable under its provisions. The lower court had ruled that the doctrine of res judicata did not apply.

In a lengthy opinion, the appellate court held otherwise. It pointed out that in deportation proceedings instituted in 1938 the primary question involved was whether the alien had entered the United States before or after July 1, 1924 and that in a habeas corpus action to review the holding by the Service that the alien had entered after that date, the district court had taken the position that there was no direct testimony sustaining the finding of the Service, although the court further held that it would hold the writ for a reasonable time to permit further investigation of the issue. This investigation was not conducted because of conditions in Italy as a result of World War II. Some years later another judge of the district court therefore granted the writ and discharged the alien from custody. The Assistant United States Attorney did not object to the entry of that order and no appeal was taken from it.

In 1948 the present deportation proceedings were instituted, based upon the identical charge contained in the prior proceedings as well as a new charge, which was lodged at the hearing, that after the effective date of the Immigration and Nationality Act the alien was deportable because he had entered the United States without inspection.

Among other things, the appellate court said that a final judgment by a court of competent jurisdiction is res judicata as to the parties not only as to all matters litigated and determined by such judgment but also as to all relevant issues which could have been presented but were not. The circumstance that the final judgment on the issue raised was premised on the failure of the losing party to support its position by sufficient evidence does not impair the binding effect of the judgment rendered. A judgment in habeas corpus proceedings discharging the petitioner for the writ is res judicata of the issues of law and fact necessarily involved in that result.

Consequently the appellate court concluded that in this case the original deportation proceedings, which were sustained by the issuance of a writ of habeas corpus were res judicata and that new deportation proceedings on the same issue could not be brought. The Court also rejected the government's contention that new administrative proceedings, including a charge based on the 1952 Act, based on new process and new evidence gave validity to the proceedings. Such facts could not avoid the res judicata impact of the prior habeas corpus judgment. The doctrine of res judicata comprehends the particular matter decided and here, the habeas corpus judgment having determined that the alien entered prior to July 1, 1924, and that his status was governed by the 1917 Act, the doctrine should have been applied by the lower court.

NATURALIZATION

Unwillingness to Bear Arms Against Native Country; Statutory Requirements Not to Be Waived by Courts. Petition of Krause (S.D. Ala., March 10, 1958). Petition for naturalization opposed by government on ground that

alien petitioner is unwilling to bear arms on behalf of United States as required by law.

Petitioner, a native and citizen of England, sought naturalization and it was found that she possessed all the general qualifications for admission to citizenship except that she stated that she would be unwilling to bear arms on behalf of the United States against England if required by law. She stated her willingness to bear arms against all other countries but indicated that if her native country should at any time be an enemy of the United States, her position would be that of a neutral.

The Court pointed to the provisions of the Immigration and Nationality Act which require a petitioner for naturalization to be willing to bear arms as required by law unless opposition to do so is based on "religious training and belief". The definition of "religious training and belief" does not encompass the reason given by the petitioner in this case for her refusal to agree to bear arms against her native country.

The Court said that an alien seeking to be naturalized can rightfully obtain naturalization only after complying with all of the statutory requirements for citizenship. Courts are without authority to sanction changes and modifications; their duty is to enforce rigidly the legislative will in respect to a matter so vital to the public welfare. The petitioner cannot be held exempt from taking the full oath as prescribed.

Petition denied.

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I N D E X

<u>Subject</u>	<u>Case</u>	<u>Vol.</u>	<u>Page</u>
<u>A</u>			
ADMIRALTY			
Stay of Appeal Pending Presentation of Newly Discovered Evidence	Staples, et al. v. U.S.	6	204
U.S. May Foreclose Notwithstanding Pending Reorganization Proceedings	U.S. v. SS TMT Carib Queen et al.	6	207
ANTI-KICKBACK ACT			
Subcontractor and Recipient of Kick- back Jointly and Severally Liable for "Kickback"	U.S. V. Gemmell, et al.	6	207
ANTITRUST MATTERS			
Court Denies Government's Motions in Pipe Line Cases Sherman Act - Complaint and Final Judgment Filed Under Section I Complaint Filed Under Section I	U.S. v. Atlantic Refining Co., et al.	6	211
	U.S. v. B. F. Goodrich Co., et al.	6	210
	U.S. v. Retail Floor Covering Association of Greater Philadelphia, et al.	6	210
<u>B</u>			
BACKLOG REDUCTION			
Districts in Current Status as of February 28, 1958		6	195
BANK ROBBERY	U.S. v. Johnston; Riley	6	200
BRIBERY			
Extortion	U.S. v. Bertone	6	201
<u>C</u>			
CITIZENSHIP			
Right to Trial De Novo to Determine Issue in Action Under Sec. 10 of Administrative Procedure Act; Action Under Sec. 360 of Immigra- tion and Nationality Act Not Ex- clusive	Frank v. Rogers (C.A. D.C., March 20, 1958)	6	227
COURT REPORTING			
Increase in Rates		6	225

<u>Subject</u>	<u>Case</u>	<u>Vol.</u>	<u>Page</u>
<u>D</u>			
DENATURALIZATION			
Necessity for Affidavits in	Matles, Lucchese and Costello v. U.S.	6	195
DEPORTATION			
Crimes Involving Moral Turpitude; Income Tax Evasion; Single Scheme of Criminal Misconduct; Applicability of Immigration and Nationality Act	Khan v. Barber (C.A. 9, March 11, 1958)	6	228
Res Judicata; Effect of Prior Decision in Habeas Corpus Based on Same Issues	Anselmo v. Hardin (C.A. 3, February 25, 1958)	6	228
<u>F</u>			
FALSE CLAIMS ACT			
Claim Does Not Abate on Death of Defendant	U.S. v. United Auto, Inc., et al.	6	208
FEDERAL TORT CLAIMS ACT			
Government May Assert Defense Against Suit by Municipality Not Available to Private Person	Newark v. U.S.	6	205
Scope of Employment; Effect of Permissive Use Statute	Mandelbaum v. U.S.	6	205
FEDERAL TRAIN WRECK STATUTE			
Constructive Intent	U.S. v. Stuart	6	202
FOOD, DRUG, AND COSMETIC ACT			
Dispensing of Dangerous Drugs Without Prescription by Physician; Amphetamine (Dexedrine)	Brown v. U.S.	6	201
<u>G</u>			
GOVERNMENT EMPLOYEES			
Non-disclosure of Veterans Status Estops Employee From Asserting It	Vigdor v. Young, et al.	6	204
<u>I</u>			
INJUNCTION			
Taxpayer Lacks Standing to Enjoin Administration of Soil Bank Act	Reuss v. Benson	6	209
<u>K</u>			
KIDNAPING			
	U.S. v. Smith; Noel	6	200

<u>Subject</u>	<u>Case</u>	<u>Vol.</u>	<u>Page</u>
<u>L</u>			
LANDS MATTERS			
Condemnation; Right to Take		6	222
Condemnation; Witnesses; Offer of Proof	Rund v. U.S.	6	223
Real Property; Validity of Lease Determined by Comp. Gen. to Exceed 15% Limitation of Economy Act	Meyer v. U.S.	6	222
Res Judicata	Avertising Checking Bureau v. U.S.	6	223
Oil and Gas Leases; Secretary's Power to Allow Amendment of Application Without Loss of Priority;	McKenna v. Seaton	6	224
<u>M</u>			
MAIL FRAUD, FRAUD BY WIRE	U.S. v. Hubbard, et al.	6	199
<u>N</u>			
NATURALIZATION			
Unwillingness to Bear Arms Against Native Country; Statutory Requirements Not to Be Waived by Courts	Petition of Krause (S.D. Ala., March 10, 1958)	6	229
<u>P</u>			
PUBLIC UTILITIES			
U.S. May Recover Overcharges by Public Utility	Kingman Water Co. v. U.S.	6	206
<u>R</u>			
REPORTERS			
Grand Jury; Security Check on		6	195
<u>S</u>			
SUBVERSIVE ACTIVITIES			
Conspiracy to Violate "National Firearms Act" and "Federal Firearms Act"	U.S. v. Bachman, et al.	6	197
False Statement; National Labor Relations Board Affidavit of Noncommunist Union Officer	U.S. v. Brown	6	197
Smith Act; Conspiracy	U.S. v. Wellman, et al.	6	198
Suits Against the Government	Wellman v. Folsom	6	198
	Robeson v. Dulles	6	198

<u>Subject</u>	<u>Case</u>	<u>Vol.</u>	<u>Page</u>
<u>T</u>			
TAX MATTERS			
Books of Taxpayer Relied Upon to Prove Unreported Income	Moore v. U.S.	6	220
Collapsible Corporations; Gain on Housing Project and Shopping Center	Burge v. Comr.; Weil v. Comr.	6	214
Deductions - Fines Paid by Motor Vehicle Carriers	Tank Truck Rentals v. Comr.; Hoover Motor Express Co. v. U.S.; Comr. v. Sullivan, Ross, Mesi	6	213
Nonbusiness Legal Expenses	Fisher v. U.S.	6	217
Income; Whether Corporation Funds in Secret Bank Accounts Constituted Taxable	U.S. v. Peelle	6	216
Losses; Embezzlement; Time for Claiming Deductions	Interstate Financial Corp. v. U.S.	6	218
Tax Lien; Attached to Cash Surrender Value of Insurance Policy	U.S. v. Equitable Life Assurance Society	6	216
Tax Liens - Federal Liens Accorded Priority Over State Claims which Had Not Been Perfected	Fletcher v. Air Conditioning of Md.	6	220
Tax Lien Foreclosure	In re U.S. v. Leary	6	219
Tax Lien; Prior to Attachment and Judgment	Howard v. Western Machinery Co.	6	215
THEFT FROM INTERSTATE SHIPMENT			
Receiving Goods Known to Have Been Stolen from Interstate Shipment	U.S. v. Perry	6	202
<u>W</u>			
WIRE TAPPING			
Unauthorized Publication or Use of Communications by Private Detective; Applicability of Wire Tapping Statute to Intrastate Communications	Lipinski v. U.S.	6	203