

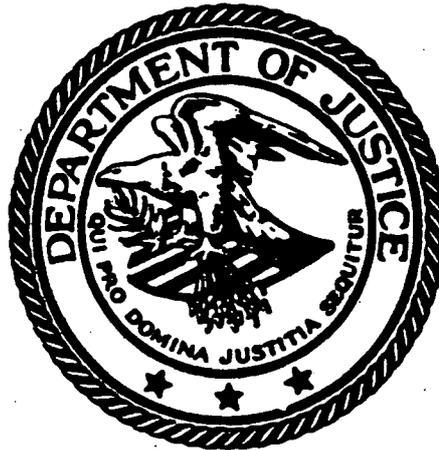
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No. 25



**UNITED STATES ATTORNEYS
BULLETIN**

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NOTICE

Accompanying this issue of the Bulletin is a memorandum prepared by the Office of Legal Counsel dealing with the effect of Public Law 85-619, 85th Congress, on an executive department head's regulation or order concerning the availability of information or records pertaining to that department. Requests for additional copies of the memorandum should be addressed to the Executive Office for United States Attorneys.

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INCENTIVE AWARDS PROGRAM

Under the incentive awards program honorary awards are given to employees in recognition of long and faithful performance of official duties for ten or more years of service. Such service is calculated in multiples of five years, i. e., recognition is given at 10, 15, 20 years, etc. Credit is allowed for all periods of Department of Justice service and any intervening military service, including periods of leave without pay, military furlough or separation for military purposes. Leave without pay for purposes other than military may be credited when such leave does not exceed six months in any one calendar year. Service in other agencies is not considered since the awards are for Department of Justice service only.

Each year a list of employees in each office who are eligible for such awards is sent to each United States Attorney with the request that the list be checked for accuracy and to insure the inclusion of all eligible employees. As awards are not granted automatically simply on length of service alone, the United States Attorneys are asked to recommend those whom they consider worthy of recognition by virtue of continuing satisfactory service.

It is not necessary that this recommendation be in the form of a letter. The United States Attorney need only write "Recommended" opposite the name of each employee listed, or he may simply note on the listing that all employees thereon are recommended. The list should then be returned to the Personnel Office, Department of Justice.

As of this date some of the listings submitted to United States Attorneys have not been returned. It is requested that all such listings be forwarded to the Personnel Office as soon as possible so that preparation of the appropriate certificates and accompanying emblems can be completed and sent to the United States Attorneys before the Christmas season when such awards are usually made.

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JOB WELL DONE

Former Assistant United States Attorney Robert Bjork, Southern District of New York has been commended by the Securities and Exchange Commission for his interest and cooperation and the fine lawyer-like approach he took in the cases which he has handled for them.

The Chairman of the Securities and Exchange Commission has commended United States Attorney William M. Steger, Eastern District of Texas, for the successful prosecution of a case involving schemes to defraud investors in interstate securities offerings.

Assistant United States Attorney Charles H. Miller, Southern District of New York, has been complimented by the trial judge on the preparation of an anti-racketeering case which he successfully prosecuted.

The American Consular Agent, Department of State and the Special Agent in Charge, Federal Bureau of Investigation, have commended Assistant United States Attorney Herbert F. Roth, Southern District of New York, for the efficiency he displayed in successfully prosecuting a case involving conversion of a vessel and misuse of documents.

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ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

SERVICE OF WARRANTS ON HOSPITALIZED PERSONS

Section 708.02-c of the United States Marshals Manual states the Department's policy that it will not assume the expenses of hospitalization or any service rendered a prisoner who is confined in a hospital at the time the warrant is served. This statement is developed further along in the paragraph.

All officials are requested to observe this Departmental policy. In case of doubt or after experiencing difficulty with the hospital authorities, the facts should be telephoned or telegraphed to the Bureau of Prisons to obtain advice before assuming any responsibility for the cost of hospitalization.

FORMS USAGE INQUIRY

Recently there was sent to most United States Attorneys further comments concerning the forms usage questionnaire. As of now responses had not yet been received from the following districts:

Alabama, Northern	Michigan, Western
Alabama, Middle	Montana
Alaska, 1st	Nevada
Alaska, 2nd	New York, Eastern
Alaska, 3rd	Ohio, Southern (Columbus Office)
Arkansas, Western	Oklahoma, Western
California, Northern	Oregon
California, Southern	Pennsylvania, Eastern
Colorado	South Carolina, Eastern
Delaware	South Carolina, Western
District of Columbia	Tennessee, Eastern
Florida, Southern	Tennessee, Middle
Idaho	Texas, Northern
Indiana, Northern	Texas, Southern
Indiana, Southern	Utah
Kansas	Vermont
Kentucky, Western	Virginia, Western
Louisiana, Eastern	Washington, Western
Louisiana, Western	West Virginia, Southern
Maryland	Wisconsin, Eastern
Massachusetts	Wisconsin, Western
Michigan, Eastern	

If you have not returned these comments by the time this Bulletin is received, will you please do so as soon as possible?

* * *

ANTITRUST DIVISION

Assistant Attorney General Victor R. Hansen

SHERMAN ACT

Complaint Filed Under Section 1. United States v. General Electric Company, et al., (S.D. N.Y.). A civil antitrust suit was filed on November 24 in New York City against General Electric Company, Westinghouse Electric Corporation, and N. V. Philips' Gloeilampenfabrieken, a leading Netherlands electronics firm, on charges of violating Section 1 of the Sherman Antitrust Act.

The complaint alleged that defendants, operating through Canadian subsidiaries, engaged, with 13 named co-conspirators, in an unlawful combination and conspiracy in restraint of foreign trade and commerce between the United States and Canada in radio and television receiving sets. Such restraint, the complaint alleged, was accomplished by the organization of a Canadian patent pool, controlled by defendants' Canadian subsidiaries, which prevented the importation into Canada of radio and television receiving sets manufactured in the United States. The complaint alleged that the Canadian patent pool threatened to institute, and instituted, patent infringement suits against manufacturers or dealers selling radio or television sets manufactured in the United States, and refused to license dealers indicating an intention of importing into Canada such United States-made apparatus.

The suit also alleged that as a result of defendants' conduct, the Canadian market for radio and television receivers has been virtually closed to United States manufacturers from early 1927 to date, and that, unlike the large volume of exports in other lines, the volume of United States exports of radio and television sets to Canada has been negligible. In 1956, United States exports of radio and television receivers to Canada amounted to only \$2,356,000, approximately one percent of Canada's total sales of such apparatus in that year.

The complaint also charged that United States manufacturers, who would normally have exported such apparatus for the expanding Canadian market, were compelled instead to manufacture such apparatus in Canada. In addition, United States consumers have been adversely affected, according to the suit, in that they have been deprived of the benefits which would have resulted from increased production of such apparatus in the United States.

Staff: Harry G. Sklarsky, John S. James, Bernard M. Hollander,
Herman Gelfand and Ralph S. Goodman (Antitrust Division)

Collaboration by Seagram and Schenley With Maryland Trade Associations Held to Violate Sherman Act. United States v. Maryland State Licensed Beverage Association, et al., (D. Md.) On November 21, 1958, Chief Judge Roszell C. Thomsen released a draft of his opinion terminating a five-week trial of this case.

The government's complaint, filed September 11, 1956, charged two state-wide associations of retailers, one state-wide association of wholesalers, an executive officer from each association, ten manufacturers, and seven wholesalers, engaged in the alcoholic beverage industry in Maryland, with participation in a price-fixing conspiracy and a conspiracy and attempt to monopolize interstate trade and commerce in alcoholic beverages in violation of Sections 1 and 2 of the Sherman Act.

Shortly before trial, consent decrees were entered terminating the case against the Association of wholesale dealers, the Association of package store operators, National Distillers Products Corporation, Hiram Walkers & Sons, Inc., Hiram Walkers Inc., Gooderham & Worts Ltd., James Barclay & Co., Ltd., McKesson & Robbins, Inc., and the defendant wholesalers. A judgment by default was obtained against the Maryland State Licensed Beverage Association (The Tavern Owners Association).

In October 1958, the government proceeded to trial against the four defendants remaining in the case, Joseph E. Seagram & Sons, Inc., Distillers Distributing Corporation (the Seagram sales Company), Schenley Industries Inc., and Affiliated Distillers Brands Corporation (the Schenley sales company).

The Court in its opinion found the existence of a continuing conspiracy as charged by the government and the participation of all defendants as charged. The Court ruled that the customary injunctive provisions of the consent decrees previously entered against the distillers should be adopted in the decree against Seagram and Schenley, including a provision requiring said defendants to restore sales of certain brands of alcoholic beverages to Montgomery County, Maryland, on a direct basis. Concerning the suspension of fair trade requested by the government, the Court ruled "the conspiracy to which all of the defendants adhered existed for so long a time, was so widespread and is still so animate among the retailers that in the ordinary case this court would hold that a suspension of all fair trade activity by the defendant manufacturers would be necessary to prevent a continuance or revival of the conspiracy." The Court noted however that this case involved the liquor business and that Maryland law includes a sobriety or temperance policy against price wars which unduly stimulate the sale and consumption of liquor. The Court considered the probability that a suspension of fair trade would encourage price cutting. Therefore, while the decree against the Seagram and Schenley companies will include a provision for the suspension of fair trade requested by the government, its operation will be suspended until it appears that the other provisions of the decree are insufficient to prevent the continuance or recurrence of the conspiracy. The government may move at any time more than six months and less than three years after the date of the entry of the decree to make the fair trade ban effective and to make it binding on all of the defendants in the case for a period of two years from the date of such order.

Staff: Wilford L. Whitley, Jr., John H. Earle and
John C. Fricano (Antitrust Division)

CLAYTON ACT

Cooperative's Acquisition of Principal Outlet for Milk of Competing Independent Producers Held Violative of Section 7 of Act. United States v. Maryland and Virginia Milk Producers Association (District of Columbia). Separate trial of the government's cause of action based upon alleged violations by defendant of Section 7 of the Clayton Act was ordered in the above case by Judge Holtzoff.

The pertinent allegations of the amended complaint charged that defendant acquired substantially all of the assets of Embassy Dairy, Inc., in 1954 and all of the stock of Richfield Dairy Corporation and Simpson Bros., Inc., in 1957 with the prescribed effects.

At the conclusion of the trial of the Section 7 allegations on November 21, 1958, the Court ruled that the evidence adduced at the trial led to the "inescapable" conclusion that defendant's acquisition of Embassy's assets tended both to lessen competition and to create a monopoly. In reaching this conclusion, the Court relied heavily on a number of documents written by defendant's officers, noting that, while motive or intent need not be established in a Section 7 case, "nevertheless evidence of motive or intent is admissible as it may possibly cast an illuminating light on what actually transpired." In addition to quoting at length from documents setting forth the defendant's aims in undertaking the Embassy acquisition, the Court also noted that the price paid "was far in excess of the actual and intrinsic value of the property purchased."

The Court concluded that, as a result of the acquisition, many of the independent producers of milk who supplied Embassy were unable to find an outlet for their product in the Washington market unless they were willing to surrender their independent status and join the defendant and that "one result of the transaction was that a portion of the fluid milk supply was diverted from the Washington to the Baltimore market, while another consequence was an increase in the amount of milk coming into the defendant's hands."

"A still further sequel of the transaction was the elimination of the largest single outlet in the Washington metropolitan area for milk produced by independent producers. Immediately after the Embassy acquisition 91.7 percent of the milk purchased by the federal government originated directly or indirectly from the defendant; as against 45 percent that it had indirectly supplied previously. The Embassy Dairy was eliminated completely as a factor from this competitive business."

"Thus, the result of the acquisition of Embassy by defendant tended to lessen competition in the milk industry in the Washington market in more ways than one. It diminished competition for the purchase of milk from producers by eliminating one large independent purchaser; it reduced

competition for sales to Government establishments by excluding a rival that had been in the habit of cutting prices and under-bidding Association customers; it tended to create a monopoly by concentrating a larger proportion of the milk supply reaching the Washington area in the hands of the defendant, thereby augmenting the defendant's control or, at least, influence on the market."

The Court ruled that the acquisition by defendant of the stock of Richfield and Wakefield Dairies was not violative of Section 7 of the Clayton Act because at the time of acquisition the two companies were insolvent and deeply in debt, the defendant being the largest creditor, and that these acquisitions came within the failing company doctrine enunciated in the International Shoe Company case. At the trial, the Court had excluded as irrelevant or remote virtually all of the evidence offered by the government to show the failing status of the two corporations was due in large measure to defendant's predatory or discriminatory practices.

In its ruling, the Court stated that the formal judgment would order defendant to divest itself within a reasonable time of all assets acquired from Embassy Dairy and to report within sixty days and at such other times as the Court may order what steps are being taken to comply with the judgment. Cancellation of certain noncompetitive agreements made in conjunction with the acquisition was also ordered.

Staff: Joseph J. Saunders, Edna Lingreen, J. E. Waters,
A. Duncan Whitaker and Harry Bender (Antitrust Division)

INTERSTATE COMMERCE COMMISSION

Three Judge Court Sustains Commission Denial of Motor Carrier Certificate for Lack of Public Need Where Evidence Relating to Need Had Been Excluded for Illegality of Past Operation; Good Faith in Past Operation Held Not Shown Where Applicant Carrier Failed to Submit Best Evidence of Intrastate Operating Authority Which Would Justify Conclusion of Innocent Unauthorized Operation. McBride's Express, Inc., v. United States and I.C.C. (E.D. Ill.). On November 6, 1958 a three-judge statutory court sitting at Danville, Illinois affirmed an order of the Interstate Commerce Commission which had denied plaintiff McBride's application for authority to operate as a common motor carrier in interstate commerce in Illinois.

The joint board, which had heard the proceeding in the first instance, had excluded all evidence relating to shipments carried by McBride's during the four year period in which it lacked interstate operating authority. Since the goods were all carried within Illinois, McBride's maintained that no interstate authority was required, or that its Illinois operating authority at least provided a showing of bona fides sufficient to justify the operation, so that the joint Board's

summary exclusion of this evidence was arbitrary action. It asserted further that the legality of the past carriage was not in issue in the application proceeding, and then generally attacked the substantiality of evidence relating to the finding that no public need had been shown which the proposed service would justify.

The Court sustained the exclusion, agreeing with the Commission that McBride's Illinois certificate was the best evidence of its local operating authority. Finding the legality of past operations material to the application proceeding, and finding substantial evidence in the record to support the Commission's findings, the Court sustained the administrative order by dismissing the complaint.

Staff: John C. Danielson (Antitrust Division)

* * *

CIVIL DIVISION

George Cochran Doub, Assistant Attorney General

COURTS OF APPEALBANKRUPTCY

Petition for Arrangement May Be Withdrawn Only With Court's Permission; Court Has Personal Jurisdiction Over Petitioner, Even Though Petition, by Mistake, Was Not Filed in His Name. Coy C. Goodrich v. John M. England, Trustee of the Estate of Goodrich Manufacturing Co., a co-partnership consisting of Coy C. Goodrich and Lulu Goodrich, bankrupts (C.A. 9, November 5, 1958). Appellant filed a petition for an arrangement intending thereby to place all of his personal assets and debts before the court. However, the petition was erroneously filed in the name of a non-existent partnership. Subsequently, appellant moved to dismiss the petition on the grounds inter alia that the petition gave the court jurisdiction only over the assets and debts of the fictitious partnership. On motion by the United States as a creditor, the district court ordered the petition amended to show it to be the petition of appellant as an individual. On this appeal the appellant contended inter alia (1) that the district court erred in refusing to dismiss the petition; and (2) that the court lacked personal jurisdiction over him and therefore could not substitute in the petition his name for that of the partnership. The Court of Appeals affirmed, holding: (1) a petition for an arrangement may be withdrawn only with the permission of the court, which will be denied if dismissal is not in the best interests of the creditors, and (2) since the appellant intended to place his personal debts and assets before the court by the initial petition, there was no substantial difference between the original and the amended petition and therefore the appellant was at all times personally subject to the jurisdiction of the court.

Staff: United States Attorney Robert H. Schnacke; Assistant
United States Attorney Marvin D. Morgenstein (N.D.
Cal.)

GOVERNMENT EMPLOYEES

Civil Service Commissioners Are Indispensable Parties to Suit for Reinstatement Where Commission Has Acted in Removal Proceedings. Robert W. Hicks v. Summerfield, et al. (C.A.D.C., November 13, 1958). At the direction of the Civil Service Commission, appellant, a non-veteran, was removed from his position with the Post Office Department because he had made false statements in his Civil Service papers. He filed suit in the district court to compel the Postmaster General and the Civil Service Commissioners to restore him to his position. While the suit was pending, two of the defendant Civil Service Commissioners resigned and their successors were not substituted as parties defendant within six months after taking office, as required by F.R.C.P. 25(d). On the government's

motion, the district court dismissed the suit without prejudice because of plaintiff's failure to substitute indispensable parties.

On appeal, the judgment of the district court was affirmed. The Court of Appeals held that in the circumstances of this case -- where it was conceded that the Civil Service Commission had directed the removal action complained of -- the Civil Service Commissioners were indispensable parties. Cf. Blackmar v. Guerre, 342 U.S. 512; Benenati v. Young, 95 U.S. App. D.C. 120, 220 F. 2d 383.

Staff: Howard E. Shapiro (Civil Division)

HOUSING

Settlement of Certificate of Claim Between Lender and F.H.A. Constitutes Accord and Satisfaction; Repealed Former Statutory Provision Awarding Excess to Defaulted Mortgagor After Payment of Certificate of Claim Did Not Create Vested Right. Deal, et al. v. Federal Housing Administration; Northwestern Mutual Life Insurance Co. v. Federal Housing Administration (C.A. 8, October 28, 1958). In 1939, FHA insured a loan of \$2,700,000 by Northwestern to Lucas-Hunt Village, Inc. of which Deal is trustee. Upon Lucas-Hunt's default in April 1940, Northwestern foreclosed and transferred the property of FHA along with its deficiency claim. Under Section 207(g)-(j) of the Housing Act, 12 U.S.C. 1713(g)-(j), debentures were issued to Northwestern for the principal amount of the defaulted mortgage. In addition, a certificate of claim was issued in the amount of \$41,194.15, representing foreclosure and other costs to Northwestern, which were to be paid upon liquidation of the property if, and to the extent that, the net amount realized by FHA from the property exceeded FHA's debenture obligation, the interest paid on the debentures, and the expenses incurred in handling and disposing of the property. In 1950, FHA made the necessary computation and settled with Northwestern, paying \$28,071.99. FHA's statement of settlement included a deduction of more than \$770,000 for debenture interest; since the debentures had been redeemed in 1945 and 1946, \$401,742.34 of this were not actual interest payments. FHA considered them in the nature of an "expense", warranted by the statutory directions to make debentures negotiable and to use excess funds for investment or for redemption of debentures.

In this action, brought in 1955, Deal and Northwestern challenged the interest deductions after redemption and sought an accounting. The district court sustained the FHA's practice as proper under the statute and held that, in any event, both plaintiffs were barred from contesting it. Northwestern was barred by accord and satisfaction, Deal by an amendment to the Act in 1948. The interest of Deal was based upon a prior provision that any excess, after payment of the certificate of claim, was to be paid to the defaulted mortgagor. The court held that this was a gratuity which Congress lawfully terminated when it provided in 1948 that excesses were to be retained in the Housing Insurance Fund.

The Eighth Circuit did not reach the merits of the FHA accounting practice but affirmed solely upon the latter two grounds. It held that

the prior statutory provisions did not constitute a contractual obligation to Lucas-Hunt and that, regardless of alleged reliance, no vested right could have been obtained prior to final liquidation of the project in 1950, and Deal was therefore barred by the 1948 amendment. There was also no "liability" to be saved by the General Savings Statute, 1 U.S.C. 109. As to Northwestern, the Court held that the obligation under the certificate was contingent, not liquidated, that there was no sufficient evidence of fraud or mutual mistake of fact or law, and that acceptance of the settlement in 1950 consummated an accord and satisfaction.

Staff: Lionel Kestenbaum (Civil Division)

JURISDICTION

Suit Against Secretary of Army and Chief of Army Engineers to Restrain Construction of Bridge Dismissed as Unconsented Suit Against United States; Federal Officials Domiciled in Washington Cannot be Sued in Official Capacities Except in the District of Columbia. Jones v. State Road Department of Florida, et al. (C.A. 5, November 5, 1958). Appellant brought this suit in the United States District Court for the Southern District of Florida against the State Road Department of Florida, the Secretary of the Army, the Chief of Army Engineers, and others, to enjoin the construction of a bridge across the intercoastal waterway at Miami. The District Court dismissed the action, and the Court of Appeals affirmed, holding, *inter alia*, that the suit against these federal officials was an unconsented suit to restrain official government action and hence could not be maintained. The Court also held that, since these federal officials were officially domiciled in Washington, D. C., only the District Court for the District of Columbia could have obtained personal jurisdiction over them in such an action. See Blackmar v. Guerre, 342 U.S. 512.

Staff: Robert S. Green (Civil Division)

VETERANS' AFFAIRS

Veteran Has No Right to Preferred Place on Former Employer's Seniority Roster if Preference Is Not Dependant on Length of Service Alone. Phillip W. Sularz v. Minneapolis, St. Paul & Sault Ste. Marie RR Co., and System Federation No. 66 of the Railway Employees' Department of the American Federation of Labor (C.A. 8, November 10, 1958). Appellant, a veteran, was employed as a carman's helper prior to his induction. After his discharge he was reemployed as a carman mechanic, but placed on the carman mechanic's seniority roster below two non-veterans who, at the date of the appellant's induction, were not even carman's helpers. The Court of Appeals found that the appellant would not automatically have become a carman mechanic as a matter of right before the two non-veterans were so employed, and consequently, relying on McKinney v. Missouri-Kansas-Texas Railroad Co., et al., 357 U.S. 265, affirmed the district court's judgment for the appellee.

Staff: Hershel Shanks (Civil Division)

Veteran Cannot Recover Damages Against Former Employer's Successor in Interest for Illegal Discharge by Former Employee. Irving Rix v. Turnbull-Novak, Inc. (C.A. 8, November 14, 1958). After his discharge from the Army, appellant was rehired by his former employer to fill a higher position than he formerly held. Five months later the employer notified appellant that he would have to return to his former position. This the appellant declined to do and, consequently, he was discharged. Immediately thereafter, the employer, who had offices in a number of different cities, sold his business in Kansas City where the appellant had been employed. This action for damages under Section 9 of the Selective Service Act of 1948, was brought against the purchaser of the Kansas City business on the theory that the purchaser was a "successor in interest" of the appellant's former employer. The district court dismissed the complaint on the grounds that the purchaser was not a successor in interest of the appellant's former employer, and that, having accepted a position higher than he held before induction, he waived his veteran's right to job protection. The Court of Appeals affirmed. Assuming, without deciding, that the purchaser of the Kansas City business was a successor in interest, the Court held that, while the statute obligates a successor to restore veterans to their former positions, it does not expose successors to liability for damages for the wrongful discharges by their predecessors. The Court also suggested, obiter dictum, that a veteran who returns to a higher position in his former employer's organization than he previously held, does not waive his one year statutory protection. That protection, however, would not prohibit the employer from demoting the veteran to his pre-service position.

Staff: Hershel Shanks (Civil Division)

DISTRICT COURTS

ADMIRALTY

Personal Injury; Federal Employees' Compensation Act is Exclusive Remedy of Seamen Injured on Vessels Employed in Merchant Service Owned by Panama Canal Company, an Agency and Instrumentality of United States. Scott v. Panama Canal Company (S.D.N.Y., November 5, 1958). Plaintiff, a seaman employed on the SS CRISTOBAL, a merchant vessel owned and operated by the Panama Canal Company, sued to recover damages for alleged personal injuries. The government moved to dismiss the complaint on the ground that plaintiff's exclusive remedy was for compensation under the Federal Employees' Compensation Act, 5 U.S.C. 751 et seq. The District Court, in granting the motion to dismiss the complaint, held that "the plaintiff was a civil employee of the United States, whose exclusive remedy is that provided by the Federal Employees' Compensation Act", citing Johansen v. United States, 343 U.S. 427 (1952) and Patterson v. United States, 258 F. 2d 702 (C.A. 2, July 11, 1958). It is to be noted that the Supreme Court granted certiorari in the Patterson case on November 24, 1958. 27 L.W. 3159. The Government had acquiesced in the granting of the petition because of the conflict with the Eighth Circuit's decision in Inland Waterways Corporation v. Doyle, 204 F. 2d 874.

Staff: Benjamin H. Berman (Civil Division)

HOUSING

Contracts; Decision of One District Judge That FHA Insured Note Was Unenforceable Binding on Judge of Same District in Subsequent Action Against Insured Bank for Breach of Warranty of Enforceability Despite Fact Bank Was Not Party to First Action. United States v. Citizens National Trust and Savings Bank of Los Angeles (S.D. Cal., October 8, 1958). The borrower defaulted on his FHA insured note, thereby obligating the government to pay the remaining balance to the Bank. In its suit against the borrower the government was unsuccessful, the court holding that the note was invalid and unenforceable because it had been obtained by fraud and because the Bank and the United States, as assignee, were not holders in due course. The Bank was not a party to this action although it was informed of it prior to the trial. The government then brought suit in the same district against the Bank on its warranty that the assigned note was valid and enforceable against the maker. The Bank contended that it was not bound by the prior decision because it was not a party to that suit. The Court held that it could not go behind the findings in the prior action that the note was invalid and unenforceable, and, accordingly, held the Bank liable on its warranty.

Staff: United States Attorney Laughlin E. Waters; Assistant United States Attorneys Richard A. Levine and Alfred B. Doure (S.D. Cal.); Preston L. Campbell (Civil Division)

TORT CLAIMS

Tort Claims Liability; No Duty on Part of Government in Sparsely Settled Areas to Inspect and Remove National Forest Trees Which Are Likely To Fall Because of Natural Decay and Injure Highway Travelers. Dewey J. O'Brien v. United States (D. Ore., September 30, 1958). Plaintiff sought damages for personal injuries suffered when a tree fell from Willamette National Forest land adjacent to a highway and struck the vehicle in which he was riding. The Oregon State Highway Department had assumed responsibility for the condition of the road. Just before its fall, the tree was on a hill about 84 feet upward and 112 feet from the center line of the road. It was dead and apparently had been dead for some time, but the Forest Service had no knowledge of this fact. The Forest contains more than 1,600,000 acres of land in Western Oregon.

The Court held that, although there were no local cases in point, it would be unthinkable that the Oregon judiciary would impose a duty to inspect upon the owners of forest lands, adjacent to little used roads in sparsely settled areas. Therefore, the location of the tree which fell, the absence of knowledge of its existence or condition, and the assumption of responsibility by the Oregon State Highway Department all required a judgment in favor of the Government.

Staff: United States Attorney C. E. Luckey; Assistant United States Attorney Robert R. Carney (D. Ore.); Lawrence Tucker (Civil Division)

CIVIL RIGHTS DIVISION

Assistant Attorney General W. Wilson White

Police Brutality. United States v. Payne (N.D. Ga.). Payne, a policeman in the Town of Iyerly, Georgia, incited a group of citizens to go to the home of another member of the community for the purpose of teaching him a lesson. When the group arrived at the victim's house, the victim fled into the woods where he was caught and beaten. The following night substantially the same group, again led by the police officer, went to the victim's home and again beat him after telling him to leave town.

The evidence was presented to a grand jury meeting in Rome, Georgia, on November 17th. The grand jury returned a two-count indictment against the police officer and one of the other participants. Counts were for conspiracy in violation of section 371 and for a violation of section 242, one of the so-called "civil rights statutes," of Title 18, United States Code.

The case will be tried at the next criminal term at Rome.

Staff: United States Attorney James W. Dorsey and
Assistant United States Attorney E. Ralph Ivey
(N.D. Ga.)

* * *

CRIMINAL DIVISION

Assistant Attorney General Malcolm Anderson

TOBACCO PRICE SUPPORT PROGRAMS

New Procedure in Forwarding to United States Attorneys by Department of Agriculture of Cases Involving Alleged Violations in Connection With Tobacco Price Support Programs. The Department of Agriculture has advised that there has been put into operation a new procedure in the administration of its tobacco price support programs, under which alleged marketing quota violations as well as alleged illegal pledgings of tobacco, both arising from the operations of the same persons, will be jointly reported in a single investigation report rather than separately as formerly and forwarded directly to the United States Attorneys. However if the marketing quota penalty claim exceeds \$5,000 both phases of the case will be referred to the Department of Agriculture and thence to the Department of Justice in accordance with present practice. It is also to be noted that where auction warehousemen are involved separate investigation reports will continue to be made, and separate handling of illegal pledging and marketing quota violations will continue.

The hardships upon United States Attorneys resulting from piecemeal reception of the two facets of tobacco cases was called to the Department's attention by United States Attorney Henry J. Cook of the Eastern District of Kentucky. Thereafter at the Department's request the Department of Agriculture undertook a study seeking a method to relieve this burden, this study resulting in establishment by that Department of the new procedure.

PERJURY

False Information Given in Deposition to Court Reporter. United States v. Richard Hendricks (D. Kansas). On September 17, 1958, Richard Hendricks gave a deposition to an official reporter of the United States District Court, Wichita, Kansas, in a civil action between private litigants. Hendricks stated that he had been an eye witness to an automobile-train collision in which three teenagers were killed and three injured on December 24, 1956. The information furnished by Hendricks was in such direct contradiction of statements given by numerous other witnesses that Federal District Judge Delmas Hill, Sr., on September 30, 1958, requested the Federal Bureau of Investigation to investigate the possibility that Hendricks may have perjured himself. Hendricks was interviewed on October 9, 1958, at which time he admitted that the information given in his deposition was false. On October 14, United States Attorney Wilbur Leonard, District of Kansas, ordered the facts developed by the investigation

presented to the grand jury. The following day an indictment charging Hendricks with violation of 18 U.S.C. 1621 was returned. The prompt presentation of this matter to the grand jury was in the best interest of preserving the integrity of federal court proceedings.

Staff: United States Attorney Wilbur Leonard (D. Kansas).

FOOD, DRUG AND COSMETIC ACT

Interstate Shipment of Adulterated Food; Heavy Penalties Imposed on Second Offenders. United States v. Basic Food Materials, Inc. and Ray F. Beerend (N.D. Ohio). Defendant corporation and Ray F. Beerend, its President, were charged in a two-count information (indictment having been waived) with violating 21 U.S.C. 331(a) and 333(a) by shipping in interstate commerce fennel seed which had been held under insanitary conditions and contained rodent excreta. Defendants had been convicted of similar offenses in March 1947. Following their pleas of guilty the Court, on September 19, 1958, fined each defendant \$2,000 and placed Beerend on probation for five years. The total fine of \$4,000 represents a substantial penalty in this type of case.

Staff: United States Attorney Summer Canary;
Assistant United States Attorney Richard M. Colasurd
(N.D. Ohio).

MAIL FRAUD

United States v. Alastair Kyle, Clinton Gardner and Toys of the World Club, Inc. (C.A. 2). The defendants Kyle and Toys of the World appealed from a conviction on a seven-count indictment charging conspiracy and six substantive violations of the mail fraud statute (18 U.S.C. 371, 1341 and 1342). Defendant Gardner appealed from a conviction on the conspiracy count. The indictment was based on the operation of a mail order business by the defendants from June, 1955 to August, 1956 in the course of which defendants placed in the mails millions of solicitations for membership in a gift toy club representing that they had a present supply of toys to fill subscriptions, that they would make full refunds to dissatisfied subscribers and that certain prominent persons had endorsed the plan. All of these representations were shown to be false and it was further proven that the defendants continued to make solicitation by mail after the company was hopelessly insolvent, that they failed to fill completely any subscriptions, that they made no refunds, that they sent lulling letters to dissatisfied subscribers and that subscription monies were placed in a non-corporate account in Canada. Kyle, president of the company, was sentenced to a year and a day to run concurrently on each count; Gardner, secretary-treasurer was sentenced to six months on the conspiracy count, and the corporate defendant was fined a total of \$1,400.

In affirming the conviction the Court of Appeals held, among other things, that there was sufficient evidence to justify the conviction of all defendants and that defendants' activities were not the result of poor management but constituted a concerted scheme to defraud by use of the mails. The Court also denied contentions of error in the trial procedure concerning the admission or exclusion of certain evidence and the court's charge on criminal intent. Defendant Gardner has filed a petition for a writ of certiorari.

(For disposition of pre-trial motions in this case, see items under Rule 16 in Bulletin Appendix issues of Vol. 5, No. 11, May 24, 1957, Vol. 5, No. 19, September 13, 1957, and under Rule 17(c), in Vol. 5, No. 25, December 6, 1957.)

Staff: United States Attorney Cornelius W. Wickersham, Jr.;
Assistant United States Attorney Warren Max Deutsch
(E.D. N.Y.).

LIQUOR

Forfeiture of Property Intended for Sale to Liquor Law
Violators (26 U.S.C. 5682 and 7302). United States v. 2,265 One-Gallon
Paraffined Tin Cans, etc., William C. Cumby, Claimant (C.A. 5, October 24,
1958). The government instituted a libel proceeding seeking condemnation of the entire stock of hardware, building and plumbing supplies seized from the claimant's place of business because he possessed the same with intent to use it in violation of the internal revenue laws relating to liquor.

The claimant conducted a hardware business in Georgia. All of the goods handled by him were capable of use in the production and manufacture of illicit whiskey and, as the district court found, were also capable of use in legitimate trade or business. Though legitimate buyers patronized the claimant's establishment his patrons included many known moonshiners to whom he catered, and to whom he made the greater part of his sales. Alcohol and Tobacco Tax investigators, posing as persons who wished to engage in the manufacture of illicit whiskey visited the premises and were advised by the claimant, Cumby, as to the proper articles from his stock to be used and how best to use them for that purpose. They purchased some of these articles. The seizure of Cumby's entire inventory followed.

The district court found that Cumby knew that many of his customers were reputedly engaged in the illicit liquor business and that the goods he sold them would in all probability be put to that use. However, concluding that Cumby himself did not intend to put the goods to such use or to share in the profits of such ventures, the district court felt constrained to deny forfeiture, holding that the intention to use or cause the use of the seized property, in violation (of Section 7302 of the Internal Revenue Code) must be that of the possessor and

cannot be that of the person to whom the property is sold.

The Court of Appeals reversed. Noting that the trial court's reliance upon decisions dealing with criminal prosecution of an offender rather than upon those dealing with forfeitures of property was misplaced, it held that where the property is being used in actual violation of law, or where it is not, is being held with the intent to make the goods available to those who will deal illicitly with it, the forfeiture statutes in question are satisfied. The Court, however, did not see fit to accept the government's contention that the entire stock of merchandise should be forfeited. Holding that the mere proof of an intention to sell for illegal purposes some of the chattels, which are not fungibles and each of which has a separate identity, could not be imputed to others of the chattels as to which the clear intention to so sell and use them is not shown, the court remanded the case to the district court for further proceedings.

Staff: United States Attorney James W. Dorsey;
Assistant United States Attorney J. Robert Sparks
(N.D. Ga.).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Criminal Charges; Recommendation Against Deportation; Conviction by Court-martial Will Not Sustain Deportation Proceedings. Gubbels v. Hoy (C.A. 9, November 14, 1958). Appeal from decision upholding validity of deportation order. Reversed.

The alien in this case was ordered deported on the ground that he had after entry been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct, within the meaning of section 241(a)(4) of the Immigration and Nationality Act of 1952. He entered the United States in 1948 for permanent residence and thereafter enlisted in the United States Army. While serving in Germany with the Armed Forces he was convicted of two separate offenses by courts-martial. As a result he was ordered deported, and the district court upheld the order (152 F. Supp. 277).

In the appellate court the alien stressed the provisions of section 241(b) of the 1952 Act, which provide in part that a court sentencing an alien for crime may make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, with due notice being given to specified interested parties who may make representations in the matter. He contended that when this provision is read in conjunction with section 241(a)(4), the latter section must refer only to sentences imposed by ordinary criminal courts and that sentences imposed by military courts or courts-martial are not within the contemplation of the provision.

The Court of Appeals said that the question before it was most difficult and apparently had not been previously decided. The Court found nothing in the legislative history of these provisions to throw any light upon the intention of Congress in the use of the language in question. The Court then considered various differences in the organization and procedure of courts-martial as contrasted with civil courts and reached the conclusion that court-martial procedures are not well adapted to the practical working of the recommendation against deportation procedure contemplated by section 241(b). With that in mind and considering the doubts which arise therefrom, the Court felt that it must follow the suggestion made by the Supreme Court in Fong Haw Tan v. Phelan, 333 U.S. 6, 10, that inasmuch as deportation is a penalty and since the stakes are considerable for the alien involved, it would not be assumed in construing a deportation statute that Congress meant "to trench on (an alien's) freedom beyond that which is required by the narrowest of several possible meanings of the words used."

The Court therefore resolved the doubts against the contention that the sentence of a court-martial may be a basis for deportation under section 241(a)(4), reversed the judgment of the district court and remanded the cause with directions to vacate and set aside the order of deportation.

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I N T E R N A L S E C U R I T Y D I V I S I O N

Acting Assistant Attorney General J. Walter Yeagley

Foreign Assets Control Regulations: Importation from Red China.
United States v. Weishaupt, et al. (E.D. N.Y.). Defendants were charged among other things, with willfully dealing in, purchasing and importing postage stamps, the country of origin of which was China, in violation of the Trading With the Enemy Act, 50 U.S.C. App. 5, and the Foreign Assets Control Regulations, Title 31 C.F.R. 500.204. On defendants' motion to dismiss the indictment based chiefly on the contention that the statute and the regulations promulgated thereunder were vague and indefinite, held, motion denied. Construing the regulations, the Court stated that their language "unequivocally prohibits the purchase, transportation, importation, or dealing in of any merchandise the country of origin of which is China (except Formosa)." The Court labelled as "specious" the argument that postage stamps were not within the proscription of the regulations because they were not among the more than one hundred articles named in the regulations. The Court said "it was the palpable intent of the regulations to prevent the giving of economic aid and comfort to Communist China by denying her and her nationals, except upon issuance of a license therefor, an American market for their goods, regardless of the nature or character thereof."

Staff: United States Attorney Cornelius W. Wickersham, Jr.;
Assistant United States Attorney Warren Max Deutsch
(E.D. N.Y.)

Perjury Before the Grand Jury. U. S. v. Mark Zborowski (S.D. N.Y.).
On April 18, 1958 the grand jury returned a one-count indictment against Mark Zborowski, charging that he testified falsely on February 20, 1957 when he denied before the grand jury that he had ever met Jack Soble. (See U.S. Attorneys Bulletin, Vol. 6, No. 10, page 268). On November 20, 1958 a verdict of guilty was returned by the trial jury. Judge John M. Cashin revoked bail and remanded Zborowski to custody. Sentencing has been set for December 8, 1958.

Staff: United States Attorney Arthur Christy; Assistant United States Attorney Herbert Kantor (S.D. N.Y.)

* * *

LANDS DIVISION

Assistant Attorney General Perry W. Morton

Statutory Trespass for Grazing on Indian Lands; United States as Proper Party Plaintiff; "Penalty" for Overgrazing Under Grazing Permit Construed as Liquidated Damages. R. B. Fraser, et al. v. United States, (C.A. 9, November 18, 1958). The United States instituted this action on behalf of the Crow Indian Tribe of Montana seeking to (1) recover the statutory penalty for trespass on Indian lands; (2) enjoin future acts of trespass; and (3) recover damages for cattle grazed, in excess of the number authorized in the grazing permit. Defendants were non-Indian cattle ranchers holding valid grazing permits on Indian lands. The district court found that defendants had committed trespass within the meaning of 25 U.S.C. 179 and 25 C.F.R. sec. 71.21 of the regulations of the Department of Interior in that defendants on repeated occasions had allowed their livestock to drift onto unfenced Indian lands. The court further found that continued trespass threatened overgrazing, resulting in permanent damage, difficult of computation, to the inheritance of the land, and accordingly awarded an injunction to prevent recurrence. The court concluded that the provision in the grazing permit which provided for a "penalty" consisting of the regular fee plus 50% thereof for each head of cattle grazing on the permitted land in excess of the authorized number was not a true penalty but liquidated damages.

Defendants appealed contending that "wilfulness" was an essential element of trespass under 25 U.S.C. 179 and that merely finding their cattle on adjacent lands did not constitute wilfulness. As to this contention, however, the Court held that the "wilfulness" imparted to section 179 by appellant "finds support in neither the cases nor the realities of the situation". The Court noted that the evidence showed not an "isolated" or "unintentional" act, but an offense repeated to the extent of clearly substantiating the district court in its finding that the trespasses were wilful within the meaning of section 179. United States v. Thompson, 51 F.Supp. 13 (D.C. Wash. 1941).

Appellants further contended that the United States was not a proper party plaintiff because the land on which the trespasses were committed was Indian land leased to a non-Indian, and it was he who should have brought this action to enjoin future trespass. The Court, however, held that continued trespass affects the reversionary interest; accordingly, the United States as trustee for the Indian landlord was a proper party to maintain suit for protection of the land.

Finally, appellants contended that the provision for a 50% "penalty" in addition to the regular fee for cattle in excess of the authorized number permitted to graze was not recoverable on the ground that this was in fact a penalty and the government had failed to prove actual damages. The Court stated that the use of the term "penalty" in the clause was not determinative. United States v. Bethlehem Steel,

205 U.S. 105 (1907). The Court went on to state that the provision was "a reasonable forecast of just compensation for the harm caused by the breach of the permit", and that the damage was incapable or extremely difficult of accurate estimation. Accordingly, the Court held the provision to be one for liquidated damages.

Staff: Robert S. Griswold, Jr. (Lands Division)

* * *

T A X D I V I S I O N

Assistant Attorney General Charles K. Rice

NOTICE

The Criminal Section of the Tax Division is receiving an unusually large number of requests from United States Attorneys for assistance in trials and in the preparation of briefs on appeal. With a very limited staff available in the Section and with the workload of new cases approaching its seasonal peak, it is difficult, if not impossible, to accede to all of the requests.

Some of the requests have been due to the fact that, upon the illness, resignation or disqualification of a United States Attorney, or of a particular member of his staff, no one is available in his office with any experience in the handling of criminal tax cases. United States Attorneys have been urged in years past to insure that at least two members of their staffs gain experience in the trial and briefing of this type of case so that their offices will not be caught short-handed in the event of an emergency. This request is repeated at this time and United States Attorneys are advised that, in a number of instances, it simply will not be possible for the Tax Division to furnish such assistance.

CIVIL TAX MATTERS
Appellate Decisions

Travel Expense Deduction; Construction Workers Employed at Job Site Away from Location of Family Residences Were Not Entitled to Travel Expense Deduction. Peurifoy, et al. v. Commissioner (S. Ct.), November 10, 1958. Taxpayers were heavy construction workers living at Kure Beach and Raleigh, North Carolina, respectively, and belonging to local unions there. Taxpayers worked in the vicinity of their residences when possible, but frequently also their unions obtained employment for them on construction projects in other places. The employment involved here was near Kinston, North Carolina, which is 122 miles from Kure Beach and 78 miles from Raleigh. While working at Kinston, taxpayers roomed and boarded there. Their employment lasted for 20 1/2, 12 1/2, and 8 1/2 months, respectively, after which they returned to their family residences. Taxpayers sought to deduct their expenses for room and board while at Kinston and their transportation costs to return to their residences at the termination of their employment on the ground that these were traveling expenses incurred while they were away from home in the pursuit of a trade or business within the meaning of Section 23(a)(1)(A) of the Internal Revenue Code of 1939.

The Commissioner denied the deduction on the ground that taxpayers were not away from home, but rather that their employment at Kinston had been indefinite rather than temporary and that Kinston had therefore become their home for purposes of the statute. While the Tax Court

generally holds that "home" within the meaning of the statute means a taxpayer's principal post of duty and not merely his residence, it found that here the taxpayers' employment at Kinston was temporary rather than indefinite, and hence that taxpayers were in fact away from their principal post of duty. The Court of Appeals reversed on the ground that the Tax Court's finding that taxpayers' employment was temporary was clearly erroneous. Taxpayers had failed to carry their burden of proving that they had satisfied the criteria of temporary employment, i.e., that their employment at Kinston was short and that prior to its commencement they had foreseen that it would be short.

The Supreme Court affirmed in a per curiam opinion. Noting the "temporary-indefinite" test applied by the Tax Court, the Court held that the issue was factual and that the Court of Appeals had made a fair assessment of the record. Under the circumstances, the Supreme Court refused to intervene.

Three justices dissented on the ground that "home" means a taxpayer's family abode, that the statute does not distinguish between temporary and indefinite absences from there, and hence that taxpayers were away from home within the meaning of the statute.

Staff: Kenneth E. Levin and Melva Graney (Tax Division)
Earl E. Pollack (Solicitor General's Office)

Priority of Federal Tax Liens Over Mechanics' Liens. United States v. Hulley (Sup. Ct., November 10, 1958.) In this case federal tax liens arose prior to the time the taxpayer incurred indebtedness constituting the basis of seven mechanic's liens claims, and, in fact, prior to the date marking the "visible commencement" of operations for the improvement of the property with respect to which the mechanic's liens furnished material. Under Florida law, mechanic's liens "relate back" to the latter date. The tax liens were also recorded prior to the time that all but one of the mechanic's liens were recorded. On the ground that the "visible commencement" of operations antedated the recording of the federal tax lien, the state trial court held that all the mechanic's liens were superior to the tax lien. On appeal, the Supreme Court of Florida affirmed per curiam (102 So. 2d 599) the order of the trial court, relying upon its prior decision in the United States v. Griffin-Moore Lumber Co., 62 So. 2d 589, and the dissenting opinion in United States v. White Bear Brewing Co., 350 U.S. 1010.

In turn, the Supreme Court of the United States rendered a per curiam opinion in which it granted the petition of the United States for a writ of certiorari and summarily reversed the judgment of the Florida Supreme Court. In so doing it cited virtually all its decisions upholding the relative priority of federal tax liens. The rationale of such decisions as applied to this case is that adverse mechanic's liens which require the taking of additional steps in order to be perfected, must yield to prior federal tax liens, and that such mechanic's liens do not become choate upon recordation, (United States v. Colotta, 350 U.S. 808, summarily reversing 79 S. 2d 474 (Miss.), United States v. White Bear Brewing Co., 350 U.S. 1010, summarily reversing 227 F. 2d 359 (C.A. 7); United

States v. Vorreiter, 355 U.S. 15, summarily reversing 134 Colo. 543); that the doctrine of relation-back cannot be invoked to defeat an antecedent federal tax lien (United States v. Security Tr. & Sav. Bk., 340 U.S. 47); and that as between choate liens the first in time is first in right (United States v. New Britain, 347 U.S. 81, 85).

Staff: Earl E. Pollock, Assistant to the Solicitor General.
George F. Lynch (Tax Division)

District Court Decisions

Tax Liens: Priority Given to Administration Expenses and Wage Claims Over State and Federal Tax Liens. In the matter of Concord Supplies & Equipment Corp., Bankrupt, S.D. N.Y. On March 6, 1956, the District Director filed notice of tax lien for \$29,429.56. On March 8, 1956, the Sheriff of Franklin County, Alabama, made a levy on certain personal property of the bankrupt in a plant at Russelville, Alabama. On March 30, 1956, the petition in bankruptcy was filed. Neither the lien of the State Tax Collector nor of the United States was enforced by sale prior to the filing of the bankruptcy petition, nor did either one reduce to possession the personal property on which the liens existed. Accordingly, the liens of the State Tax Collector and of the United States were postponed in payment to administration expenses and wage claims as set forth in clauses (1) and (2) of subdivision a of Section 64 of the Bankruptcy Act.

Staff: United States Attorney Arthur H. Christy and Assistant United States Attorneys William Ellis and Edward N. Delaney (S.D. N.Y.)
C. Stanley Titus (Tax Division)

Suit to Restrain Collection of Tax. William England v. H. J. White, Individually and as District Director. (E.D. Ill. September 3, 1958, 1958 CCH ¶ 9894.) This suit was filed to enjoin the collection of taxes by distraint until there has been a final determination of a case presented earlier to the court and presently pending final decision on appeal by the United States Court of Appeals for the 7th Circuit. In the earlier action, plaintiff and his wife filed a complaint against the United States seeking a declaratory judgment, declaring various documents null and void, cancelling of a tax lien and release of certain real properties from encumbrance, refund of sums paid into the Treasury, and recovery under the Tort Claims Act. The District Court dismissed that action and the appeal from the dismissal is now pending before the Court of Appeals.

In the instant case seeking a preliminary restraining order and an injunction restraining collection of taxes pending the appeal, the United States filed a motion to dismiss. The District Court granted the motion holding that it had no jurisdiction to entertain the complaint or plaintiff's motion for preliminary injunction. Reference was made to Section 7421 of the Internal Revenue Code of 1954 prohibiting suits to restrain the collection of taxes. To be excepted from that statute, the Court

held that there must be both an illegal tax and extraordinary circumstances. The Court stated that no case could be found in which injunctive relief was granted on facts similar to those presented here, and that plaintiff failed to come within the required exceptional circumstances.

Staff: United States Attorney C. M. Raemer and Assistant United States Attorney James B. Moses (E.D. Ill.); Paul T. O'Donoghue (Tax Division)

CRIMINAL TAX MATTERS
Appellate Decisions

Income Tax Evasion; Admissibility of Defense Exhibits Covering Transactions Occurring After Commission of Crime. Wolfe v. United States, (C.A. 6, November 13, 1958.) Appellant was convicted of wilfully attempting to evade his 1951 individual income taxes and the income taxes of a corporation owned by him. The proof showed that the travel and entertainment expenses claimed on the corporation returns were heavily padded by the inclusion of personal items which the corporation had paid on behalf of appellant, e.g., vacation expenses, a dishwasher and television set for appellant's home, luggage bought as a gift for a relative of appellant, and extensive repairs and improvements to appellant's residence. The evidence of wilfulness included misrepresentations by appellant to the corporation bookkeeper. Appellant admitted at the trial that he had drawn excessive "travelling expenses" and that the government's computations of the tax deficiencies (totalling about \$43,000) were substantially correct. The defense contended, however, that many of the items charged to expense were really capital expenditures; that they were so treated in 1955 when the corporation was liquidated and appellant bought its assets; and that hence a capital gains tax was paid with respect to such items. This contention was embodied in two summary charts prepared by an accountant retained by defendant. The main question presented by the appeal was whether the trial court had erred in excluding these charts. The Court of Appeals affirmed the conviction, holding that (1) since the exhibits covered events occurring long after the completion of the crimes, their exclusion was a proper exercise of the trial court's discretion; and (2) in any event, the exhibits were irrelevant because they did not go to the question at issue--whether the expenditures when made were properly charged to the corporation.

Staff: Frederick B. Ugast and Joseph R. Cannon (Tax Division)

Conspiracy to Evade Taxes; Statute of Limitations. In Forman v. United States (C. A. 9, September 15, 1958), the conviction of appellant for conspiracy to evade certain income taxes was reversed on the ground that prosecution was barred by the statute of limitations, and the case was remanded for entry of a judgment of acquittal. (See Bulletin, October 24, 1958, p. 654.) On October 27, 1958, the Court of Appeals granted the government's petition for rehearing, which did not ask for an affirmance of the conviction, and remanded the case for a new trial. The government conceded that the case was not submitted to the jury on a

proper theory, but argued that the error in the instructions could be cured on a new trial; i.e., that the jury could have found, on proper instructions, a continuing conspiracy to evade taxes extending into 1952, by submitting false records and making false statements to the investigating agents. United States v. Beacon Brass Co., 344 U. S. 43. The Court of Appeals, which had originally regarded these acts as nothing more than devices to cover up the initial filing of false returns, rather than as constituting new overt acts to further the main object of the conspiracy-- tax evasion, has now modified its opinion to say that "the record does not require a conclusion that the conspiracy here was consummated by the filing of the individual tax returns."

Staff: United States Attorney William P. Moriarty and Assistant
United States Attorney J. S. Obenour (W.D. Wash.)
Joseph F. Goetten and Richard B. Buhrman (Tax Division)

DISTRICT COURT DECISION

Income Tax Evasion: Net Worth Prosecution; Quantum of Proof of Assets Attributable to Taxpayer; Allocation of Income Between Years; Proof of Current Income. United States v. Kleinman (E.D. N.Y. Unreported). A judgment of acquittal was granted in a one-year net worth case involving attempted evasion of income taxes for 1949 on the basis of an insufficient showing that funds deposited in the savings bank account of the defendant's father were properly attributable to the defendant. In this prosecution of a former revenue agent, the government's case was weakened by the lack of evidence of either a disclosed or an undisclosed source of income. Although the defendant's explanation as to the origin of the funds was considered "unlikely, contradictory, and provided the basis for its own refutation," the trial court did not consider the fabrication sufficiently "clear and impressive" for an application of the rationale of United States v. Adonis, 221 F. 2d 717 (C.A. 3, 1955). The chain reaction following a lack of proof of a likely source of income and the doubt as to the ownership of the assets also led the trial court to express doubts that there was a proper allocation of the allegedly unreported income to the one prosecution year.

The holding can be criticized for its application of the discredited reasonable hypothesis rule and for being overly strict in requiring clear and convincing proof of ownership by the taxpayer when the government's proof established a recognized improbability that the father could not have amassed the funds attributed to the taxpayer. Nevertheless, this case illustrates the necessity in net worth cases for a tracing of funds appearing in the names of third parties which are to be attributed to taxpayers to avoid the possible interaction of allocation-of-income and proof of current income problems in net worth prosecutions.

Staff: United States Attorney Cornelius W. Wickersham, Jr., and
Assistant United States Attorney Morton J. Schlossberg
(E.D. N.Y.)

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MEMORANDUM

Re: Effect of Public Law 85-619, 85th Cong., on a regulation or order of the head of an executive department limiting the availability of information or records appertaining to that department.

There has been presented the following question:

Does Public Law 85-619, 85th Cong., affect the validity of a regulation or order of the head of an executive department which has heretofore been issued under Rev. Stat. § 161, 5 U.S.C. § 22 (1952), and which limits the availability of information or records appertaining to that department?

For the reasons set forth below I am of the opinion that the question should be answered in the negative. There follows a statement of the reasons for this conclusion.

Before Public Law 85-619, 85th Cong., became law, Rev. Stat. § 161, as amended, provided as follows:

"The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it." 5 U.S.C. § 22. ^{1/}

^{1/} Under Rev. Stat. § 159, 5 U.S.C. § 2, the word "department" in Rev. Stat. § 161 means one of the ten executive departments, the so-called cabinet departments, which are enumerated in Rev. Stat. § 158, as amended, 5 U.S.C. (Supp. V) § 1. Hence Rev. Stat. § 161, as amended by Public Law 85-619, 85th Cong., is not applicable to an agency or establishment which is not in an executive department.

Public Law 85-619, 85th Cong., amends this section by adding at the end thereof the following sentence:

"This section does not authorize withholding information from the public or limiting the availability of records to the public."

In his letter of March 13, 1958, to Senator Hennings, Chairman of the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, the Attorney General expresses the opinion that Rev. Stat. § 161 is essentially a codification of earlier statutes for the custody of the records and papers of the initial executive departments, beginning with § 2 of the 1789 Act creating a Department of Foreign Affairs, and its counterparts for the other early executive departments, 1 Stat. 28, 49, 65, 68, 553. The letter concludes by stating that "where records of the executive branch are involved, reasons of public policy in the interest of efficient and effective government, require that access to certain documents shall not be permitted, if the President in his sound discretion determines that it would be contrary to the public's best interest to make them available." ^{2/}

Before Public Law 85-619, 85th Cong., became law, there was issued Order No. 3229 (Revised) of the Attorney General, dated January 13, 1953. If a subpoena or other order purports to require a subordinate employee of this Department to produce official information in the Department's files, this Order provides that departmental counsel shall advise the body issuing such a subpoena or other order that the employee is not authorized to furnish such information, and that the demand therefor has been referred to the Attorney General,

^{2/} The letter is reproduced in Hearings on Freedom of Information and Secrecy in Government, S. 921, Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 2d Sess. pt. 1, 52-54 (1958).

18 Fed. Reg. 1368. 3/ This Order, requiring an employee to refer a request for particular information to the Attorney General, simply centralizes in the head of the Department, a decision as to whether such information is privileged from inspection by, or disclosure to, another branch of Government or the public.

In upholding the validity of a predecessor to the present Order No. 3229 (Revised), the majority opinion states that the Supreme Court has not yet been required to pass upon the constitutionality of a determination by the Attorney General himself that government papers should not be produced in response to a subpoena. United States ex rel. Touhy v. Ragen, 340 U.S. 462, 469 (1951). The validity of a similar type of order which was issued under Rev. Stat. § 161 by the Secretary of the Treasury, the head of another executive department, had earlier been upheld. Boske v. Comingore, 177 U.S. 459 (1900). See also 25 Op. Atty. Gen. 326 (1905).

On March 6, 1958, the Attorney General presented a statement before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, on inquiry by the Legislative Branch concerning the decision-making process and documents of the Executive Branch. He pointed out that Rev. Stat. § 161 is not itself the fundamental basis for the exercise of the executive privilege to withhold particular information from the Legislative or Judicial Branches or the public on the ground that its disclosure is not in the public interest.

The legal basis for the position of the Executive Branch that certain information in its possession is not available for public inspection is that the Constitution vests the

3/ Order No. 3464, Supplement No. 4 (Revised), of the Attorney General, dated January 13, 1953, provides inter alia that all official files, documents, records and reports in the Department's files shall be regarded as of a confidential nature, and that the contents thereof shall be disclosed only in the performance of official duties.

executive power of the Federal Government in the President; and that the doctrine of the separation of powers prevents one branch of the Federal Government from encroaching upon the powers vested by the Constitution in another branch. ^{4/} Accordingly when the President, or the head of an executive department, subject to conformity to his orders, determines that such information is not available for inspection by another branch or the public, under the Constitution there does not exist the power to compel them to make it available. ^{5/}

There is a possibly grudging concession of the existence of the executive privilege in the Senate committee report on Public Law 85-619, 85th Cong., ^{6/} and its existence was also conceded in the Senate debate preceding its passage by the Senate. ^{7/} There were generally similar concessions in the House debate on Public Law 85-619, 85th Cong. ^{8/} In the

^{4/} This statement, which includes appropriate citations to the judicial precedents, is reproduced in the Hearings, supra note 2, at 33-48, and in 44 A.B.A. J. 941-944, 1007-1014.

^{5/} The historical precedents respecting the exercise of the executive privilege to withhold information from the Legislative Branch in instances where it was decided that it was not in the public interest to do so are collected in the memorandum from the Attorney General to the President, which is attached to the latter's letter of May 17, 1954, to the Secretary of Defense. The letter and memorandum is reproduced in 100 Cong. Rec. 6621-23.

Some relatively recent precedents are cited in the Attorney General's statement of March 6, 1958. See Hearings, supra note 2, at 38-42, and 44 A.B.A. J. 1007-1008.

^{6/} S. Rep. No. 1621, 85th Cong., 1st Sess. 6-9 (1958).

^{7/} See, for example, 104 Cong. Rec. 14357, 14364 (daily ed. July 31, 1958).

^{8/} Ibid., at 5863-5865 (daily ed. April 16, 1958). See the additional views of Congressman Hoffman in H. R. Rep. No. 1461, 85th Cong., 2d Sess. 15 (1958).

congressional debate it was recognized that the amendment to Rev. Stat. § 161 in Public Law 85-619, 85th Cong., "cannot * * * upset any of the inherent powers or the privileges of the Executive, if any."

To justify Public Law 85-619, 85th Cong., it was said that it is intended to prevent any future contention by an executive department that this statute itself authorizes the head of that department to withhold information from another branch of government or the public. ^{9/} Both of the legislative reports on Public Law 85-619, 85th Cong., state that the amendment is limited in its application to Rev. Stat. § 161. They emphasize that the amendment to that statute in this Public Law is not intended, and should not be construed, to amend or repeal any other statute which may authorize the withholding of information from the public or limiting the availability of records to the public. ^{10/}

In an oral statement at the hearings on March 6, 1958, before the Subcommittee on Constitutional Rights, with reference to the records and papers of an executive department, the Attorney General characterized Rev. Stat. § 161 as a "keeping of custody statute, a housekeeping statute." ^{11/}

^{9/} 104 Cong. Rec. 5883 (daily ed. April 16, 1958). See also S. Rep. No. 1621, supra note 7, at 1.

^{10/} S. Rep. No. 1621, supra note 7, at 9; H. R. Rep. No. 1461, supra note 9, at 12. For a compilation of some such other statutes, see Committee Print, Compilation of Statutes Authorizing the Withholding, Restricting, or Limiting the Availability of Government Information and Records, Government Information Subcommittee of the House Committee on Government Operations, 85th Cong., 2d Sess. (March 1958). It should be noted, however, that some of the statutes there listed as authorizing the withholding of particular information are only applicable to various executive establishments or agencies which are not in an executive department.

^{11/} Hearings, supra note 2, at 26.

In the congressional debate on Public Law 85-619, 85th Cong., there was a discussion of the effect of the proposed amendment on the performance of such housekeeping functions.

Thus, a letter from the sponsor in the Senate of Public Law 85-619, 85th Cong., said:

"The amendment to section 161 proposed by S. 921 [a companion bill to H. R. 2767, 85th Cong., which was approved as Public Law 85-619, 85th Cong.] definitely will not affect existing valid departmental regulations and orders made by the heads of executive departments.

"In this connection let me refer to the decision of the Supreme Court in the case of United States ex rel. Touhy v. Ragen (340 U.S. 462), decided in 1941. In that case, the Court held valid an order of the Attorney General promulgated under section 161 removing from his subordinates and centralizing in his own office the determination of when records in his department should be made available to the judicial branch.

"It is not the purpose of S. 921 to affect the decision in Touhy v. Ragen. Insofar as S. 921 is concerned, the holding in that case would remain the law of the land, since S. 921 goes only to the authority of the department head himself, and seeks to make it clear that section 161 does not authorize executive department heads to withhold information from the public. S. 921 will not interfere with the existing authority of the heads of executive departments to issue reasonable regulations and orders governing the conduct of their subordinates, and will not affect valid regulations and orders now in effect. Existing, valid regulations and orders which now apply to personnel files would remain unchanged and would not be affected by enactment of S. 921, even though promulgated under section 161.

"From the foregoing I think it is clear that S. 921 in no way will affect the present confidential status of executive department personnel files." 12/

A spokesman for this sponsor said:

"In the case of Touhy v. Ragen (340 U. S. 462), the Court had before it a Department of Justice order whereby officers and employees of the Department were ordered to decline to produce any official files, documents, records and information in the offices of the Department in response to a subpoena duces tecum, unless otherwise expressly directed by the Attorney General. The Court, after stating that it was not determining the ultimate question whether the Attorney General himself might refuse to produce the Government papers in his possession, held the departmental order valid under section 161. The Court cited its decision in Boske against Comingore, and held that the Attorney General could validly withdraw from his subordinates the power to release department papers.

"The plain meaning of section 161, as described in the Committee report on S. 921, and as interpreted and applied in Boske against Comingore and Touhy against Ragen, in my opinion represents the true meaning of the present law." 13/

In response to a question as to whether the amendment to Rev. Stat. § 161 in Public Law 85-619, 85th Cong., would prohibit the head of an executive department from prescribing regulations instructing his employees to refer requests for certain information to that department head, this spokesman said:

12/ 104 Cong. Rec. 14358 (daily ed. July 31, 1958).

13/ Ibid.

"To whatever extent section 161 now authorizes the Postmaster General or the head of any of the other executive departments to prescribe regulations instructing his employees to refer requests for certain information to him for decision, such authority will remain unchanged by the proposed amendment", 14/

and that

"Assuming the directive [of the head of an executive department centralizing in himself the decision on a request for access to certain information] was a valid directive, promulgated by the head of an executive department under section 161, then under the holding in the Touhy against Ragen case, that directive would constitute good authority for the subordinate to refer a request for information to the department head." 15/

In response to another question, he said that

"It is not contemplated that the amendments which S. 921 would make to section 161 would prevent the head of an executive department from prescribing reasonable 'housekeeping' regulations as to the time, place, and method of presentation of requests for information. For example, at the moment I can visualize no reason why under this amendment the head of an executive department could not validly issue a regulation, not inconsistent with law, setting forth that various official records were to be available for public inspection only during regular hours of business of that department. As long as the regulation were reasonable and fair under the particular circumstances, I think such a regulation would be as valid under section 161 as it is written today and as it would be amended by S. 921." 16/

14/ Ibid., at 14363.

15/ Ibid., at 14364.

16/ Ibid.

Thus there does not appear in the Senate debate on Public Law 85-619, 85th Cong., any statement which would support a conclusion that there is a legislative intent that the amendment therein to Rev. Stat. § 161 would affect existing orders and regulations already issued under that statute, such as those in Order No. 3229 (Revised).

The privileged character of investigative reports in the possession of the Executive Branch, such as those of the Federal Bureau of Investigation, has already been set forth in a letter to the Chairman of the House Committee on Naval Affairs. In that letter Attorney General Jackson stated:

"It is the position of this Department re-stated now with the approval and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to 'take care that the laws be faithfully executed,' and that congressional or public access to them would not be in the public interest." 40 Op. Atty. Gen. 45, 46 (1941).

As the executive privilege respecting such reports is derived from the Constitution, it does not depend upon the provisions of such a statute as Rev. Stat. § 161, and hence does not depend upon any such amendment thereto as is made by Public Law 85-619, 85th Cong.

For the same reasons, it will not affect the prohibitions in the President's directive of March 13, 1948, 17/ against the disclosure of information under the employee loyalty program established by Executive Order No. 9835. 18/ It has been the informal position of this Department that those prohibitions are applicable to the records and papers under Executive Order No. 10450, providing security requirements for Government employment. 19/

17/ 3 CFR 475 (Supp. 1948).

18/ 3 id. 627 (1943-1948 Comp.).

19/ 3 id. 72 (Supp. 1953), as amended.

In the course of the Senate debate the spokesman for the sponsor of Public Law 85-619, 85th Cong., said:

"Furthermore, the amendment will not jeopardize the defense security of this country in any way. Nor will it interfere with the proper classification of military secrets. If I thought for a moment it would be harmful to them in any way, I would not be here today speaking in behalf of the bill." 20/

In the House the sponsor of Public Law 85-619, 85th Cong., said:

"It does not go to security-sensitive information. Whenever a withholding is made because the release of information might adversely affect the interests of the United States the Departments of Government rely on a different authority. This amendment affects only nonsensitive nonsecurity information. Nor does it in any way modify the authority of the Government to direct withholding because the [disclosure of the] information would be injurious to the United States." 21/

Hence, it seems clear that there is no legislative intent that the amendment to Rev. Stat. § 161 in Public Law 85-619, 85th Cong., should raise a question as to the validity of Executive Order No. 10501, providing for safeguarding official information in the interests of the defense of the United States. 22/

Under the Constitution the executive power is vested in the President who is the head of an independent, coequal, and coordinate branch of the Federal Government. As such, he is

20/ 104 Cong. Rec. 14357 (daily ed. July 31, 1958).

21/ Ibid., at 5865 (daily ed. April 16, 1958).

22/ 3 CFR 115 (Supp. 1953).

not subject to coercion by another branch in the exercise of the executive privilege to withhold information where its disclosure is not in the public interest. Because his power to do so, or to provide that it be done by those who are subject to his direction, is derived from the Constitution, and not from any statute, such as Rev. Stat. § 161, at the hearing on March 6, 1958, before the Subcommittee on Constitutional Rights the Attorney General expressed the belief that Public Law 85-619, 85th Cong., is generally "meaningless" in effect. 23/

When the President approved H. R. 2767, 85th Cong., as Public Law 85-619, 85th Cong., on August 12, 1958, he issued the following statement:

"I have today signed the bill H. R. 2767, 'To amend Section 161 of the Revised Statutes with respect to the authority of Federal officers and agencies to withhold information and limit the availability of records.' The purpose of this legislation is to make clear the intent of the Congress that Section 161 of the Revised Statutes shall not be cited as a justification for failing to disclose information which should be made public.

"In its consideration of this legislation the Congress has recognized that the decision-making and investigative processes must be protected. It is also clear from the legislative history of the bill that it is not intended to, and indeed could not, alter the existing power of the head of an Executive department to keep appropriate information or papers confidential in the public interest. This power in the Executive Branch is inherent under the Constitution."

From the foregoing review of its legislative history, I am satisfied that it does not, and is not intended to, affect existing Executive orders and directives respecting investi-

23/ Hearings, supra note 2, at 26.

gative reports, reports under the government employee security programs, and the maintenance of the security classified defense information, or to amend or repeal existing statutes making certain types of information confidential or limiting random public inspection of such information.

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