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UNITED STATES ATTORNEYS

BULLETIN

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Vol. 9 September 8, 1961 No. 18

NEW APPOINTMENTS

The nominations of the following United States Attorneys have been confirmed by the Senate:

Kentucky, Eastern - Bernard T. Moynahan, Jr.

Mr. Moynahan was born December 29, 1918 at Akron, Ohio, is married and has two children. He entered the University of Kentucky on September 14, 1932 and received his A.B. degree on May 31, 1935 and his LL.B. degree on June 3, 1938. He was admitted to the Bar of the State of Kentucky in 1940. From 1938 thru 1939 he was law clerk for Mr. Clement Kelly in Lexington, Kentucky and from 1940 to 1942 he engaged in the practice of law in Nicholasville, Kentucky. He served in the United States Army Air Force from April 23, 1942 to December 1, 1945 when he was honorably discharged as a Second Lieutenant. Since that time he has been a partner in the firm of Watts and Moynahan in Nicholasville. He also served as County Attorney for Jessamine County, Kentucky from January 1946 to January 1954.

Kentucky, Western - William E. Scent

Mr. Scent was born July 10, 1925, in Fayette County, Kentucky, is married and has four children. After graduating from high school in Danville, Kentucky, in 1943, Mr. Scent enlisted in the U. S. Air Force and served until November 1945, when he was honorably discharged as Staff Sergeant. He attended Centre College from January 1946, to June 1947, and Union College during the summer of 1947. He entered the University of Kentucky in July of 1947 and received his LL.B. degree in June 1950. He was admitted to the Bar of the State of Kentucky in 1950. From March 1950, until December 1955, he was employed in the State of Kentucky Revenue Department in various capacities and was Legal Officer when he resigned. From November 1955, until March 1956, he was attorney and Director of Personnel for the Morton Frozen Foods Company in Louisville, Kentucky. He entered the private practice of law in Louisville in March 1956, with Michael J. Clare. From August 1956, until June 1957, he worked on a part-time basis as an attorney in the Finance Department of the City of Louisville and from July 1957, until December 1959, he was Assistant City Attorney. In December 1959, he was named Commissioner of Revenue for the State of Kentucky and is currently serving in this position.

New York, Western - John T. Curtin

Mr. Curtin was born August 24, 1921 at Buffalo, New York, is married and has five children. He received his B.S. degree from Canisius College

in Buffalo in 1946 and his LL.B. degree from the University of Buffalo Law School in 1949. He was admitted to the Bar of the State of New York that same year. He served in the United States Marine Corps from June 19, 1943 to January 21, 1946 when he was honorably discharged as a First Lieutenant and again from September 28, 1952 to February 24, 1954 when he was honorably discharged as a Captain. He now holds the rank of Major in the Marine Corps Reserve. From October 17, 1949 to August 1, 1950 he was an attorney for Sullivan and Weaver and from August 1950 to 1952 he was an attorney with Mr. John K. Keeler, both in Buffalo. From March 14, 1954 to June 30, 1955 he was on a special assignment with the Office of Corporation Counsel, City of Buffalo, and since that time he has been a partner in the firm of Benzinger and Curtin in Buffalo. He also served as confidential clerk to Justice William B. Lawless of the New York Supreme Court in 1960-61.

The names of the following appointees as United States Attorneys have been submitted to the Senate:

Montana - H. Moody Brickett
Ohio, Northern - Merle M. McCurdy
South Carolina, Eastern - Terrell L. Glenn
South Carolina, Western - John C. Williams

As of September 1, the score on new appointees is: Confirmed - 61; Nominated - 5.

JOB WELL DONE

The Acting Supervising Customs Agent has commended Assistant United States Attorney James G. Starkey, Southern District of New York, for his successful prosecution of a recent case involving drug smuggling. The letter stated that since May, 1958, when defendant was arrested, Mr. Starkey worked unrelentingly in piecing together evidence which was so expertly presented at trial that all defendants received long prison sentences; that this was accomplished through many hours of preparation after the usual work day and on many week-ends; that after a mistrial caused by the refusal of the Government's main witness to testify after cooperating with the Government for approximately two years prior to trial, Mr. Starkey was forced to revise his whole prosecution; and that the successful culmination of the case was due only to his tremendous desire to see justice done.

Assistant United States Attorney K. Key Hoffman, Jr., Western District of Texas, has been commended by the Acting Commissioner of Narcotics for his splendid cooperation in a recent hearing on a motion for a new trial which was filed in connection with the conviction of a major narcotics violator. The letter stated that the vigor of the presiding judge's order denying the motion reflected the vigor with which Mr. Hoffman handled the matter on behalf of the Government.

The District Postal Inspector in Charge has commended Assistant United States Attorney Irving Younger, Southern District of New York, on

his fine work in a recent difficult case, involving theft from the mails, in which both defendants were found guilty. The letter stated that both defendants were uncooperative, defiant, and threatening; that the evidence against them was limited; and that Mr. Younger should be complimented on the courageous and competent manner in which he handled the case.

Assistant United States Attorney Thomas W. James, Northern District of Illinois, has been commended by the Assistant General Counsel, Food and Drug Administration, on his work in a recent case involving the sale of an electrical device purportedly able to diagnose all illnesses but which was in reality worthless. The letter stated that the case was an important one for the Food and Drug Administration since it constituted a substantial fraud on the public; that it was difficult and hard fought because defendants had built up a substantial body of pseudo-scientific literature concerning the device and had even persuaded a number of licensed medical practitioners to testify at the trial as to the effectiveness of the device; and that had it not been for Mr. James' hard work and legal ability in the preparation and trial of the case, the results might well have gone against the Government.

The Special Agent in Charge, United States Secret Service, has commended Assistant United States Attorney William O. Bittman, Northern District of Illinois, on his fine work in a recent prosecution involving the possession and passing of counterfeit $20 notes. The letter stated that Mr. Bittman speedily and efficiently guided the case through the judicial stages to the ultimate conviction and sentence of both defendants to ten years; that he counseled with agents on certain phases of the inquiry which continued after the arrest and which finally culminated in the seizure of the Indianapolis plant where the counterfeit money had been printed; and that such results stemming from a spirit of close cooperation were extremely gratifying.

Assistant United States Attorney John R. Hargrove, District of Maryland, has been commended by the Chief Postal Inspector for his fine work in a recent mail fraud case involving a fraudlent business directory scheme. The letter stated that the successful prosecution of the case will be of considerable importance in the efforts of the Post Office Department to combat this type of swindle; that for this reason the conviction of the defendants is of more than ordinary significance; and that Mr. Hargrove is to be congratulated on the results achieved.

The Regional Counsel, Internal Revenue Service, has commended Assistant United States Attorney Robert A. Maloney, Northern District of Illinois, for the highly competent manner in which he handled a recent tax matter. The letter stated that the various parties to the proceeding had submitted proof of their claims and the Court was in the process of making its determination before the United States intervened. As a result of such intervention, a compromise offer of $38,000 was accepted by the Attorney General. The Regional Counsel observed that much of the credit for receiving the offer is attributable to the efforts of Mr. Maloney.

United States Attorney Lawrence M. Henry and Assistant United States Attorney Yale B. Huffman, District of Colorado, have been commended by the Chief Postal Inspector for their prompt and vigorous action in securing a recent 43-count mail fraud indictment. The letter stated that because of the concealed nature of the fraud in cases of this kind, the Post Office Department is cognizant of the burden involved in proving criminal intent, and that it stands ready to be of assistance in the further prosecution of this important case.

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ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

PREPARATION OF FORMS 25B

Forms 25B are being improperly prepared, especially with respect to travel and employment of expert witnesses. Often the Form does not include the approximate date of incurrence of expense, a breakdown of the cost or justification. There is some tendency to begin the request with a detailed history of the case followed by an explanation of other problems, then on the back of the Form and in the middle of a paragraph there will appear a brief sentence asking for authority to make a certain trip or to employ an expert witness. In other words, the substance of the request becomes buried in the outline.

Action on Forms 25B can be expedited if the opening statement indicates the type of expenditure; approximate itemization of expenses; date of service; and a brief justification. If you have an unusual matter requiring a detailed explanation, please use the reverse side of the Form or a separate page for the additional information.

GOVERNMENT TRANSPORTATION REQUESTS

In all Forms 25B involving travel by common carrier, the value of the Government transportation request should be shown. The railroads, air lines, and bus companies bill the Department in Washington for the cost of transportation after the ticket is purchased with the Government transportation request. Therefore, we must obligate funds for the payment of these bills. See the United States Attorneys' Manual, Title 8, page 102a.

SUBPOENA DUCES TECUM

Recently two Government agencies asked this Division to explain the need for their employees to make personal appearances under subpoenas duces tecum. Frequently, such court appearances involve no more than a confirmation of the fact that the records are official, in which case certified copies of the documents would be sufficient. At the present time the Armed Forces find it difficult to release employees solely to transport documents. The cooperation of Government attorneys in furnishing Government agencies more advance notice and being more specific in their requests will result in better service. See the United States Attorneys' Manual, Title 8, pages 124.1 and 125, which regulation applies to records from any Government agency.

MEMOS AND ORDER

The following Memoranda applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 14, Vol. 9 dated July 14, 1961:

MEMOS	DATED	DISTRIBUTION	SUBJECT
193-S5	7-6-61	U.S. Attys & Marshals	Absentee Voting Assistance and Information Program
297	7-27-61	U.S. Attys	Cooperation with American Bar Association and state bar associations in disciplinary program.
277-S2	7-31-61	U.S. Attys	Public Law 86-257 (Labor-Management Reporting and Disclosure Act of 1959)
173-S13	8-17-61	U.S. Attys and Marshals	Public Law No. 87-139, approved August 14, 1961, amending Government Travel Regulations

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ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

SHERMAN ACT

Drug Firms Indicted. United States v. Chas. Pfizer & Company, Inc., et al. (S.D. N.Y.). On August 17, 1961, a three count indictment was filed against defendants Chas. Pfizer & Co., Inc., John E. McKeen, President and Chairman of the Board of Pfizer & Co., American Cyanamid Company, Wilbur G. Malcom, Chairman of the Board of Cyanamid, Bristol-Myers Company and Frederic N. Schwartz, President of Bristol-Myers. Olin Mathieson Chemical Corporation (Squibb) and the Upjohn Company were named as co-conspirators. The indictment charges the six named defendants with violations of Sections 1 and 2 of the Sherman Act in the manufacture, sale and distribution of broad spectrum antibiotics, commencing in November, 1953 and continuing to date of filing. The broad spectrum antibiotic market consists of Aureomycin, Terramycin, Tetracycline and Chloromycetin which are widely used in the treatment of a broad range of infectious deseases. Company sales of these drugs in 1959 amounted to $165,000,000 and prescription sales to the public in that year amounted to $250,000,000. The indictment charges that defendants entered into an agreement, the substantial terms of which were that (a) the manufacture of Tetracycline be confined to Pfizer, Cyanamid and Bristol, (b) the sale of Tetracycline be confined to Pfizer, Cyanamid, Bristol, Upjohn and Squibb; (c) the sale of bulk Tetracycline be confined to Bristol and bulk Tetracycline be sold by Bristol only to Upjohn and Squibb; and (d) the sale of broad spectrum antibiotic products by the defendant companies and the co-conspirators be at substantially identical and non-competitive prices.

Among the means charged in the indictment to effectuate this alleged conspiracy were cross-licenses among the defendant companies with refusals to license all others; the suppression of litigation involving the validity of the Tetracycline patent; the withholding by defendants of pertinent and material information from the Patent Office prior to the issuance of the Tetracycline patent; and the maintenance by defendants of substantially identical, non-competitive and unreasonably high prices on their broad spectrum antibiotic products from November, 1953 to at least July, 1960. The indictment charges that as a result of the alleged combination and conspiracy, purchasers of broad spectrum antibiotics were compelled to pay non-competitive and unreasonably high prices, companies other than defendants and co-conspirators were excluded from this market, a judicial determination of the validity of the Tetracycline patent was prevented, and introduction of improved forms of broad spectrum antibiotics and research in this field was prevented and hampered.

Staff: Harry G. Sklarsky, Lewis Bernstein, Herman Gelfand and Donald Ferguson (Antitrust Division)

Electronics and Aerospace Industries Named as Defendants Under Section 7. United States v. Ling-Temco Electronics, Inc., et al. (N.D. Texas). A Section 7 complaint was filed in Dallas, Texas on August 16, 1961 against Ling-Temco Electronics, Inc. and Chance Vought Corporation, alleging that actual and potential competition between the defendants and other companies generally in various lines of commerce in the electronics and aerospace industry (including the design, development, production and sale as prime contractor or subcontractor of aircraft, missiles, space vehicles, drones, and subassemblies thereof, and various ground and airborne support equipment to operate these craft) may be substantially lessened by the acquisition by Ling-Temco of all the property and assets of Chance Vought.

Chance Vought, in 1960, had total sales of almost $214,000,000; Ling-Temco's sales in 1960 were over $148,000,000. Most of the sales of each company were in various pertinent lines of commerce but in no instance was the percentage shares of the market of either company in excess of 1.5%. The complaint alleges that the substantiality of the defendants as factors in the lines of commerce is shown by the importance, capabilities, experience, volume of sales, competitive activities and volume of work upon which each submitted bids in the electronics and aerospace industry.

Concurrently with the filing of the complaint the Government moved for a temporary restraining order to enjoin consummation of the agreement of merger and a plan of liquidation of Chance Vought. Consummation of these transactions was, at the same time, hurriedly being completed by the defendants.

Merger of Ling-Temco and Chance Vought and liquidation of the latter was completed on August 16, 1961, and the Government's motion for a temporary restraining order was denied on the same day. On August 17, 1961, the Government again appeared before the Court and moved for a stay of further action by the new corporation, named Ling-Temco-Vought, to commingle the assets of defendants or otherwise make effective relief impossible. This motion was also denied, the Court indicating that, in his view, no temporary restraining order or stay should be granted in merger cases.

The Court set September 6, 1961 as the date for a "pre-trial" conference and ordered a hearing had on plaintiff's motion for a preliminary injunction on September 11, 1961.

Staff: Nicolaus Bruns, Jr. (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General William H. Orrick, Jr.

COURTS OF APPEALS

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959

Secretary of Labor Need Not Show Probable Cause for Believing That Violation of LMRDA Has Occurred or Is Contemplated as Prerequisite to Judicial Enforcement of Subpoena Duces Tecum Issued Under Section 601 of Act; Reporting Provisions of LMRDA of 1959 Are Constitutional. Arthur J. Goldberg, Secretary of Labor v. Truck Drivers Local Union No. 299, et al. (C.A. 6, August 16, 1961). Pursuant to the authority given him by Section 601 of the LMRDA of 1959, 29 U.S.C. (Supp. I) 521, the Secretary of Labor issued subpoenas duces tecum to two Detroit, Michigan area Teamster locals, Nos. 299 (the home local of James A. Hoffa) and 614. These subpoenas sought the production of all of the books and records on the basis of which the locals had submitted the detailed organizational and financial reports required by Section 201 of the Act, 29 U.S.C. (Supp. I) 431. After the two locals refused to comply with the subpoenas, a petition for judicial enforcement was filed. The district court agreed with the unions that Section 601 requires, as an absolute condition precedent to enforcement of subpoenas of this character, a showing of probable cause for believing that a violation has occurred or is about to occur. It also held that, absent such a showing, enforcement would violate the Fourth Amendment to the Constitution. Further, the district court thought the subpoenas to be too broad. Accordingly, judicial enforcement of the subpoenas was denied.

The Court of Appeals reversed and directed the district court to enforce the subpoenas. The Court pointed out that the legislative history of the Act indicates that Congress deliberately deleted the probable cause requirement from Section 601, and that imposition of such a requirement would hamper and delay any investigation initiated under the Section, if not thwart it altogether, since the records sought would probably be the only source of information as to violations of the Act. The Court was further of the opinion that Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, disposed of any constitutional objection to the issuance of an administrative subpoena duces tecum without a showing of probable cause. In rejecting the unions' argument that the subpoenas were too broad, the Court noted that the subpoenaed documents were records required by statute to be kept and were quasi-public records. The Court thought it not unreasonable to demand these records since the Secretary had no other way to check the accuracy of previously submitted reports and since the records were clearly relevant to this lawful inquiry.

Finally, the Court of Appeals disagreed with the unions' contention (not passed upon by the district court) that the reporting provisions of the Act are unconstitutional. The Court pointed out that Congress had

made detailed findings, based upon its own extensive investigations, to the effect that improper practices in the labor-management field were defeating the policy of the Taft-Hartley Act and burdening and obstructing interstate commerce. The Court held that these findings were binding on it, that they fully supported the reporting provisions of the Act, and that, even if this amounted to regulation of the internal affairs of unions, in view of the findings, the Commerce clause gave Congress the power so to do.

Staff: Alan S. Rosenthal and W. Harold Bigham (Civil Division)

TAFT-HARTLEY ACT

Maritime Strike by Unions Representing Seamen and Officers Enjoined Under Emergency Provisions of Taft-Hartley Act Because Strike Imperiled National Health and Safety. United States v. National Marine Engineers' Beneficial Association, et al. (C.A. 2). This suit was instituted by the United States at the direction of the President under the national emergency provisions of the Taft-Hartley Act, 29 U.S.C. 178, to enjoin the continuation of the nation-wide maritime strike. The evidence in the case consisted entirely of affidavits, and the Government affidavits represented the views of various Cabinet officers and other Government officials concerning the serious adverse effects of the strike in those areas and jurisdictions over which they had authority and were kept informed. The district court granted the injunction.

The Court of Appeals affirmed holding that the strike imperiled the national health and safety because, among other things, supplies of petroleum products were affected, there were critical shortages of staple food products in Hawaii, the United States could not meet its commitments under the Mutual Security and Food For Peace programs, and the strike reduced the effectiveness of the merchant marine as a vital military auxiliary. The Court rejected the contention of two of the unions that, because their membership consisted of "officers" and "supervisors" rather than "employees," a strike by these unions, even if it endangered the national health and safety, could not be enjoined.

Staff: William H. Orrick, Jr., Assistant Attorney General, Alan S. Rosenthal, Pauline B. Heller, W. Harold Bigham and Edward A. Groobert (Civil Division)

DISTRICT COURTS

ADMINISTRATIVE PROCEDURE ACT

Government Not Bound to Resort to State Administrative Proceeding Before Suing in District Court to Recover Charges on Transportation of Military Property Exceeding Contractual Rate; Carrier Can Appeal Decision of General Accounting Office by Suit for Declaratory Judgment; Government Not Bound by Local Tariff Regulations and Is Free to Contract for Transportation Charges on Defense Material. United States v. A.B.C. Express

Company (E.D. Pa., July 26, 1961). The Government brought suit to recover overpayments on the transportation of clothing from manufacturers in Philadelphia to the Philadelphia Quartermaster Corps Depot alleging a different tariff applied than that used by defendant. Defendant filed a motion to dismiss on the grounds, among others, that the court lacked jurisdiction because the Government had not sought administrative relief before the Pennsylvania Public Utilities Commission. The Court, after hearing arguments on the motion, held that the United States was not bound to resort to state administrative proceedings before suing in the District Court to recover the overpayments. It stated that, since the carrier could have appealed the decision of the General Accounting Office (the Office which had asserted the claim) under the Administrative Procedure Act (5 U.S.C. 1001, et seq.) by means of a declaratory judgment action, the action would be treated as if it had been brought by defendant for a declaratory judgment. The Court noting that the case had been argued on the merits, despite the fact that the United States had not filed a motion for judgment on the pleadings or for summary judgment, denied the defendant's motion to dismiss and ordered entry of judgment for the United States.

Staff: United States Attorney Joseph S. Lord, III, and Assistant United States Attorney Mabel G. Turner (E.D. Pa.); Preston L. Campbell (Civil Division)

VETERANS AFFAIRS

Insured's Ignorance That He Had Incurable Cancer did not Excuse Failure to Submit Evidence of Total Disability Within Prescribed Period. Mrs. Hazel D. Klish v. United States (M.D. Ga., August 4, 1961). Because of failure to pay premiums, the insured's two National Service Life Insurance policies lapsed on August 1, 1958. He forwarded a non-medical application for reinstatement in May 1960, which was disapproved by the Veterans Administration as not timely filed. In July and August of 1960 he forwarded "premiums" to the V.A. On July 28, 1960, he applied for waiver of premiums. (38 U.S.C. 712, permits such waiver during the insured's continuous total disability beginning "while the insurance was in force under premium-paying conditions", but if the insured applied for waiver more than one year after lapse, a showing is required that failure to make timely application "was due to circumstances beyond his control".) He died on August 7, 1960. The V.A. later denied both the waiver application and plaintiff's claim as beneficiary.

Plaintiff then sued, alleging that prior to lapse, the insured was suffering from incurable cancer, a fact which was unknown to him; that this disease totally disabled him; that because of his lack of knowledge of his condition, he failed to file a timely waiver application; and that both the disease and insured's lack of knowledge thereof were circumstances beyond his control entitling him to premium waiver. The complaint also asserted that insured had been entitled to reinstatement. The Government answered and then filed a motion for judgment on the pleadings.

Judge Bootle granted the motion, holding (1) that the Court lacks jurisdiction to compel reinstatement of the policies, and (2) that the untimeliness of the waiver application was not due to circumstances beyond control, since in order for a health condition to so operate it must be shown to have made insured mentally incapable of applying for waiver. The insured's mere ignorance of his condition did not have such an effect.

Staff: United States Attorney Floyd M. Buford and Assistant United States Attorney Truett Smith (M.D. Ga.); David V. Seaman, Attorney (Civil Division)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Voting and Elections; Civil Rights Act of 1957. United States v. Association of Citizen Councils of Louisiana, Inc., et al. (W.D. La.) On June 7, 1960, the Government filed suit alleging the removal in 1956 of 560 registered Negroes from the rolls of Bienville Parish by racially discriminatory acts and practices of the White Citizens Council and the registrar of voters. It was further alleged that the registrar had continued to discriminate against Negro applicants for registration since that time.

The case was tried in November 1960, and on August 21, 1961, Judge Ben C. Dawkins, Jr., issued an opinion in which he found that the removal of the Negroes from the voter rolls was discriminatory and that the registrar had been discriminating against Negroes right up to the time of the trial. The Court stated that it would order the Negroes restored to the rolls and enjoin the registrar from engaging in any further racially discriminatory practices. Although the Court declined to issue an injunction against the Citizens Council, jurisdiction was retained for the purpose of issuing any additional orders which may become necessary.

Staff: United States Attorney T. Fitzhugh Wilson; D. Robert Owen, David L. Norman and Frank Dunbaugh (Civil Rights Division)

School Desegregation, Louisiana. Hall v. St. Helena Parish, (E.D. La.). On May 25, 1960, the District Court entered its order restraining and enjoining the St. Helena Parish School Board from continuing the practice of racial segregation in the schools under their supervision "after such time as may be necessary to make arrangements for admission of children to such schools on a racially non-discriminatory basis with all deliberate speed." This order was affirmed by the Court of Appeals in February, 1961. Immediately thereafter the Louisiana legislature enacted a "local option law", Act No. 2 of the Second Extraordinary Session of 1961, under whose provisions a referendum was held which resulted in a vote authorizing the parish school board to close the public schools. Negro plaintiffs sued to enjoin this circumvention of the Court's order and the Court invited the United States, as well as the Attorneys General of all 50 states, to file briefs amicus curiae presenting their views on the due process and equal protection questions involved in the case.

In its amicus brief and oral argument the Government took the position that the local option closing law and its companion legislation providing for establishment of private schools and state-financed tuition grants constituted circumvention of the court's

order, denial of geographic as well as racial equal protection, and denial of the right of the children of St. Helena Parish to a publicly supported education without due process of law.

On August 30, 1961, the three-judge District Court entered a temporary injunction against the enforcement of Act No. 2. In its opinion the Court made no mention of the due process issue but held that the act, designed to circumvent the orders of the Court, was unconstitutional as a denial of geographic and racial equal protection of the laws. Although the closely related tuition grant law was not directly involved in the case, the Court indicated that that device, in its present form at least, would have little chance of success in a court test.

Staff: Assistant Attorney General Burke Marshall (Civil Rights Division); United States Attorney M. Hepburn Many (E.D. La.); Harold H. Greene, Isabel L. Blair, Gerald P. Choppin, J. Harold Flannery, Jr., (Civil Rights Division); Richard Berg (Office of Legal Counsel).

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959

Secretary of Labor Empowered to Delegate Subpoena Power and Investigative Power Under Labor-Management Reporting and Disclosure Act of 1959. Arthur J. Goldberg, Secretary of Labor v. Thomas Battles, 30 L.W. 2082 (E.D. Pa., August 8, 1961). In May 1961 the Commissioner of the Bureau of Labor Management Reports of the Department of Labor delegated to the Department of Justice the authority to investigate any violations of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) occurring in connection with activities of an organization known as the Teamsters' League of Philadelphia and Vicinity. Subsequently the Commissioner, at the request of the Department of Justice, issued a subpoena directing one Thomas Battles to appear and testify before the Department of Justice attorney conducting the Teamsters' League investigation. Battles appeared but refused to testify. As a basis for his refusal to testify, Battles contended that the Secretary of Labor could not delegate the investigative or subpoena authority conferred upon him by the LMRDA to his subordinates in the Department of Labor; that neither the Secretary of Labor nor his subordinates were empowered by LMRDA to delegate any investigative authority under LMRDA to the Department of Justice; and that subpoenas issued by the Secretary or his subordinates could not properly be made returnable before officials of the Department of Justice. Battles also contended that he had no duties under the LMRDA to file reports, etc., and thus was not subject to the subpoena authority of the LMRDA. He also challenged the validity of the immunity from prosecution which would attach were he compelled to testify.

This action to enforce the administrative subpoena was then begun. On August 8, 1961 the Court (Clary, J.) ruled the subpoena enforceable. In ruling on respondent's contentions, the Court held that the Secretary of Labor may delegate to his subordinates both the subpoena authority and the investigative authority conferred upon him by the LMRDA and that the Secretary, or his authorized subordinates, may delegate to the Department of Justice the investigative authority under the Act. Therefore, subpoenas issued by an authorized official of the Department of Labor may properly be made returnable before an official of the Department of Justice. In upholding the power of delegation of investigative and subpoena authority, the Court relied on the plain meaning of sections 601 and 607 of LMRDA and also took note of the fact that the Attorney General and the Secretary of Labor had, in February 1960, entered into a Memorandum of Understanding (25 F.R. 1708) which made comprehensive arrangements for the division between the Departments of Labor and Justice of investigative responsibility under LMRDA, and further provided for specific arrangements on a case-by-case basis of investigative responsibility. The Court also upheld the immunity provisions which are made applicable by section 601(b) of LMRDA and held that Battles, even though not directly charged with

duties or responsibilities under the Act, was obliged to appear and testify in response to the subpoena.

Staff: Thomas F. McBride (Organized Crime and Racketeering Section, Criminal Division.)

FEDERAL FOOD, DRUG, AND COSMETIC ACT

Misbranded Foods; Enforcement Campaign Against Short-Weight and Otherwise Improperly Labelled Foods. Beginning in July 1961, the Food and Drug Administration and the Department have been conducting an enforcement campaign against packaged foods found to be short-weight or otherwise improperly labelled. Foods found by the Food and Drug Administration to be in violation of 21 U.S.C. 343, particularly Section 343(f), are being proceeded against with a view toward securing condemnation (pursuant to 21 U.S.C. 334). Improper labelling includes failure to declare required information such as ingredients and net contents as accurately, prominently and conspicuously as required by the Federal Food, Drug, and Cosmetic Act. More than 100 separate seizure actions have already been instituted throughout the country in this drive, including proceedings against potato chips produced by the Frito Company, Seattle, Washington; puffed wheat and puffed rice by the Quaker Oats Company; ground white pepper by McCormick & Company, Inc., Baltimore; chocolate-covered peanuts by Safeway Stores, Inc.; bread by Continental Baking Company, Seattle, Washington; candy lifesavers by Beechnut Lifesavers, Inc., New York; imported dates by the National Biscuit Company, New York; matzo crackers by Aron Streit, Inc., New York; and cookies by Megowan Educator Foods, Lowell, Massachusetts.

The Food and Drug Administration announced that for several years it had not been able to give adequate attention to honest packing and prominent labelling in the food field because of the pressure of other duties. However, repeated reports of continued abuses compelled a review of the situation and a survey revealed substantial violations warranting enforcement action. Seizure actions were then brought. In one instance the abuses were so serious and flagrant that injunction proceedings were instituted, promptly resulting in the entry of a temporary restraining order, and shortly thereafter, on August 17, of a consent decree against The Sweets Company of America. (This case was handled by United States Attorney David M. Satz, Jr., New Jersey.) The company is now permanently enjoined from continuing to ship its well-known "Tootsie Rolls," in interstate commerce, when misbranded by being short-weight. Specifically, the Tootsie Roll "Multi-Pak" carton, which contained 6 individually wrapped pieces of candy, was labelled as containing 9 ounces, whereas it actually contained only 8-1/4 ounces. The company had reduced the size of its candies in January of this year without changing the weight stated on the labels, and the old labels were still being used on the cartons despite specific Food and Drug Administration warnings. A seizure action against Tootsie Rolls had been filed in Chicago on August 3, 1961 following inspection of the New Jersey plant and specific warnings to the

management about the short-weight packages. Nevertheless, the company persisted in producing and distributing in commerce the misbranded packages. The temporary restraining order and injunction followed.

The short-weight -- improper label campaign is continuing with the complete cooperation of the United States Attorneys.

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CRIMINAL TAX MATTERS
Appellate Decision

Tax Evasion; Willful Attempt to Evade; Specific Items Theory Upheld. John J. Burke, Jr. v. United States (C.A. 1, August 10, 1961). Taxpayer, a lawyer, was convicted of willful attempted evasion for the years 1952 through 1955. Although he was engaged in, or a substantial stockholder in, several enterprises, he reported only salary income received from these enterprises during the prosecution years, omitting commissions and bond interest income as well as salary checks made payable to his wife by one of the corporations in which he was a substantial shareholder, and by which she was not employed.

In showing willfulness, Government introduced evidence disclosing that in years prior to the prosecution years, taxpayer had reported the same sources of income (commissions etc.) which constituted the omitted specific items during the prosecution years. Also introduced in evidence were deficiency assessments for prior years based upon failure to report income from these sources in pre-prosecution years.

The Court rejected taxpayer's contentions that the district court had erred in refusing to subpoena a witness at Government expense to testify on his behalf. The Court rejected this contention on the taxpayer's admission that he had paid witness fees to the witnesses of his choice, apparently in preference to the witness he contended the Government should have subpoenaed for him.

The Court further held that records obtained by Internal Revenue Agents from an assignee for the benefit of creditors of certain incorporated vessels in which taxpayer had an interest were not improperly obtained, absent service of a subpoena upon taxpayer.

Staff: Former United States Attorney Elliot L. Richardson and Assistant United States Attorneys Harold Lavien and Thomas P. O'Connor (D. Mass.).

CIVIL TAX MATTERS
District Court Decisions

Lien for Taxes; Property Rights of Taxpayer and Effect of Florida Homestead Laws Upon Those Rights and Upon Federal Tax Liens. United States v. Raymond Weitzner, Administrator of Estate of Joe H. Weitzner, et al. (S.D. Fla., June 2, 1961) The expectancies of the decedent's widow and children in the homestead property were not vested interests

until decedent's death on October 9, 1956, at which time the widow became seized of a life estate in the property, remainder in fee simple to the children, both such life estate and remainder being subject to the encumbrances of the first mortgage and the tax liens perfected on April 19, 1954. Although the Florida Constitution restricted somewhat the decedent's power to alienate, and deprived him of the power to devise the property while it retained its homestead character, full property rights remained in the decedent, and were so held by him to the exclusion of his wife and children at the time the tax liens attached. Thus, the homestead property is subject to be foreclosed in satisfaction of the income tax liens.

Staff: United States Attorney Edward F. Boardman (S.D. Fla.).

Liens--Penalty Action Under Section 6332, 1954 I.R.C.; Claim of Government Arising from Failure of Defendant to Honor Notice of Levy Served Upon It Levying Upon Debt Due Taxpayer Not Barred by State Statute of Limitations Even Though Taxpayer Itself Barred by Statute of Limitations from Instituting Suit on Debt. United States v. Polan Industries Inc. (S.D. W.Va. July 25, 1961). Defendant became indebted to taxpayer by reason of a series of loans made during the period September 13, 1954, to October 4, 1956. The total outstanding indebtedness as of the latter date was $127,500. On May 16, 1958, an assessment was made against taxpayer in the amount of $36,370.76. On June 23, 1959, a notice of levy in the amount of $38,444.54 was served upon defendant demanding it to turn over all property in its possession belonging to taxpayer. Defendant failed to honor the notice of levy and the instant action was commenced on April 21, 1961, seeking judgment against defendant for the amount set forth in the notice of levy. Defendant admitted its indebtedness but contended suit against all but $13,500 of the loans was barred by the state statute of limitations, in this case five years. Defendant contended the statute could be tolled only if the taxpayer or the Government had instituted suit on the obligations within five years from the date of each of the loans and since the Government had no greater right than the creditor-taxpayer, its right being derivative, and the statute having admittedly expired as to it, the Government's remedy by suit to collect the debt was similarly barred against all but $13,500 of the obligations; this amount representing loans made within five years of the date of the commencement of the instant suit.

The Court cited the generally accepted rule that the United States is not subject to state imposed statutes of limitation once it has acquired an interest in the taxpayer's property. The Court acknowledged the derivative nature of the Government's claim but held its right is derivative only at the moment it is acquired and that the ". . . element of derivation goes only to the right and not to the remedy for the enforcement of that right." The five year statute of limitations had not yet run against the creditor-taxpayer on any part of the indebtedness at the time the Government's lien arose on the date of the assessment against taxpayer (May 16, 1958) as provided in Section 6321 and 6322 of

the Internal Revenue Code of 1954. This being so, the Court held ". . . once the right has been acquired by the United States, no infirmity may attach to bar its enforcement . . ." and that the creation of the lien tolled the statute of limitations on the debt as to the United States.

The Court cited the only other reported decision on this issue United States v. Jacobs, (D.C. N.J. 1957) 155 F. Supp. 182, also decided in favor of the Government which was decided under the Internal Revenue Code of 1939, Sections 3670 and 3671, these sections being the counterparts of Sections 6321 and 6322 of the Internal Revenue Code of 1954.

Staff: United States Attorney Duncan W. Daugherty (S.D. West Virginia); Norman E. Bayles (Tax Division).

Jurisdiction; Dismissal for Lack of Jurisdiction Over Subject Matter Where Same Issue for Same Taxable Year Already Before Tax Court. Gill v. United States (N.D. Ala. July 20, 1961.) Pursuant to a final determination by the Fifth Circuit and the district court upon remand requiring exclusion of certain income from taxpayers' 1949 income tax because earned in 1948, the Commissioner asserted a deficiency for 1948 under the provisions of Section 1312(3) (a). Taxpayers contested the deficiency in the Tax Court on the ground that the Commissioner did not have the right to reopen 1948 taxes which were barred by the statute of limitations and on the further ground that even if the Commissioner did have such right an amount of income earned in 1947 but erroneously included in 1948 income should be excluded from 1948 income. The Tax Court decided both contentions against taxpayers. Estate of Sarah Louise Gill et al. v. Commissioner, 35 T.C. No. 126. Without paying the deficiency, taxpayers filed a claim for refund with the District Director claiming a refund of taxes on account of the erroneous inclusion of 1947 income in 1948. Suit was thereafter instituted on this claim. The Government moved for dismissal for lack of jurisdiction over the subject matter on three grounds: the Tax Court proceeding collaterally estopped taxpayer under Section 6512(a) of IRC 1954; the statute of limitations for 1948 taxes had run; and taxpayer was precluded from maintaining a suit for refund because the deficiency remained unpaid under the doctrine of Flora v. United States, 357 U.S. 63, rehearing, 362 U.S. 145. In his order dismissing taxpayers' complaint for lack of jurisdiction over the subject matter, Judge Lynne adopted each of the three grounds above and noted as well that taxpayers, having failed to allege the required payment, failed to state a claim upon which relief could be granted.

Staff: United States Attorney W. L. Longshore and Assistant United States Attorney M. L. Tanner (N.D. Ala.); Thomas A. Frazier, Jr. (Tax Division).

Summons, Internal Revenue, Enforcement of; Examination of Books, Attorney-Client Privilege; Waiver of Privilege under Fifth Amendment. Glotzbach, District Director v. Arthur P. Klavans and P. A. Agelasto, Jr.

(E.D. Va., August 4, 1961). A revenue agent and special agent of the Internal Revenue Service visited taxpayer's business premises and with his consent commenced an examination and audit of his books after first placing him under oath that certain specific records could be examined by them. They had previously informed him of their purpose, also telling him that he was not required to make any statement or give any information. They did not advise him of any right to counsel.

The agents worked on the records during the entire afternoon. Pursuant to agreement with taxpayer they returned the next day to the same room which he had made available for them. They spent that entire day continuing their examination. They told the taxpayer that they would return the next day to resume their duties. At no time up to that moment had taxpayer failed to cooperate, and the records had been turned over to the agents without objection.

The following morning, taxpayer's lawyer telephoned the special agent, advising the latter that the records were in his (the lawyer's) custody and would not be surrendered because of the attorney-client relationship and because of taxpayer's constitutional privilege from self-incrimination.

Thereafter, an Internal Revenue Service summons was issued to both taxpayer and his lawyer. They both appeared but refused to produce the records. The special agent admitted the possibility of a criminal tax case against taxpayer.

The case presents the issue of possible waiver of privilege against self-incrimination, i. e., whether a party who has voluntarily permitted an examination of certain business records for two days may be said to have waived his privilege so as to be thereafter deprived of withdrawing such waiver and terminating the examination. Taxpayer and the attorney urged that the privilege could be asserted at any time, thereby stopping the investigation. The Government argued that the examination was part of a single proceeding and that taxpayer, having voluntarily made his records available with full knowledge of his constitutional rights, had waived his privilege under the Fifth Amendment. No contention was made that taxpayer was estopped from invoking his privilege in a subsequent proceeding.

The Court ordered the production of such books and records of taxpayer as the agents had been previously examining. In reaching its decision the Court relied upon Brown v. Walker, 161 U. S. 591,597; McCarthy v. Arndstein, 262 U. S. 355, 359, and United States v. St. Pierre, 132 F. 2d 837 (C. A. 2).

Under Brown v. Walker, a witness who elects to waive his privilege must go on and make a full disclosure once he discloses his criminal connections. The Arndstein holding permits the witness to invoke the privilege after waiver, provided there has not been any previous admission of guilt or incriminating facts. In the St. Pierre case, in an opinion by Judge Learned Hand, the court held that a disclosure of the commission of a crime without identifying the victim, requires the defendant to make a "full disclosure" by divulging the victim's name.

In applying the rationale of these cases to the case at bar, the Court here declared that when taxpayer "turned over these records, he made a 'full disclosure' to the extent of the records which were in the process of examination" and therefore taxpayer would have "to permit the agents to complete the examination of such books and records as were previously delivered to the agents". In short, the Court indicated that taxpayer had waived his privilege not with respect to certain limited individual entries in the books which the agents may have already seen, but with respect to the entire contents of each particular book and record under examination which, of necessity, included all of the entries therein.

Staff: United States Attorney Claude V. Spratley, Jr. and Assistant United States Attorney Roger T. Williams (E.D. Va.); Clarence J. Nickman (Tax Division)

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