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DEPARTMENT OF JUSTICE

Vol. 10 No. 13

UNITED STATES ATTORNEYS

BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 10 June 29, 1962 No. 13

MONTHLY TOTALS

During the month of May, the total number of criminal cases and matters pending dropped slightly. The aggregate of pending cases and matters also dropped slightly, but it is still over 7,200 items higher than it was at the outset of this fiscal year, and, except for the preceding month of April, represents the highest such total since March, 1956. The following analysis shows the number of items pending in each category as compared with the total for the previous month.

	April 30, 1962	May 31, 1962	
Taxable Criminal	8,509	8,407	- 102
Civil Cases Inc. Civil Less Tax Lien & Cond.	15,740	15,741	+ 1
Total	24,249	24,148	- 101
All Criminal	10,097	9,978	- 119
Civil Cases Inc. Civil Tax & Cond. Less Tax Lien	18,708	18,778	+ 70
Criminal Matters	12,489	12,326	- 163
Civil Matters	15,112	15,264	+ 152
Total Cases & Matters	56,406	56,346	- 60

The breakdown below shows the pending caseload on the same date in fiscal 1961 and 1962. Both filings and terminations of criminal and civil cases totaled more than for the same period in fiscal 1961. Almost 2,000 more cases were filed than were terminated. As a result, the pending caseload shows an increase of 3,907 cases over the same date in the previous fiscal year, which represents a slight drop from the preceding month.

	First 11 Mos. F.Y. 1961	First 11 Mos. F.Y. 1962	Increase or Decrease Number	%
Filed				
Criminal	28,708	29,582	+ 874	+ 3.04
Civil	21,801	23,285	+ 1,484	+ 6.80
Total	50,509	52,867	+ 2,358	+ 4.67
Terminated				
Criminal	27,628	27,855	+ 227	+ .82
Civil	20,150	20,301	+ 151	- .75
Total	47,778	48,156	+ 378	+ .79
Pending				
Criminal	8,727	9,978	+ 1,251	+ 14.33
Civil	20,689	23,345	+ 2,656	+ 12.83
Total	29,416	33,323	+ 3,907	+ 13.28

During the month of May, case filings dropped below those of the previous month. Civil case terminations also were down, but criminal case terminations reached the second highest total of the fiscal year.

	Filed			Terminated		
	Crim.	Civ.	Total	Crim.	Civ.	Total
July	1,819	1,886	3,705	1,732	1,500	3,232
Aug.	2,163	2,126	4,289	1,629	1,595	3,224
Sept.	2,910	1,989	4,899	2,263	1,650	3,913
Oct.	2,715	2,259	4,974	2,709	1,951	4,660
Nov.	2,806	2,002	4,808	2,702	1,800	4,502
Dec.	2,429	1,821	4,250	2,766	1,841	4,607
Jan.	2,601	2,127	4,728	2,258	1,852	4,110
Feb.	2,955	2,107	5,062	2,406	1,850	4,256
March	3,108	2,383	5,491	3,457	2,101	5,558
April	3,151	2,355	5,506	2,900	2,090	4,990
May	2,925	2,230	5,155	3,033	2,071	5,104

For the month of May, 1962 United States Attorneys reported collections of $2,227,871. This brings the total for the first eleven months of fiscal year 1962 to $46,141,178. Compared with the first eleven months of the previous fiscal year this is an increase of $14,338,036 or 45.08 per cent over the $31,803,142 collected during that period.

During May $7,219,192 was saved in 108 suits in which the government as defendant was sued for $9,116,415. 52 of them involving $2,316,593 were closed by compromises amounting to $466,362 and 22 of them involving $3,104,586 were closed by judgments amounting to $1,430,861. The remaining 34 suits involving $3,695,236 were won by the government. The total saved for the first eleven months of the current fiscal year aggregated $52,656,685 and is an increase of $15,188,226 over the $37,468,459 saved in the first eleven months of fiscal year 1961.

DISTRICTS IN CURRENT STATUS

As of May 31, 1962, the districts meeting the standards of currency were:

CASES

Criminal

Ala., N.	Ga., S.	Mass.	N. C., E.	Tex., E.
Ala., M.	Idaho	Mich., E.	N. C., M.	Tex., S.
Ala., S.	Ill., N.	Minn.	Ohio, N.	Tex., W.
Alaska	Ill., E.	Miss., N.	Ohio, S.	Utah
Ariz.	Ill., S.	Mo., E.	Okla., N.	Vt.
Ark., E.	Ind., N.	Mo., W.	Okla., E.	Va., E.
Ark., W.	Ind., S.	Mont.	Okla., W.	Va., W.
Calif., S.	Iowa, N.	Neb.	Ore.	Wash., E.
Colo.	Iowa, S.	Nev.	Pa., E.	Wash., W.
Conn.	Kan.	N. J.	Pa., M.	W. Va., N.
Del.	Ky., E.	N. Mex.	Pa., W.	W. Va., S.
Dist. of Col.	Ky., W.	N. Y., N.	R. I.	Wis., E.
Fla., N.	La., W.	N. Y., E.	Tenn., E.	Wis., W.
Fla., S.	Maine	N. Y., S.	Tenn., W.	Wyo.
	Md.	N. Y., W.	Tex., N.	Guam

CASES

Civil

Ala., N.	Hawaii	Miss., N.	Ore.	Utah
Ala., S.	Idaho	Mo., E.	Pa., M.	Vt.
Alaska	Ill., E.	Mo., W.	Pa., W.	Va., E.
Ark., E.	Ind., S.	Neb.	P. R.	Va., W.
Ark., W.	Iowa, N.	N. Y., E.	S. C., W.	Wash., E.
Colo.	Iowa, S.	N. C., M.	S. D.	Wash., W.
Dist. of Col.	Kan.	N. C., W.	Tenn., E.	W. Va., N.
Fla., N.	Ky., W.	N. D.	Tenn., W.	W. Va., S.
Fla., S.	Md.	Ohio, N.	Tex., N.	Wis., W.
Ga., N.	Mass.	Okla., N.	Tex., E.	Wyo.
Ga., M.	Mich., E.	Okla., E.	Tex., S.	C. Z.
Ga., S.	Mich., W.	Okla., W.	Tex., W.	Guam
				V. I.

MATTERS

Criminal

Ala., N.	Ga., M.	Maine	Okla., N.	Tex., E.
Ala., M.	Ga., S.	Md.	Okla., E.	Tex., S.
Ala., S.	Hawaii	Mich., W.	Okla., W.	Tex., W.
Alaska	Idaho	Miss., N.	Ore.	Utah
Ariz.	Ill., N.	Miss., S.	Pa., E.	Vt.
Ark., E.	Ill., S.	Mont.	Pa., M.	Va., W.
Calif., N.	Ind., N.	Neb.	Pa., W.	Wash., E.
Calif., S.	Ind., S.	N. J.	P. R.	W. Va., N.
Colo.	Iowa, N.	N. M.	S. C., E.	W. Va., S.
Conn.	Iowa, S.	N. Y., N.	S. D.	Wis., E.
Del.	Ky., E.	N. Y., E.	Tenn., E.	Wyo.
Fla., N.	Ky., W.	N. C., M.	Tenn., W.	C. Z.
Fla., S.	La., W.	Ohio, S.	Tex., N.	Guam
				V. I.

MATTERS

Civil

Ala., N.	Hawaii	Mich., E.	N. C., M.	Tex., E.
Ala., M.	Idaho	Mich., W.	N. C., W.	Tex., S.
Ala., S.	Ill., N.	Minn.	N. D.	Tex., W.
Alaska	Ill., E.	Miss., N.	Ohio, N.	Utah
Ariz.	Ill., S.	Miss., S.	Okla., N.	Vt.
Ark., E.	Ind., N.	Mo., E.	Okla., E.	Va., E.
Ark., W.	Ind., S.	Mo., W.	Okla., W.	Va., W.
Calif., N.	Iowa, N.	Mont.	Ore.	Wash., E.
Calif., S.	Iowa, S.	Neb.	Pa., E.	W. Va., N.
Colo.	Ky., E.	Nev.	Pa., W.	W. Va., S.
Dist. of Col.	Ky., W.	N. H.	P. R.	Wis., W.
Fla., N.	La., W.	N. J.	R. I.	Wyo.
Ga., N.	Maine	N. Y., E.	S. D.	C. Z.
Ga., M.	Md.	N. Y., S.	Tenn., W.	Guam
Ga., S.	Mass.	N. Y., W.	Tex., N.	V. I.

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ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

SHERMAN ACT

Asbestos-Cement Pipe Companies Indicted Under Secs. 1 & 2. U.S. v. Johns-Manville Corporation, et al. (E.D. Pa.) On June 1, 1962, a grand jury returned a three count indictment against Johns-Manville Corporation, New York, N.Y., Robert F. Orth, Vice President and General Manager of its Pipe Division, and Louis F. Frazza, Manager, Direct Sales, Merchandising Department; Keasbey & Mattison Company, Ambler, Pennsylvania, Robert R. Porter, President and Chairman of the Board, Norman L. Barr, Vice President for Sales, and James R. Reichel, General Sales Manager. The indictment charges a conspiracy to restrain and to monopolize and an attempt to monopolize interstate and foreign trade in the asbestos-cement pipe and couplings industry in violation of Sections 1 and 2 of the Sherman Act.

The indictment charges that, beginning sometime prior to 1954, defendants conspired to fix and maintain prices and terms of sale for asbestos-cement pipe and couplings, and to engage in other activities designed to restrain and eliminate competition in the manufacture and sale of such products; that representatives of Johns-Manville and Keasbey & Mattison, which are the only domestic producers of asbestos-cement pipe, from time to time met in Johns-Manville's New York offices to discuss and agree on uniform delivered prices which thereafter were published as their respective "list" prices; that the companies agreed on deviations from list prices on specific jobs, submitted collusive and rigged bids to governmental agencies and other potential customers; and that they entered into so-called "agency" agreements with independent distributors to further facilitate control over delivered prices.

The indictment also charges that defendants sought to restrain and eliminate the importation, distribution, sale and use in the United States of asbestos-cement pipe and couplings of foreign manufacture by means, among others, of agreeing upon, proposing, and bringing about the adoption by the American Society for Testing Materials, the American Water Works Association, and other organizations, municipalities and awarding authorities, of specifications designed to increase the costs of foreign-made pipe and to render them ineligible for use in the United States; that for the same purpose the defendants also used disparaging trade propaganda, used Mexican made pipe as a fighting brand, prosecuted and threatened patent infringement suits, and met with and attempted to induce and coerce foreign manufacturers and American importers of foreign-made pipe to limit and allocate among themselves annual shipments of their products to the United States; and that by these means the corporate defendants have allegedly maintained their dominant position in the manufacture, sale and distribution of asbestos-cement pipe and couplings.

Named as co-conspirators are Turner & Newall, Limited of Manchester, England (parent of the defendant Keasbey & Mattison), the American Society for Testing Materials, Philadelphia, Pa., and the American Water Works Association, New York City.

Asbestos-cement pipe and couplings are designed for and used extensively in municipal and industrial water and sewer lines, in irrigation service, as electrical and telephone conduits, air ducts, and for other purposes. Total sales in the United States in 1960 amounted to more than $80 million, with Johns-Manville accounting for approximately 70%, Keasbey & Mattison 25%, and imports 5%.

Staff: Raymond K. Carson, Kenneth R. Lindsay, Marshall C. Gardner, Rodney O. Thorson and Roy C. Cook. (Antitrust Division)

Producers of Shortening Indicted Under Sherman Act. U.S. v. Armour and Company, et al., (S.D. Calif.) This indictment, returned June 13, 1962, alleges that ten principal producers selling shortening in the ten western States conspired to stabilize prices on sales to commercial customers. Such commercial customers are defined as bakeries and restaurants who purchase shortening for consumption in making or processing food.

The indictment names as defendants: Armour and Co; Corn Products Co.; Cudahy Packing Co.; Glidden Co.; Lever Brothers Co.; Proctor & Gamble Distributing Co.; Swift & Co.; Vegetable Oil Products Co., Inc.; Wesson Oil & Snowdrift Sales Co.; and Wilson & Co., Inc.

The following individuals were also named as defendants: George F. Atkinson, Manager, Chicago Refinery Div., Glidden Co.; William L. Dickinson, Vice President & General Manager, Vegetable Oil Products Co., Inc.; Grant M. Farley, Manager, California Div., Armour & Co.; J.D. Fleming, Vice President in Charge of General Refinery Dept., Chicago, Swift & Company; Stan D. Goodman, Pacific Coast Manager for Refined Oils, Corn Products Company; R. J. Hauer, Manager, Durkee Division, The Glidden Co.; Milo B. Medlock, Vice President in Charge of Refinery Department, Armour and Co.; Pierce L. Brothers, Pacific Coast Regional Sales Manager, Wesson Oil & Snowdrift Sales Co.; Fred L. Onken, Manager of Pacific Sales Region, The Proctor & Gamble Distributing Co.; H.B. Paisley, Manager of Los Angeles Refinery, Swift & Co.; Harold B. Reed, General Manager of Los Angeles Plant, The Cudahy Packing Co.; Horace Rowley, Vice President in Charge of Institutional Sales, Wesson Oil & Snowdrift Sales Co.; Ray Wear, Vice President and Sales Manager, Vegetable Oil Products Company, Inc.

Shortening is made from crude vegetable oil, obtained primarily from cottonseed and soybeans; animal fats are added to some but not all shortening. It is alleged that during 1959 the amount of shortening sold directly or indirectly by the defendant corporations to commercial consumers within the Western Territory amounted to approximately $40,000,000.

The indictment charges that the conspiracy began in or about November 1957 and continued thereafter at least until January 1960, and that it consisted of a continuing agreement, the substantial terms of which were: (a) to stabilize prices, terms, and conditions for the sale of shortening to commercial consumers; and (b) to induce distributors and others to stabilize, adopt, and adhere to the prices, terms, and conditions utilized by defendants for the sale of shortening to commercial consumers.

Arraignment is calendared for June 25, 1962.

Staff: Stanley E. Disney, Anthony E. Desmond, John D. Gaffey. (Antitrust Division)

Internal Wrenching Bolt Companies Indicted. U.S. v. Standard Pressed Steel Co., et al. (S.D. Calif.) On June 7, 1962, a grand jury returned an indictment against Standard Pressed Steel Co., Jenkintown, Pa.; Voi-Shan Industries, Inc., Los Angeles, Calif., and Richard H. Kauffman, its vice president; and Briles Manufacturing, a partnership, El Segundo, Calif., and Paul R. Briles, its president and general manager. The indictment charges a conspiracy to restrain interstate trade in internal wrenching bolts, in violation of Section 1 of the Sherman Act.

The indictment charges that beginning sometime prior to March 1959, and continuing thereafter until at least May 1959, defendants and co-conspirators conspired to fix and maintain prices for the sale of internal wrenching bolts. It is alleged that the total dollar volume of sales of internal wrenching bolts in the United States was approximately $2,300,000 for the year 1959, of which the corporate and partnership defendants together accounted for over 70%.

Internal wrenching bolts are fasteners made of high strength steel and are used in joining various parts of military and commercial aircraft, missiles, and for other purposes. They have heads with forged or broached inserts into which a special tool can be inserted for tightening and removing bolts. By definition in the indictment internal wrenching bolts are limited to those qualified under standards specified by the Departments of the Army, the Navy and Air Force and designated MS 20004 through 20024.

Named as co-conspirators are Valley Bolt Corporation, Los Angeles, Calif.; and Aircraft Bolt Corporation, El Monte, Calif.

An unusual feature of this case is that a California partnership, Briles Manufacturing, is indicted. Section 8 of the Sherman Act makes associations existing under the laws of any state subject to indictment for violation of the Act, and under California law a partnership is an association which may be sued as a legal entity.

Staff: Draper W. Phillips and John D. Gaffey. (Antitrust Division)

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CIVIL DIVISION

Acting Assistant Attorney General Joseph D. Guilfoyle

SUPREME COURT

AGRICULTURAL MARKETING AGREEMENT ACT

Milk Marketing Order Provisions For "Compensatory Payments" Invalidated Because of Conflict With Statutory Restriction That Marketing Order Shall Not Prohibit Marketing of Milk Produced in Any Production Area in United States. Lehigh Valley Cooperative Farmers, Inc., et al. v. United States (Supreme Court, June 4, 1962). Milk handlers operating plants in Pennsylvania challenged the validity of certain "compensatory payment" provisions included in the New York-New Jersey milk marketing order, under which handlers who sell some fluid milk in the New York-New Jersey marketing area but who are not fully regulated by the order, were required to pay, for the benefit of the milk producers who regularly supply the area and whose milk is regulated, certain sums as "compensatory payments". Such payments were exacted for the purpose of protecting the basic regulatory plan and preventing the impairment of the price to the regular producers of milk for the area. The amount of the compensatory payment provided in the New York-New Jersey order -- as in many others -- is the difference between the minimum price computed by the Market Administrator for regulated milk handlers to pay for fluid milk and the minimum price set for surplus milk.

The Court of Appeals for the Third Circuit had upheld the provisions as incidental and necessary to effectuate the other provisions of the order and not in conflict with the requirements of section 8c(5)(A) of the Act. The Second Circuit, in an earlier case, Kass v. Brannan, 196 F. 2d 791, certiorari denied, 344 U.S. 891, had held such "compensatory payments" invalid under the requirements of section 8c(5)(A) for uniformity of prices as to all handlers.

The Supreme Court in a 6 to 1 decision, Mr. Justice Black dissenting, held that the "compensatory payment" provisions of the order imposed an economic trade barrier on the entry of milk into the New York-New Jersey milk marketing area and were therefore in violation of section 8c(5)(G) of the Act which provides that "no marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit in the case of products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States." The Court indicated that it will have difficulty in concluding, as did the court in the Kass case, that section 8c(5)(A) of the Act precluded the compensatory payment provisions, but did not rule on that point.

The Court's decision is limited to compensatory payments based on the difference between the minimum prices set for fluid and surplus milk. Other types of compensatory payments were noted in the opinion

without commitment as to their validity. The Court stated that the Secretary of Agriculture remains free -- consistently with the statute -- to protect the marketing area against the economic consequences resulting from the introduction of outside milk.

Staff: Alan S. Rosenthal; Pauline B. Heller (Civil Division)

COURTS OF APPEALS

ADMINISTRATIVE LAW

Standing - Administrative Procedure Act Does Not Confer Jurisdiction For Judicial Review of Dispute Between County and State ASC Committees as to Location of Office of County Committee. Duba, et al. v. Schuetzle, et al. (C.A. 8, May 23, 1962). The office of the Campbell County Agricultural Stabilization and Conservation Committee, which has seven employees, had been located for over 20 years in Mound City, South Dakota, the county seat, with a population of less than 150 persons. For a number of years reports made by the Department of Agriculture indicated that the office was too small, and lacked adequate sanitary and heating facilities. Accordingly, the State Committee repeatedly requested the County Committee to find more suitable quarters. A lively and bitter competition as to the location of the office thereafter arose between residents of Mound City and those of Herreid, a town of 750 inhabitants located 9 miles to the north.

The State and County ASC Committees are created by statute, which directs the Secretary of Agriculture to utilize them in the administration of various programs, and gives him authority to regulate the functions of the committees. 16 U.S.C. 590h(b). The Secretary gave the State Committees general supervisory control over the County Committees, but left the selection of the location of the county office to the County Committee "subject to the approval of the State committee." 7 C.F.R. 7.20, 7.32.

Members of the County ASC Committee signed a lease for new office space in Herreid in July 1961. The same Committee later attempted to rescind the lease, but the rescission was not approved by the State Committee. When two members of the three-man County Committee indicated that they would not remove the office to Herreid, the State Committee suspended them. When trucks of the State Committee attempted to move the office, records and equipment to Herreid, a group of several hundred persons from the Mound City area physically blocked the move. On the same day, suit was filed by farmers within Campbell County who lived near Mound City, asserting that the County Committee had the right to select the location of its office, and that the State Committee, through fraud and coercion had illegally usurped that right, alleging jurisdiction under the Administrative Procedure Act. The district court granted a preliminary injunction, but later dissolved it on the grounds that the new County Committee should determine the question of the relocation of the office, "subject to the approval of the State ASC Committee." Schueltzle v. Duba, 201 F. Supp. 754.

The new County Committee moved the office to a new building in Mound City, despite the opposition of the State ASC Committee and the Deputy Administrator in Washington. When the County Committee refused to move the office to Herreid in compliance with directions of the State Committee, acting under specific authority of the Deputy Administrator, the State Committee suspended the County Committee members, and removed some of the records and office equipment from the Mound City office to Herreid. Before all of the equipment could be transferred, however, a large group of Mound City citizens ordered the State Committee out of town. The district court then entered a preliminary injunction requiring the State Committee to relocate the office in Mound City. A stay of the affirmative provisions of that injunction was denied by the district court but granted in the court of appeals.

Appeal was taken principally on the ground that the district court lacked jurisdiction, both because the plaintiffs had no standing to secure judicial review, and because the issue was not justiciable in nature, but was an administrative matter. The Court of Appeals reversed, holding that there was no jurisdiction for both reasons.

The Court ruled that since they had no legally enforceable right to have the county office located in any particular place, plaintiffs could suffer no legal wrong from the removal of the office from Mound City to Herreid. Following the decision in Kansas City Power and Light Co. v. McKay, 225 F. 2d 924 (C.A. D.C.), certiorari denied, 350 U.S. 884, the Court held that the Administrative Procedure Act did not change "the basic principle that one must suffer a legal wrong in order to have standing to challenge programs administered by governmental agencies." The Court also noted that a dispute between the County Committee and the State Committee was an administrative matter which should be resolved within the Department of Agriculture. Accordingly, the Court vacated the preliminary injunction, and remanded the case with instructions to dismiss the complaint.

Staff: Davil L. Rose (Civil Division)

TAFT-HARTLEY ACT

District Court Jurisdiction Limited to Enjoining Strike For Eighty Day Period During Which Time Normal Operations Must Be Resumed in Industry. Seafarers International Union v. United States (C.A. 9, May 29, 1962). This action was brought under the Taft-Hartley Act to enjoin the continuance of the strike in the Pacific Coast maritime industry. There was no question that the strike imperiled the national health or safety, and that the strike should be enjoined. Both the unions and the companies, however, advanced proposals concerning the scope and terms of the injunction that the district court was required to issue.

These proposals stemmed from the peculiar nature of employment in the shipping industry. Unlike factory workers, seamen do not work on a day-to-day basis, but sign "articles of employment" which, depending on the destination of the vessels, can extend for more than the 80-day

injunction period prescribed by the Act. These articles cover, by the custom of the industry, a voyage from a United States port to foreign ports, and a return to a United States port designated by the employer, including the discharge of the cargo at the final port. The union argued that its members should be free to terminate their articles and strike any vessel which returns to an American port after the 80-day injunction period as soon as the vessel returns to an American port. The seamen would, therefore, be able to leave their vessel before the cargo was discharged. The unions also urged that no vessel should be required to sail during the 80-day period where more than one-half of the voyage would not be completed during the statutory period. These proposals were predicated upon the ground that, otherwise, the seamen would be required to work beyond the 80-day injunction period and while other union members had resumed the strike.

The employers, on the other hand, argued that the unions should be restrained from striking any vessel required to sail by the Act until its cargo was discharged, even if the vessel returned after the 80-day period. They claimed that if there was no guarantee that the cargo would be unloaded, shippers would not charter cargo on the return trip of the vessel. The Government argued that the Act requires that the strike must be enjoined for a full, 80-day period, and that during that period normal operations must be resumed in the industry. Since normal operations in the industry are based upon the signing of "articles," the Government argued that seamen cannot refuse to sign such articles for any vessel scheduled to sail during the statutory period. Further, the seamen are obligated to perform whatever duties the articles normally impose, including discharge of the cargo. While the seamen may thereby be required to work beyond the 80-day injunction period, this arises from their contractual obligation under the articles and not from the injunction. The Government also argued that, since the statute specifically limits the injunction to an 80-day period, the court lacked jurisdiction to enjoin union strike activity beyond that period.

The district court held that the seamen were obligated to sign articles during the entire 80-day period. It further ruled that the unions could not strike a vessel until its cargo was discharged, even if the vessel returned to port after the 80-day period. On appeal, the Court of Appeals affirmed that part of the district court's order requiring seamen to sign articles during the entire 80-day period and to continue on board the vessel until the cargo was unloaded. For, the Act requires that the strike is to be enjoined for the full, 80-day period, and during this period normal operations are to be resumed in the industry. The Court, however, reversed that part of the district court's order enjoining union strike activities after the 80-day period on the ground that the statute specifically provides that the injunction shall be discharged after 80 days. Both the union and the shipping companies filed petitions for writs of certiorari in the Supreme Court. Certiorari was denied on June 18, 1962.

Staff: Former Assistant Attorney General William H. Orrick, Jr.; Alan S. Rosenthal; E. A. Groobert (Civil Division)

DISTRICT COURT

TORT CLAIMS ACT

Government Not Liable For Damage to Helicopter Where Pilot, Employee of Plaintiff, Agreed to Fly It in Excess of Time Prescribed by Safety Regulations. Stockton Helicopters, d/b/a Calicopters v. United States (S.D. Calif.) Plaintiff sued for damages to one of its helicopters used by the National Park Service in fighting forest fires in Sequoia National Park during June and July of 1960. The helicopter had been flown by one of the plaintiff's employees, but the pilot was under the direction of the fire boss, the National Park Service employee in charge of fire fighting operations. Plaintiff's main contention was that the fire boss had made the pilot fly too much -- that is, in excess of recommended flight limitations contained in the Forest Service Handbook, thus causing him to become fatigued and in turn to crash the helicopter. While those flight limitations had in fact been exceeded, it was because only a limited number of helicopters were available and their continued and prolonged use was absolutely necessary to the success of fire fighting operations. The fire boss had been faced with the difficult decision of whether to jeopardize the fire fighting operations by cutting back on his use of helicopters, or to jeopardize the safety of the helicopter pilots and their aircraft by continuing to fly them in excess of Forest Service suggested flight limitations. He chose a compromise: He called a meeting of all pilots and discussed the Forest Service suggested flight limitations, asking the pilots what they thought about the amount of flying they were doing. All pilots at the fire, including the pilot from plaintiff corporation, agreed to judge their own fitness to fly and to ground themselves if they felt incapable of safely operating their helicopters. On this basis, fire fighting operations went forward with the pilots continuing to fly long hours.

On these facts, the Court held that the fire boss had not been negligent, but, on the contrary, made a reasonable and prudent decision in all the circumstances concerning the extended use of the helicopters. The Court further found that, in any event, plaintiff was barred because plaintiff's pilot-employee had assumed the risk of any injury or damage to plaintiff's helicopter resulting from its prolonged use when he agreed to judge his own fitness to fly. Similarly, the Court held that plaintiff was barred because of the contributory negligence of its pilot-employee in undertaking to fly the helicopter when he was too tired to do so safely.

Staff: United States Attorney Francis C. Whelan; Assistant United States Attorney Robert A. Smith (S.D. Calif.)

Interruption by Government Officials of Delivery of Irrigation Water Held Discretionary Act For Which United States Could Not be Sued, Regardless of Negligence. Faries, et al. v. United States (E.D. Wash., May 11, 1962). The Bureau of Reclamation operates a system of canals and pipelines delivering irrigation waters from the Columbia River to plaintiffs' farm lands in the Columbia Basin Project of the Eastern District of Washington. Probably due to malfunction of an air valve, a vacuum

developed during drainage of a large pipeline, causing it to burst inward and leak on refilling. The leak did not interfere with irrigation, but officials of the Bureau of Reclamation interrupted delivery of water during the early growing season to make extensive repairs immediately rather than risk a more serious breakdown during the later season. Plaintiffs sued for $130,000 damages, alleging that the pipeline break was due to negligence. The Government moved for summary judgment, claiming the alleged damages flowed from the decision to make immediate repairs rather than from any negligence causing the pipeline break. Citing Dalehite v. United States, 346 U.S. 15, the Court granted the Government's motion for summary judgment, holding that the act of interrupting delivery of the water was a discretionary act for which the United States had not consented to be sued under the Tort Claims Act.

Staff: United States Attorney Frank R. Freeman; Assistant United States Attorney Carroll D. Gray (E.D. Wash.)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Publication and Distribution of Unlabeled Political Literature. United States v. Williams (N.D. Ill.) Previously reported in the Bulletin, Vol. 10, No. 4. The case was tried before a jury, commencing on June 18, 1962. The defendant attacked the constitutionality of 18 U.S.C. 612 on the ground that it violated the First Amendment. However, the Court sustained the statute. On June 21, 1962, the jury returned a verdict of guilty.

Staff: United States Attorney James P. O'Brien, and Assistant U.S. Attorney James Ward (N.D. Ill.)

Voting and Elections; Civil Rights Acts of 1957 and 1960. United States v. Doggett, et al. (S.D. Ala.) This suit, instituted under the Civil Rights Act of 1957, as amended, was filed on June 15, 1962. The defendants are the State of Alabama and the members of the Board of Registrars of Choctaw County, Alabama. The complaint alleges that the defendants have engaged in racially discriminatory acts and practices in conducting registration of voters in Choctaw County. The complaint seeks an injunction against the defendants.

Staff: United States Attorney Vernol R. Jansen (S.D. Alabama); John Doar, Davil L. Norman, Arvid A. Sather (Civil Rights Division).

* * *

CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

"BROOKLYN PLAN"

Deferred Prosecution of Juveniles Inapplicable to Persons over 18 Years of Age. It has been brought to the attention of the Criminal Division that several United States Attorneys have extended the "Brooklyn Plan" (deferred prosecution of juveniles) to those above 18 years of age. The Department has no objection to special consideration being given to unusual cases involving adult offenders under a variety of circumstances. After reexamination of the matter, however, the Department has affirmed its prior position that special consideration by way of the "Brooklyn Plan" should not be extended to persons over 18. This conclusion is based on the premise that the considerations which prompted its use for juveniles are not present in adult cases and broadening the age limits could lead to indiscriminate use.

NATIONAL STOLEN PROPERTY ACT
18 U.S.C. 2314

Credit Card Charge Invoice Considered "Evidence of Indebtedness" Within Meaning of 18 U.S.C. 2311. Richard Ingling v. United States (C.A. 9, May 21, 1962). Defendant was convicted upon a plea of guilty to charges of causing to be transported in interstate commerce a forged security in violation of 18 U.S.C. 2314 and 2311. The present appeal is from denial of relief sought under 28 U.S.C. 2255. In his petition appellant claimed that the indictment charging him with transportation of a forged security, to wit, an oil company charge invoice, failed to allege an offense.

The Ninth Circuit in denying the defendant's petition held:

> . . . if it can reasonably be said that under certain circumstances the charge invoice was an evidence of indebtedness, then the indictment charged a public offense. It may be that the charge invoice was stamped with an endorsement that all the conditions of the credit card were incorporated therein; or that within the terms of the charge invoice there is stated a credit agreement and terms; or that the invoice contains therein an underlying credit agreement, expressly or impliedly; or that by the treatment accorded it by the parties, the invoice became an "evidence of indebtedness" in some commercial sense. (Emphasis added.)
>
> If the charge invoice contained no element which would constitute it an evidence of indebtedness, then the burden of establishing this fact was on the petitioner in this proceeding . . .

This is the second Court of Appeals decision to indicate that a credit card was capable of making a security an "evidence of indebtedness" (United States v. Robert Lee Lewis, C.A. 10, No. 6867, March 20, 1962). For a complete discussion of the application of 18 U.S.C. 2314 to transportation of credit cards cases see United States Attorneys' Bulletin, Vol. 10, No. 9, pp. 267 - 269, May 4, 1962.

WAGERING TAX CASES

Prosecutive Policy. Attention is directed to the prosecutive policy regarding Wagering Tax Cases which appears at pages 202-3 of the United States Attorneys' Bulletin of April 6, 1962 (Vol. 10, No. 7).

The instruction contained in the paragraph numbered 2 (p. 202) is intended solely for the guidance of the United States Attorneys; it is not intended to supersede or change any procedures established under existing statutes or regulations concerning the disposition of seized property.

WAGERING
26 U.S.C. 7203

Prosecutions; Evidence of Failure to Register With Director of Internal Revenue and Purchase Occupational Tax Stamp in State of Residence or State of Doing Business. United States v. McDonald (D. Mass.) On May 10, 1962, District Court Judge Anthony Julian granted a judgment of acquittal at the end of the Government's case to the defendant who had been charged with accepting wagers without first having registered with the District Director of Internal Revenue and purchased the wagering occupational tax stamp as required by 26 U.S.C. 4411 and 4412. The Court ruled that while the Government proved that defendant had engaged in accepting wagers in Massachusetts without having registered with the District Director and purchased the occupational stamp, the defendant, under the wagering tax regulations, had the option of registering either in the state of doing business or in the state of residence and since the Government had not presented prima facie evidence of his residence in Massachusetts it had not eliminated the possibility that defendant was a resident of some other state and validly registered there.

Previously, in all cases of which we are aware, the courts treated registration in another state as an affirmative defense to be raised and proved by the defendant. Defendant argued that Section 44.6091 of the Regulations of the Internal Revenue Service gives a person engaged in accepting wagers an election as to whether he will register from his legal residence or from his principal place of business. The Court noted orally the possibility that the defendant had his legal residence outside of Massachusetts, that he was registered there, and that notice of place of doing business had not yet been sent from the District Director of the state of residence to the District Director of the state of doing business. Unfortunately there was no written opinion. However, in the light of

this ruling, it would be advisable in the trial of future wagering tax stamp cases to offer evidence of the residence of the defendant and his failure to register with the District Director thereof, as well as evidence of failure to register in the state of doing business where it differs from the state of residence.

WAGERING
26 U.S.C. 7203

Motion to Suppress (Rule 41(e), F. R. Cr. P.); Sufficiency of Affidavit in Support of Application for Search Warrant; Suggestions for Making Proper Affidavits in Wagering Cases. United States v. Conway (D. Mass.) On May 23, 1962, Judge Charles Wyzanski granted a motion to suppress with respect to gambling paraphernalia seized in a raid on the premises where defendant had accepted wagers. One ground was that the affidavit in support of the application for a search warrant, which alleged the placing of four wagers with an individual at the described premises and the absence of the issuance of a wagering stamp to anyone registered at the premises, did not give "a logical basis for believing that at the (premises) there were gambling records and gambling paraphernalia. The Court noted "the absence of any detailed recital as to the wagering transactions which D'Allesandro (the applicant and affiant) observed." Continuing he stated:

> I cannot tell whether D'Alessandro saw any records or pads or other paraphernalia. If he never saw any such articles, I do not know on what basis he or the Commissioner formed their belief that such articles were present.

The Court suggests that the correlation between the type of crime observed and the type of article sought to be seized might be made explicit by reference to

1. personal observations
2. reliable hearsay, or
3. common experience of which one may take judicial notice.

The Judge was also critical of the language of the application for a search warrant in that it referred to gambling materials held (rather than being used) in violation of the gambling laws and probably would have granted the motion to suppress on this ground alone.

In view of this decision it would be advisable, particularly in the First Circuit, to have the affiant state the precise type of wagers he made (horses, numbers, sports event, etc.), whether a betting slip was made out, the notation, if any, made by the person accepting the wager, whether racing forms were kept in the establishment, etc. If, as is sometimes the case, the affiant (usually an IRS agent) observed no notation of any sort being made, he could spell out the kinds of records and paraphernalia that, in his experience, are usually used in

that type of wagering operation. Also, the application and search warrant should refer to materials used (rather than held or possessed) in violation of the gambling laws.

WAGERING

Forfeiture; Use of Automobile by "Pick-up Man" Employed in Numbers Operation Whose Principals Had Neither Registered Under 26 U.S.C. 4412 Nor Paid Occupational Tax Under 26 U.S.C. 4411 Renders Automobile Liable to Forfeiture Under 26 U.S.C. 7302 and Seizure Under 26 U.S.C. 7321. Joseph Interbartolo v. United States (C.A. 1, May 22, 1962). This case involved an automobile which had been seen under the control of an individual identified only by description while that individual was clearly engaged in the work of a "pick-up man"; that is, collecting wagering slips from the numbers "writer" and delivering them to the "banker." Over two weeks after this observation a duly authorized delegate of the Secretary of the Treasury seized the automobile while it was parked on a public street.

Claimant resisted this seizure on the basis that a pick-up man was not subject to the wagering tax and registration provisions of the Internal Revenue laws under the decision of the Supreme Court in United States v. Calamaro, 354 U.S. 351 (1957). Thus, he argued, the driver's activity was not violative of these provisions of the Internal Revenue Code, and the automobile could not have been used in violating that Code. Therefore, the vehicle was not subject to forfeiture.

On the basis of the evidence before him, however, the trial judge had ruled:

> I find that the young man who used the automobile in question to transport the betting slips and adding machine tapes . . . did so with the knowledge, consent and authority of those who were carrying on the business of accepting wagers . . . and that the transportation of the betting slips and tapes . . . was an integral part of the wagering business . . . .
>
> Since in transporting the betting slips and tapes the young man was acting for persons who were engaged in the wagering business and who had neither paid the special occupational tax . . . nor registered the place of business . . . as required . . . I find that the automobile was used . . . in violating the internal revenue laws . . . .

On appeal claimant argued that this finding of consent, authority and agency was an impermissive circumvention of the distinctions which the Supreme Court had felt essential in Calamaro. The Court of Appeals rejected this contention, however, stating that the forfeiture declared in 26 U.S.C. 7302 is directed at the property used to violate the revenue laws, not at the individual so using it. Thus, while the driver was not

required to register or pay the tax, the automobile was subject to forfeiture if its use aided in carrying on an enterprise some facet of which violated the Internal Revenue laws. The Court held that Calamaro, decided in the context of a criminal proceeding for non-payment of the wagering tax, had no application to a civil action to enforce a libel for forfeiture.

Staff: United States Attorney W. Arthur Garrity, Jr.; Assistant United States Attorney Paul J. Redmond (D. Mass.).

MAIL FRAUD AND WIRE FRAUD

Sufficiency of Indictment Which Did Not Specifically Charge "Knowingly Causing" Use of Mails. Glenn et al. v. United States (C.A. 5, May 25, 1962). A number of indictments were returned against various defendants, including some of the above, in February 1958 charging mail and wire fraud, i.e., fraudulent schemes to bilk automobile insurance companies by means of claims based on wrecks that never occurred. Convictions obtained as a result of trials in June 1959, were reversed and the cases remanded for new trials in August of 1960. Retrial of the cases took place in early 1961 and upon conviction the captioned appeals were taken.

The Court of Appeals in affirming each of the cases decided various issues. First, it observed the indictments charged that defendants "for the purpose of executing the aforesaid scheme . . . caused to be delivered by the post office" the letters in question. The Court in answer to appellants' argument that they were not charged with "knowingly causing" use of the mails, conceded the indictments must cover the element of knowledge that these actions would cause a use of the mails since the scheme envisioned by the statute must have "reasonably contemplated" such use. However, the Court found the indictment did cover that element for, although the word knowingly was not used, the phrase "for the purpose of executing the aforesaid scheme and attempting to do so" was sufficient to connote knowledge. A person may unintentionally cause an event to occur, but it is impossible for a person to cause an event for a specific purpose without knowledge of what he is doing.

One appellant urged that it was not proved that the mails were used or that he caused their use. In denying this contention the Court said the evidence established use of the mails to obtain approval of appellants' applications for insurance payments and to send checks from the insurance companies' main offices to local agents who then transmitted them to appellants. Such use by adjusters, local agents and insurance firms as part of the usual business practice in settling claims was considered reasonably foreseeable by defendants and an essential step in the process by which they obtained the fruits of their plot.

Staff: United States Attorney Clinton Ashmore; Assistant United States Attorneys Edward Stahley, R. W. Ervin, III, and C. W. Eggart, Jr. (N.D. Fla.).

NATIONAL MOTOR VEHICLE THEFT ACT
18 U.S.C. 2312

Instruction Regarding Inference to Be Drawn from Possession Following Theft; Failure to Hold Hearing Out of Presence of Jury Concerning Voluntariness of Confession Constituted Reversible Error. Herbert W. Bray v. United States (C.A. D.C., May 24, 1962). Appellant, who was convicted for transporting a stolen vehicle in interstate commerce in violation of 18 U.S.C. 2312, complained that the trial court erred in instructing the jury, over objection, that they might infer from appellant's possession of the automobile shortly after it was stolen that he was guilty of the offense charged. The Court of Appeals rejected this contention. After stating that the vitality of Bollenbach v. United States 326 U.S. 607 (1946), upon which appellant relied, is doubtful, the Court distinguished that case by noting that Bollenbach prohibits a presumption, but not an inference, that one found in possession of property shortly after it is stolen was the thief.

In addition, appellant claimed and the Court of Appeals agreed that reversible error had been committed in that the trial court failed to hold a hearing out of the presence of the jury on the question of whether appellant's written confession, made after the preliminary hearing and introduced at trial, was voluntary. After dismissing the Government's contention that appellant's motion in this regard was not timely, the Court of Appeals rejected the Government's argument that appellant was not prejudiced by the trial court's refusal to hold the hearing. The Government had argued that since its evidence revealed that the confession was voluntary, the trial court would have been precluded from holding the confession involuntary as a matter of law and would have been required to submit the issue to the jury no matter what evidence the appellant may have presented at the hearing. The Court of Appeals disagreed with the implication in the Government's argument that a trial court's determination of admissibility can be based solely on testimony for the prosecution. The Court held that the determination must be based on testimony - or the opportunity to present testimony - of both the prosecution and the defense. Since appellant exercised his constitutional right not to testify, the Court of Appeals found that the trial court did not properly explore the issue of voluntariness, and, in particular, the matters relating to appellant's physical and mental condition during the interrogation. Although the Court could not say what the result of such an inquiry would have been, it could not say that the refusal to conduct the hearing was not prejudicial.

Staff: United States Attorney David C. Acheson; Assistant United States Attorneys William H. Collins, Jr., Nathan J. Paulson and Harold H. Titus, Jr. (C.A. D.C.).

LIQUOR REVENUE CONSPIRACY

Witnesses - Privilege of Co-conspirator Upheld. United States v. Daffin et al (N.D. Fla.). Two law enforcement officers, including M. J. Daffin, Sheriff and former Police Chief of Marianna, Florida, together with five other persons were indicted for conspiracy to violate the internal revenue laws relating to non-taxpaid (moonshine) whiskey. The two law enforcement officers entered the picture as aiders and abettors. Two Government witnesses, named as co-conspirators but not defendants, testified before the grand jury, implicating Sheriff Daffin and others. When summoned to appear for trial as material witnesses for the Government these persons engaged a lawyer and moved to quash the subpoena on the ground that any testimony they would give would incriminate them. When forced to take the stand at a pre-trial hearing, they invoked the Fifth Amendment on each question concerning the conspiracy. The Judge upheld their right to privilege relying on United States v. Maranti, 253 F. 2d 135; In re Neff, 206 F. 2d 149 and Poretto v. United States, 196 F. 2d 392. The Government contended that there was a waiver and that the offenses charged were not within the statute of limitations. However, one act of the conspiracy was found to fall within the statute of limitations and the indictment was dismissed.

Staff: United States Attorney Clinton Ashmore;
Assistant United States Attorney Edward L. Stabley
(N.D. Fla.).

IMMUNITY

Use of Federal Communications Act Immunity Statute (47 U.S.C. 409 (L) in Connection With Grand Jury Investigation Into Violations of 18 U.S.C. 1084 and 1952. A second District Court decision has sustained the use of 47 U.S.C. 409(L), the immunity statute contained in the Communications Act of 1934, in connection with a grand jury investigation into alleged violations of 18 U.S.C. 1084 and 1952. (In the matter of Tagliaferri, Farace and Quercia, E.D. Pa., May 22, 1962, before John W. Lord, Jr.; for report of the earlier decision, see In re Arthur Marcus, U. S. Attorneys' Bulletin, Vol. 10, No. 10, p. 288.)

Witnesses Tagliaferri, Farace and Quercia had been summoned before the grand jury to inquire into the nature of their contacts, telephonic and otherwise, with a well-known gambler and bookmaker then under investigation. Evidence before the grand jury has already established that this gambler made use of several illegally installed telephones in connection with his gambling business. All three witnesses refused to answer questions pertaining to their contacts with the gambler under investigation, claiming their privilege against self-incrimination.

The Government moved for an order directing these witnesses to testify, arguing first that the evidence before the grand jury demonstrated the likelihood of violations of the Federal Communications Act, making the immunity statute directly applicable; and second that

regardless of the state of the evidence before the grand jury, the possibility of violations of the Federal Communications Act was inherent in investigations into possible 1084 and 1952 violations, since those sections proscribe the use of wire communication facilities and facilities in interstate commerce for certain purposes, and tariffs and regulations filed with the Federal Communications Commission pursuant to statutory requirements universally provide that telephone service is provided subject to the condition that it not be used for unlawful purposes.

The witnesses' argument was based upon the claim of the limited applicability of 47 U.S.C. 409(L) to investigations into alleged violations of Chapter 5 of Title 47; they argued further that the possibility of such violations was too remote in this inquiry.

The Court rejected these contentions, finding that the witnesses would receive a complete and absolute immunity by virtue of 47 U.S.C. 409(L) with respect to any questions put to them by the grand jury and answered under compulsion, citing Brown v. United States, 359 U.S. 41. The witnesses were thereupon directed to reappear before the grand jury and answer the questions propounded to them.

Staff: David W. Mernitz and Thomas F. McBride
(Criminal Division)

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Communist Control Act of 1954. Attorney General v. International Union of Mine, Mill and Smelter Workers. The Subversive Activities Control Board issued on May 4, 1962 its report and order granting the petition of the Attorney General (see Bulletin Vol. 3, No. 16, p. 3) and determining that the International Union of Mine, Mill and Smelter Workers is a Communist-infiltrated organization within the meaning of Section 3 of the Subversive Activities Control Act of 1950 as amended by the Communist Control Act of 1954.

On May 31, 1962 the Union filed a petition with the Board pursuant to Section 13A (b) of the Act, which section states that any organization which has been determined to be Communist-infiltrated, within six months after such determination, may petition the Board for a determination that such organization is no longer a Communist-infiltrated organization.

Staff: Lafayette E. Broome and Francis X. Worthington (Internal Security Division)

Immunity Proceedings Under Immunity Act of 1954. In re Bart (District of Columbia). On June 7, 1962 the Court of Appeals vacated the order of the District Court compelling the testimony of Philip Bart, National Organization Security of the Communist Party, before a grand jury investigating possible violations of the Internal Security Act of 1950, as amended, and the civil contempt commitment based thereon (see Bulletin: Vol. 10, No. 16, p. 180). The Court of Appeals held that the application therein for immunity under 18 U. S. C. 3486 did not make a factual presentation whereby the District Court could make an independent judicial determination that the matters in question threatened the national security or defense.

Staff: United States Attorney David C. Acheson and Assistant United States Attorney Nathan J. Paulson (D. C.); Benjamin C. Flannagan (Internal Security Division)

Subversive Activities Control Act of 1950; Registration of Communist Party members. Attorney General v. William L. Patterson, et al. On May 31, 1962 the Attorney General filed ten separate petitions with the Subsersive Activities Control Board at Washington, D. C. pursuant to Section 8 (a) of the Subversive Activities Control Act against East and West Coast national leaders of the Communist Party U. S. A. seeking orders of the Board requiring the respondents to register as members of the Party. All of the respondents were elected to the Communist Party National Committee at its last convention held December, 1959, and are: William L. Patterson; William Albertson; Miriam Freedlander; Louis Weinstock; Arnold Samuel Johnson; Betty Garrett Tormey; all of New York City; and Albert J. Lima, Oakland, California; Roscoe Quincy Proctor,

Berkeley, California; Dorothy Healy, Los Angeles, California; and Burt Gale Nelson, Seattle, Washington. There can be no criminal action against a member who has failed to register until an order of the Board requiring him to register has become final, followed by non-compliance therewith.

Staff: Oran H. Waterman, James A. Cronin, Jr., Leo J. Michaloski, and Robert A. Crandall (Internal Security Division)

Atomic Energy Act. Contempt of Court by Crew of "Everyman I" in Attempting to Sail from San Francisco Into Nuclear Testing Area of Johnston and Christmas Islands. United States v. Carl May et al. (N. D. Calif.) On May 25, 1962 the United States obtained a preliminary injunction restraining Carl May, Harold Stallings, Evan V. Yoes, and Edward Lazar, and all other persons in active concert or participation with them, from entering or attempting to, or conspiring to enter the danger area encompassing Christmas and Johnston Island where the United States is conducting nuclear test series and from directly or indirectly moving the "Everyman I" from its mooring without express permission of the Court.

In flagrant disregard of such order duly served on the defendants the vessel was sailed out of the Golden Gate harbor at San Francisco on May 26, 1962 whereupon it and its crew consisting of Stallings, Yoes, and Lazar were taken into custody 17 miles at sea by the U. S. Coast Guard.

An order of the Court was issued on May 26, 1962 directing the defendants to show cause why they should not be adjudged in contempt of court. On June 8, 1962, after hearing motions, the Court held the defendants Lazar, Yoes, and Stallings in contempt of Court and imposed jail sentences of 30 days on each of them.

Staff: United States Attorney Cecil F. Poole and Assistant United States Attorney Jerrold M. Ladar (N.D. Calif.); Benjamin C. Flannagan (Internal Security Division)

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Judicial Review of Deportation Order; Reviewability of Matters Outside Administrative Record; Crime Involving Moral Turpitude - Confidence Game; Entry. Rukavina v. INS (C.A. 7, May 24, 1962.) Petitioner, a permanant resident alien since 1914, was convicted in 1933 (Illinois) of obtaining money, property, or credit, by means of the confidence game. On the basis of that conviction he was deported in 1939. In 1954, after having re-entered as a stowaway, he was again deported. In 1960 he was ordered deported for having re-entered in 1956 as a stowaway a second time.

He sought judicial review of the latter order under 8 U.S.C. 1105a, contending that his 1939 deportation was based on conviction of a crime which did not involve moral turpitude, and that he was therefore deprived of his resident status against his will and cannot be said to have made an "entry" on his return to this country as a stowaway. He also moved for leave to file with the court the certified record of his conviction in the state court in 1933 in support of his contention that moral turpitude was not involved in the crime of which he was convicted.

The court denied his motion since the record sought to be filed was not a part of the administrative record on which the order complained of was based. Under 8 U.S.C. 1105a(4) the court's review of such orders is to be based solely on the administrative record.

Numerous Illinois cases define obtaining money by means of the confidence game as a crime involving a "fradulent scheme". While that offense is not included among "infamous" crimes in the Illinois Revised Statutes (Ch. 38, sec. 587) the court said that such an offense involves an act of cheating or swindling and does involve moral turpitude.

The court distinguished on the facts the cases relied upon by petitioner to support his position that he was removed from the United States against his will in 1939 and hence did not "enter" on his returns (Di Pasquale v. Karnuth, 158 F. 2d 878 (C.A. 2, 1947) and Delgadillo v. Carmichael, 332 U.S. (1947)).

Order affirmed.

Staff: Assistant United States Attorney John P. Crowley (N.D. Ill.)

EXCLUSION

Grounds for Exclusion - Conviction of Crime; Conviction While in Parole Status; Service Jurisdiction Over Paroled Aliens. Klapholz v. Esperdy (C.A. 2, May 18, 1962). This is an appeal from the district court's order granting summary judgment to the appellee and dismissing appellant's complaint (Klapholz v. Esperdy, 201 F.Supp. 294; See Bulletin, Vol. 10, No. 3, p. 92).

The Court of Appeals agreed with the court below that Klapholz's parole into the United States under 8 U.S.C. 1182(d)(5) was a proper exercise of authority granted by that section and that his detention by non-immigration officers did not constitute an admission to the United States, "de facto" or otherwise.

The Court added that the implication of 8 U.S.C. 1182(d)(5) that upon termination of parole an alien's application (for admission) can be considered in the light of events which occurred in the interim, e.g., cure of a disease which might have required exclusion, led it to reject appellant's claim that his conviction of a crime involving moral turpitude (diamond smuggling) during the period of his parole did not render him excludable under 8 U.S.C. 1182(a)(9).

Staff: United States Attorney Robert M. Morgenthau; Special Assistant United States Attorney Roy Babitt (S.D.N.Y.)

* * *

LANDS DIVISION

Assistant Attorney General Ramsey Clark

Rule 60(b) - Motion to Set Aside Consent Judgment for Mistake. United States v. A. Harvey Gould (C.A. 5, April 10, 1962). In condemning a subdivision, the United States stipulated with the record title-holder of the streets for entry of a judgment for just compensation of $31,200. The United States later moved under Rule 60(b), F.R. Civ.P., to set aside the judgment on the ground that the stipulation had been entered under the mistaken impression that the owner had clear title to the land when in fact all of it was dedicated to public use. The district court denied the motion but the Fifth Circuit reversed and remanded the case for further consideration of the motion.

The only plat before the district court showed that five of the subdivision's streets ran to the waters of the Atlantic Ocean, but it also showed that the last 100 to 150 feet of these streets had accreted after the subdivision had first been platted. The landowner asserted in the Court of Appeals that the streets had never run to the ocean and that the accreted land should be valued as ocean-front lots, although he had introduced no evidence in the trial court to support such a contention. Because the record before the district court clearly entitled the Government to have the judgment set aside, only nominal compensation being due the owner of lands dedicated to public use, the Court of Appeals reversed the district court's denial of the Government's Rule 60(b) motion. But noting that the landowner had never had occasion to attack the Government's plat, the stipulation having given him what he thought his land was worth, the Court remanded the case on the condition that both parties be allowed to offer evidence on the actual location of the streets.

Staff: Hugh Nugent (Lands Division)

Eminent Domain: Enhancement in Value Created by Improvements to Property During Pre-existing Government Occupancy; Physical Seizure as Contrasted to Formal Condemnation Proceedings; Date of Valuation. Jose Leon Guerrero Calvo v. United States (C.A. 9). In August, 1958, the United States filed a complaint and declaration of taking for the acquisition of easements in perpetuity for a road and drainage ditch constructed by the United States during year to year temporary leaseholds acquired by earlier condemnation proceedings. The last of five successive leasehold acquisitions expired June 30, 1951. The evidence was that the road was constructed by the Government in 1949, that the road received some maintenance about 1953, that it was hard-surfaced about 1955, and that it was used by the military and the public generally as a highway. The road was constructed to give a direct connection between the Naval Station at Apra Harbor on the west coast of the Island of Guam and Camp Witek which is on the east coast of that island. Both the landowner and his expert witness

acknowledged that the construction of the facilities involved increased rather than decreased the value of the lots over which the easements were acquired. The landowner contended at the trial that the valuation should be as of 1958 when the formal complaint in condemnation was filed. Government counsel expressed the view that any question concerning the date of taking "is probably moot" since the facilities constructed by the Government admittedly enhanced rather than diminished the value of the landowner's property. The district court, relying on United States v. Dow, 357 U.S. 17 (1958), held that the valuation should be determined as of 1949, when possession was acquired, and not in 1958, when the instant proceedings were instituted.

On appeal by the landowner, the Court of Appeals reversed and remanded the cause for further proceedings. After discussing the Dow case at some length, the Court of Appeals states the conclusion that "In our view, the District Court's reliance on Dow was misplaced." The appellate court asserts, inter alia, "* * * we are unable to agree that any use or possession of appellant's land by the Government during the period July 1, 1951 to August 1, 1958 was an appropriation sufficient to amount to a 'taking.'", citing in support of its view United States v. McCrory Holding Company, 294 F.2d 812 (C.A. 5, 1961), cert. den. 368 U.S. 975. In effect disregarding the Government's continued use of the facilities after the expiration of the temporary leasehold on June 30, 1951, the Government's maintenance of the road in 1953, and its hard-surfacing of the road in 1955, the Court of Appeals asserts:

> "* * * the Government elected to permit the term of the last leasehold to expire without filing a declaration of taking until August 7, 1958. From such inaction on the part of the Government, it must be concluded that the purposes for which the leasehold estates were acquired had been accomplished. Upon expiration of the term of the last leasehold estate appellant's land was free from the possessory interest created by the declaration of taking. We are aware of no case which even suggests that the subsequent filing of a declaration of taking (in this case, years later) operates to revive a possessory interest which once existed, absent continuous possession or equitable considerations not appearing here. * * *."

On such reasoning the Court of Appeals rejected the Government's contention that to require payment in the circumstances of this case would constitute an unwarranted windfall at the expense of the public treasury.

The Court of Appeals went on to reject the Government's contention that since the appellant's lots were within the scope of the earlier project which encompassed the entire island, the rule of United States v. Miller, 317 U.S. 369 (1943), and other cases, precluded payment for increased value due to the Government's project. The Lands Division believes both McCrory and this case to be erroneous as to date of taking and also that the decision unwarrantedly narrows the Miller doctrine. The question whether certiorari should be sought is now under consideration.

Staff: Harold S. Harrison (Lands Division)

Mineral Lease Applications - Authority of Secretary of Interior to Require by Regulation That Application Must Cover at Least 640 Acres - Construction of "open for leasing" - Authority of Secretary to Cancel Lease Erroneously Issued. Boesche v. Stewart L. Udall, Secretary of the Interior (C.A. D.C.). The factual situation and November, 1961 decision of the panel of the Court of Appeals first hearing this case are reported in 9 U.S. Attorneys Bulletin, No. 24, pp. 703-704. A petition for rehearing en banc was granted in February, 1962, and the case was reargued to the full bench in April, 1962. On June 15, 1962, an en banc order was entered which (1) set aside the February order granting rehearing and vacating the judgment of the panel entered in November, 1961; (2) denied the petition for rehearing en banc; and (3) reinstated the November 1961 judgment of the panel.

Staff: Harold S. Harrison (Lands Division)

Public Property: Mineral Leasing Act; Oil and Gas Leases; Secretary of Interior May Give His Interpretation of Statute or Regulation Prospective Application Only. Safarik, et al. v. Udall (C.A. D.C., June 7, 1962). The Mineral Leasing Act and the regulations pursuant thereto permitted the assignment of oil and gas leases, the assignment to "take effect as of the first day of the lease month following the date of filing in the proper land office * * *." Assignment would extend the term of the lease for two years. In 1957 an Associate Solicitor of the Department of the Interior ruled that an assignment filed in the twelfth month of the last year of the lease term would effect a two-year extension of the lease term. Many leases were extended under his interpretation. Plaintiffs filed offers to lease lands embraced in such extended leases. The Secretary in 1958 decided that an assignment would have to have been filed before the twelfth month of the last year of the term in order to effect a two-year extension. To avoid the harsh result of upsetting hundreds of leases extended under the earlier interpretation, the Secretary denied plaintiffs' offers and held that his subsequent interpretation would be applied prospectively only. The district court granted the Secretary's motions for summary judgment in these seven cases and dismissed the complaints.

The Court of Appeals, in an opinion by Senior Circuit Judge for the Tenth Circuit Orie L. Phillips, sitting by designation, affirmed the dismissals and stated that the act and regulations were reasonably open to both constructions, that Interior in a long line of decisions had refused to give retroactive application to changes in interpretations which would have inequitable results, and that Congress has entrusted the administration of the public lands to Interior. Noting the power of courts to make its decisions operate prospectively only, the court of appeals declared:

> It is obvious that the Secretary of the Interior, in carrying out his functions in the administration and management of the public lands, must be accorded a wide area of discretion and it is a well-recognized rule that administrative action taken by him will not be disturbed by a court unless it is clearly wrong.

> We conclude that the Secretary of the Interior, under facts and circumstances like those present in the instant cases, should have and does have authority, when he promulgates an interpretative regulation, or hands down a decision placing a different construction on a statute or regulation from that laid down in an earlier decision or regulation, to give prospective operation only to the later regulation or decision.

It did not reach the question of whether dismissal was also proper because of the absence of the lessees who are indispensable parties.

Staff: Raymond N. Zagone (Lands Division)

Eminent Domain: Right to Take; Statutory Authority Held Lacking; Condemnation Complaint Dismissed and Declaration of Taking Vacated. Maiatico v. United States (C.A. D.C., March 8, 1962). A complaint in condemnation was filed to condemn an office building at 1717 H Street N. W., Washington, D. C. With the complaint the Government filed a declaration of taking and deposited $9,900,000 as estimated just compensation. After withdrawing the deposit, the owner filed an answer which alleged that the taking was unauthorized. The Government's motion for surrender of possession of the property was granted by the district court, and the owner's challenge to the Government's claim of right to condemn was rejected. From these rulings an interlocutory appeal was allowed pursuant to 28 U.S.C. 1292(b).

On appeal, it was held that the district court had erred in not granting the owner's motion to dismiss the complaint. The Court of Appeals noted that the taking had admittedly not complied with two provisions of the Public Buildings Act of 1959, 40 U.S.C. 606-607. The first of these provides that no appropriation shall be made to acquire a building costing in exeess of $100,000 unless such acquisition has been approved by the committees on public works of the House of Representatives and Senate. The second provides that in carrying out its duties under the Public Buildings Act of 1959 General Service Administration shall acquire buildings in the District of Columbia exclusively within a prescribed area.

The Court of Appeals rejected the argument of the Government that the taking was authorized by Congress in the Second Supplemental Appropriation Act of 1961, 74 Stat. 821, 826, which authorization was separate from and independent of the authorization to acquire property found in the Public Buildings Act of 1959. The Court also rejected the line of cases holding that acquisition of property may be authorized by an item in an appropriation act which provides money to purchase the property. It was held that these "[c]ases cited by the Government do not support the broad sweep now asserted, for in each of them pre-existing authorization by Congress may be perceived. All antedated the Public Buildings Act of 1959, and in any event, the property involved was not outside a limited and carefully defined 'taking area' as is here the situation."

The Department is considering whether to petition the Supreme Court for a writ of certiorari.

Staff: A. Donald Mileur (Lands Division).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

IMPORTANT NOTICE

When a suit for the refund of taxes, pending in a District Court, is settled, the Tax Division sends letters so advising the United States Attorney and the taxpayer's counsel. In the letter to counsel he is requested to deposit with the United States Attorney a stipulation for the dismissal of the suit with prejudice. The Department prefers that the stipulation, bearing the style of the suit, take substantially the following form:

> It is hereby stipulated that the above-entitled action may be, and is hereby, dismissed with prejudice, the parties to bear their respective costs.

Such a stipulation should be held in the office of the United States Attorney until the refund check has been received and should be filed with the court when the refund check is delivered to the taxpayer or his counsel.

It is the Department's policy to avoid the entry of judgment in cases which have been settled by compromise for several reasons. Among these reasons, the issuance of refund checks administratively pursuant to a settlement can be handled much more expeditiously and the settlement is much less likely to become a precedent which may control the disposition or decision of other similar cases. For this latter reason particularly, the Department also prefers that the stipulation not specify the terms of the settlement.

CIVIL TAX MATTERS
Appellate Decisions

Knowledge of Taxpayers' Change of Address Not Imputed to Director of District Where Returns in Controversy Filed By Filing of Subsequent Returns in Different District. Lester L. and Betty W. Luhring v. Clifford W. Glotzbach, District Director (C.A. 4, May 28, 1962.) If the statutory notice of deficiency is not mailed to the taxpayer's "last known address" within the meaning of Section 6212(b) of the 1954 Code, the taxpayer is entitled to enjoin the assessment and collection of taxes assessed under an express exception to Section 7421(a), which ordinarily forbids such suits. In this action, taxpayers had filed their 1957 and 1958 returns in Virginia. Subsequently, they moved to Sebring, Florida, and then to Lauderdale-by-the-Sea, Florida. The District Director at Richmond was not notified of this move, and taxpayers' relatives refused to reveal taxpayers' correct address when questioned by the revenue agent. On his own initiative, the agent did learn of the Sebring address and it was there that deficiency notices for 1957 and 1958 were sent.

The Court affirmed the district court's denial of equitable relief, holding that the statutory letters had been mailed to taxpayers' "last known address" under the statute. It rejected taxpayers' contention that, by virtue of subsequent returns filed with the District Director at Jacksonville, Florida, which correctly gave their Lauderdale-by-the-Sea address, knowledge of the change of address was imputed to the Richmond Director. Recognizing the "vast domain over which the Commissioner of Internal Revenue * * * presides", and the "continual movement of taxpayers throughout the country in following their pursuits", it accepted the Government's argument that the last known address requirement is satisfied if the deficiency notice is sent to the last address of the taxpayer known to the District Director (or his underlings) of the district where the returns for the years in question were filed.

Staff: Giora Ben-Horin and Meyer Rothwacks (Tax Division).

Asserted Violation of Internal Revenue Service's Statement of Procedural Rules Insufficient Ground to Enjoin Collection of Taxes. Henry G. Luhring, Jr., et al. v. Clifford W. Glotzbach, District Director (C.A. 4, May 28, 1962). Taxpayers sought to enjoin the collection of additional taxes assessed, on the ground that the District Director, by his failure -- prior to the issuance of notices of deficiency -- to inspect taxpayers' returns and supporting records, to afford an opportunity for an informal conference, to issue them a "30-day letter, and to grant them a hearing at the regional Appellate Division, had "arbitrarily and capriciously" deprived taxpayers of "rights" guaranteed them under the Internal Revenue Service's Statement of Procedural Rules. In affirming the district court's denial of taxpayers' motions and its dismissal of their complaints, the Fourth Circuit held: (1) The Procedural Rules are directory only, not mandatory, and "do not curtail the power conferred upon the Secretary of the Treasury or his delegate * * * to send a notice of deficiency". (2) The District Director did not in fact violate the Rules. Under Section 601.105(f), the Director is specifically authorized to by-pass the customary procedures if expiration of the statute of limitation for the assessment of the tax is imminent, unless taxpayer agrees to extend the statutory period. Here, with the end of the assessment period for the first tax year in question only 46 days away, two of the taxpayers had been requested to consent to extensions, but had refused. (3) In any event, taxpayers totally failed to bring themselves within the decisional exceptions to the absolute prohibition of Section 7421(a) of the 1954 Code against restraining the assessment or collection of taxes. Their complaints alleged no facts showing either the illegality of the tax, or the existence of exceptional and extraordinary circumstances, the two factors necessary to bring the case "within some acknowledged head of equity jurisprudence". Miller v. Nut Margarine Co., 284 U.S. 498, 509. In this respect the decision is in harmony with the restricted view taken by the Supreme Court of attempts to escape the statute's express interdiction. Enochs v. Williams Packing & Navigation Co., _____ U.S. _____, decided May 28, 1962.

Staff: Giora Ben-Horin and Meyer Rothwacks (Tax Division).

District Court Decision

Bankruptcy -- Referee's Disallowance of Federal Tax Claims Because Supreme Court's Decision in Commissioner v. Wilcox Precluded Presence of Fraudulent Intent Which Would Suspend Operation of Said Taxes. United States v. George B. Parr (S.D. Texas, May 31, 1962). In this case, the Court entered its decision on May 31, 1962 on the Government's petition for review of the Referee's order disallowing various federal tax claims against George B. Parr. The Court upheld the Referee's disallowance of the Government's claim for taxes for the years 1945, 1947, 1949, 1950, 1952, and 1953, on $855,798.22 which the Government alleged taxpayer received as income in these years. The Court, however, reversed the Referee's disallowance of the Government's tax claim for 1951 on income of $26,015.55 received in 1951.

The Referee found that various monies acquired by Parr in 1945 and 1947 from the Duval County Road and Bridge Fund were loans and therefore not taxable. The court held the Referee's finding on this issue to be clearly erroneous; that there were no such loans; that Parr had misappropriated this money; and that under the rationale of the Supreme Court decisions in Rutkin v. United States, 343 U.S. 130 (1952) and James v. United States, 366 U.S. 213 (1961), these monies were taxable income to Parr. However, the statute of limitations barred collection of tax on this income unless the Government proved Parr fraudulently failed to pay such taxes. The Court concluded that even assuming Parr to have the requisite fraudulent intent, the funds were acquired in 1945 and 1947 at which time such funds were not taxable under the rationale of the Supreme Court decision in Commissioner v. Wilcox, 327 U.S. 404 (1946). The Court citing the James case found that as a matter of law the Wilcox decision prevented Parr from having committed fraud in 1945 and 1947 even though the Wilcox case involved embezzlement and the instant case did not.

The court held that the Wilcox case in 1946 established that taxable income to a taxpayer is conditioned upon: (1) the presence of a claim of right to the alleged gain, and (2) the absence of a definite, unconditional obligation to repay or return the gain. The Court reasoned that, therefore, any monies gained through misappropriation after 1946 were not taxable under the Wilcox case because of the absence of a claim of right to the fund. Monies gained through a misappropriation, the Court stated, did not become taxable until 1952 when the rationale of the Rutkin case became the law. The Rutkin case established that lawful as well as unlawful gain was taxable income when the recipient had such control over the gain that he derives readily realizable economic value from it. The court admitted that the effect of the Rutkin case reached back to years prior to 1952 and rendered taxable in 1952 gains realized through misappropriation between 1946 and 1952. Finally, the Court held that two coordinate facts must be established before the legal conclusion of fraud can be drawn, viz.: (1) a tax must have been owing, and (2) the taxpayer must have failed to pay the tax with the specific intention of deceiving the Government. The Court reasoned that as a matter of law the Goverment could not establish fraud on its claims for 1945 and 1947 because the first requirement of a

tax being due was missing; this follows from the fact that at the time that the gain was realized and at the time the respective tax returns were filed and the tax thereon paid, the misappropriated funds were not taxable income, and there was no tax due thereon.

With respect to the 1949 tax claim, the Referee found that Parr had received certain monies as a loan from the Duval County Road and Bridge Fund and therefore these monies were not taxable to him. The Court did not pass on whether the Referee's finding was clearly erroneous, but found that the Government was not entitled to prevail on the 1949 issue because of the statute of limitations, for the same reasons advanced for the 1945 and 1947 issues.

The Referee found that the monies the Government alleged Parr received from the Benavides Independent School District in 1949 ($20,782.92), in 1950 ($41,515.30), and in 1951 ($26,015.55) were not proven to have been received and thus were not taxable to him. The Government's claims for 1949 and 1950 are also barred by the statute of limitations unless the Government proves fraud. The Court held that the Government was precluded from showing fraud for the years 1949 and 1950 for the same reasons that it was precluded from showing fraud for 1945 and 1947. However, the Court found that the Referee's finding as to 1951 was clearly erroneous, that the trustee had not proven that Parr had not received the money in 1951, and that the money received in 1951 from the School District was taxable to Parr. The court also affirmed the Referee's finding that the sum of $1,500 was not taxable to George Parr in 1950, as the said finding was not clearly erroneous.

The Court affirmed as not clearly erroneous the Referee's finding that the $20,000 used in 1952 to "buy" a sheriff, was not constructive income taxable to Parr in 1952. The Court said that such $20,000 was of "political" benefit to Parr and his political party but that the Government had failed to show there was any "economic" benefit to Parr from this payment which would justify characterization of this sum as constructive income to Parr. Further, the Court concluded the Government had failed to prove Parr had fraudulently evaded payment of any tax on any constructive income he received.

The Court also affirmed as not clearly erroneous the Referee's findings that the sum of $85,000 the Government alleged to be income to Parr in 1953 was not actually received by Parr but that the bank records relied upon by the Government was false.

Staff: United States Attorney Woodrow B. Seals (S.D. Tex.); and Homer R. Miller (Tax Division).

CRIMINAL TAX MATTERS
Appellate Decision

Rejection of Essentially Uncontradicted Psychiatric Opinion Testimony. United States v. Benus (C.A. 3, June 19, 1962.) Defendant, a dentist, was found guilty in the district court, in a trial without a jury, of failing to file income tax returns for five successive years. See district court's opinion in 196 F. Supp. 601, reported in prior United States Attorneys Bulletin, Vol. 9, No. 21. At the trial, defendant stipulated that he had failed to file the returns, and that he was aware of his obligation to file, but asserted that he was not criminally responsible since his mental condition was so impaired at the time the tax returns were required to be filed that he was unable to conform his conduct to the requirements of law. See United States v. Currens, 290 F. 2d 751 (C.A. 3). To support this defense, defendant offered the opinions of two psychiatrists, both of whom opined that defendant had a "personality disturbance" which rendered him unable to act in matters requiring "independent judgment."

The Government called no psychiatric witnesses in rebuttal. The district court, after noting the flimsy and inconclusive nature of the psychiatric testimony, rejected the opinion of the psychiatrists that defendant had a mental disease which prevented him from filing his returns. The Court of Appeals, in a per curiam opinion, upheld the findings of the lower court that the psychiatric evidence was insufficient to absolve defendant from liability under the test provided in United States v. Currens, supra.

This case, together with United States v. Cain, 298 F. 2d 934 (C.A. 7), reported in prior United States Attorneys Bulletin, Vol. 10, No. 5, p. 150, supports the general rule that the trier of fact is not bound by expert opinion, even though uncontradicted, and may reject the opinion, if in the exercise of its independent judgment the facts are not in accord with the opinion. See also Dusky v. United States, 295 F. 2d 743 (C.A. 8).

Staff: United States Attorney Drew J. T. O'Keefe and Assistant United States Attorney Sullivan Cistone (E.D. Pa.); Joseph M. Howard and Norman Sepenuk (Tax Division).

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