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UNITED STATES ATTORNEYS

BULLETIN

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MONTHLY TOTALS

For the month of November, all of the news is good. Totals in all categories of work showed an encouraging reduction, and there was an appreciable decrease in the aggregate of cases and matters pending. Except for June 1962, this is the first month since January 1961 that there has been a reduction in every category of work. The following analysis shows the number of items pending in each category as compared to the total for the previous month.

	October 31, 1962	November 30, 1962	
Triable Criminal	8,937	8,675	-262
Civil Cases Inc. Civil Less Tax Lien & Cond.	16,211	16,150	- 61
Total	25,148	24,825	-323
All Criminal	10,531	10,265	-266
Civil Cases Inc. Civil Tax & Cond. Less Tax Lien	19,176	19,108	- 68
Criminal Matters	13,205	13,143	- 62
Civil Matters	15,245	15,179	- 66
Total Cases & Matters	58,157	57,695	-462

The figures below show such a high rate of activity that, if it continues at this rate for the remaining 7 months of the year, a new all-time record will be established for case filings, and the second highest total in seven years will have been established for case terminations. The latter record is of more immediate importance, however, because it is only by increasing case terminations that the pending caseload will be reduced. An encouraging beginning has been made in this direction during November. The spread between filings and terminations has been narrowed from last month's 2,102 to this month's 1,893. Another encouraging sign is the drop in the pending caseload. While this reduction is extremely small, nevertheless it is a refreshing change from the consistent upward trend of the past months.

	First 5 Mos. F.Y. 1962	First 5 Mos. F.Y. 1963	Increase or Decrease Number	%
Filed				
Criminal	12,410	13,677	+ 1,267	+ 10.21
Civil	10,262	11,017	+ 755	+ 7.36
Total	22,672	24,694	+ 2,022	+ 8.92
Terminated				
Criminal	11,035	12,733	+ 1,698	+ 15.39
Civil	8,498	10,068	+ 1,570	+ 18.47
Total	19,533	22,801	+ 3,268	+ 16.73

	First 5 Mos. F.Y. 1962	First 5 Mos. F.Y. 1963	Increase or Decrease Number	%
Pending				
Criminal	9,712	10,253	+ 541	+ 5.57
Civil	22,419	23,778	+ 1,359	+ 6.06
Total	32,131	34,031	+ 1,900	+ 5.91

The United States Attorneys are to be congratulated on the fact that, during November, terminations exceeded filings for the second successive month. If this ratio can be maintained for a while, substantial inroads can be made in the pending caseload. While total terminations were not as high as for the preceding month, they were higher than for any month in the first quarter of the fiscal year. Civil cases comprise the bulk of the caseload, and it is in this category that the rise in terminations is most meaningful. It is hoped that in the near future civil case terminations will exceed civil case filings, so that the civil caseload can be whittled down.

	Filed			Terminated		
	Crim.	Civ.	Total	Crim.	Civ.	Total
July	2,143	2,145	4,288	2,041	1,793	3,834
Aug.	2,454	2,354	4,808	1,964	2,040	4,004
Sept.	3,324	1,857	5,211	2,456	1,740	4,196
Oct.	2,973	2,393	5,366	3,199	2,338	5,537
Nov.	2,783	2,238	5,021	3,073	2,157	5,230

For the month of November, 1962, United States Attorneys reported collections of $5,159,594. This brings the total for the first five months of fiscal year 1963 to $27,444,330. Compared with the first five months of the previous fiscal year this is an increase of $12,417,612 or 82.6 per cent over the $15,026,718 collected during that period.

During November $3,083,356 was saved in 109 suits in which the government as defendant was sued for $4,396,753. 71 of them involving $2,692,215 were closed by compromises amounting to $376,274 and 34 of them involving $1,683,424 were closed by judgments against the United States amounting to $937,123. The remaining 4 suits involving $21,114 were won by the government. The total saved for the first five months of the current fiscal year was $19,118,817 and is an increase of $4,603,485 over the $14,515,332 saved in the first five months of fiscal year 1962.

DISTRICTS IN CURRENT STATUS

As of November 30, 1962, the districts meeting the standards of currency were:

CASES

Criminal

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

CASES

Civil

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

MATTERS

Criminal

Ala., N.	Ga., S.	Md.	Okla., N.	Tex., E.
Ala., M.	Hawaii	Miss., S.	Okla., E.	Tex., S.
Ala., S.	Idaho	Mont.	Okla., W.	Tex., W.
Alaska	Ill., E.	Neb.	Pa., E.	Utah
Ariz.,	Ill., S.	Nev.	Pa., W.	Va., W.
Ark., E.	Ind., N.	N.H.	P.R.	Wash., E.
Ark., W.	Ind., S.	N.J.	R.I.	Wash., W.
Calif., S.	Ky., E.	N.Mex.	S.C., E.	W.Va., N.
Colo.	Ky., W.	N.C., M.	Tenn., M.	W.Va., S.
Dist.of Col.	La., W.	Ohio, S.	Tex., N.	Wyo.
				C.Z.

MATTERS

Civil

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

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ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

MEMOS AND ORDERS

The following Memoranda applicable to United States Attorneys Offices have been issued since the last published in Bulletin No. 23, Vol. 10 dated November 16, 1962:

ORDER	DATED	DISTRIBUTION	SUBJECT
288-62	10-18-62 10-30-62	U.S. Attys. & Marshals	Title 28--Judicial Administration Chapter I--Dept. of Justice Part I. Executive Clemency Regulations Amended, etc.
289-62	11-14-62	U.S. Attys. & Marshals	Title 28--Judicial Administration Chapter I--Dept. of Justice Part 43--Recovery of cost of hospital and medical care and treatment furnished by the United States. Prescribing regulations pursuant to Pub. Law 87-693 and Executive Order No. 11060 relating to the recovery from tortiously liable 3rd persons of the cost of hospital and medical care and treatment furnished by U.S.
290-62	11-16-62	U.S. Attys. & Marshals	Providing for termination of the appointment or of the authority of officers and employees of the Justice Department appointed to be, or authorized and required to perform the functions of a Deputy United States Marshal or a Special Deputy United States Marshal in connection with temporary duty outside the Judicial District in which their duty station is located.

MEMO	DATED	DISTRIBUTION	SUBJECT
233 S-2	11-26-62	U.S. Attys. & Marshals	Airline Penalties For No-Shows.
330	11- 8-62	U.S. Attys. & Marshals	Procedure in Processing Appeals and Certiorari Matters in Collection Litigation.

MEMO	DATED	DISTRIBUTION	SUBJECT
331	11- 5-62	U.S. Attys.	The United States Attorneys are hereby instructed that, before authorizing the filing of a complaint or presenting any matter to a grand jury relating to a violation of 18 U.S.C. 1001 based upon any false statement or representation, oral or written, volunteered or otherwise, made to any agent or investigator of any department or agency of the Government, permission to so proceed should first be obtained from the appropriate Assistant Attorney General having jurisdiction of the case in which the false statement was made.
332	11-15-62	U.S. Attys. & Marshals	Improving Manpower Controls and Utilization.
333	12- 3-62	U.S. Marshals	Designation of Institutions for Commitment of Federal Prisoners.
334	11-28-62	U.S. Attys.	Revision of Form No. USA-5 to include Man-Hour data.

ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

Court Finds for Government in Alleged Improprieties in Grand Jury Proceedings. United States v. Morton Salt Company, et al. (D. Minn.) On November 20, 1962, Judge Nordbye issued an opinion in the form of an Order which rejected various contentions by defendants alleging impropriaties in the conduct of the grand jury proceedings out of which the criminal and civil cases arose.

The Government had moved for the production of documents under Rule 34 in the civil price fixing case. Some of the documents in question were in the custody of the Clerk of the Court and others of the Marshal under an impounding order issued by the Minnesota court upon the termination of the criminal case by a verdict of acquittal. Defendants had previously moved in the criminal case, after the verdict of acquittal, for the suppression and impounding of all documents obtained through grand jury process. The Court declined to decide that motion but considered defendants' arguments as a defense to the Government's Rule 34 motion in the civil case. In refusing to rule on the criminal motion made by defendants, the Court referred to defendants' previous motions prior to and during the criminal trial based on similar grounds, on which the rulings were adverse to defendants. The Court also noted that the verdict of acquittal constituted a termination of the criminal case.

The facts on which defendants based their allegations of impropriety were: In a Department press release it was indicated that the Salt Investigation was to be conducted by a grand jury in the Northern Division of the Southern District of Illinois. The documents were obtained originally by subpoenas duces tecum issued out of the office of the Clerk of Court of the Southern Division of the Southern District of Illinois at Springfield, Illinois, on December 28, 1959. A grand jury existed in Springfield but was in recess. The subpoenas were returnable at Springfield on January 25, 1960. On January 21, defendants obtained an extension of time from one of the judges of the Southern Division of the Southern District of Illinois whereby the return date of the subpoenas was extended to May 23, 1960. On January 25, 1960, an impounding order by the Springfield court placed these documents and others, when produced, in the care and custody of the Chicago office of the Antitrust Division, Department of Justice. A new grand jury was impaneled at Springfield on February 17, 1960, and on that date evidence in the salt industry investigation was introduced. On May 23, 1960, defendants, in compliance with the court's impounding order of January 25, 1960, delivered the documents to the Chicago office of the Antitrust Division.

On June 28, 1961, an indictment was returned against defendants by a grand jury sitting in the District of Minnesota, at St. Paul, Minnesota. After the St. Paul indictment, the impounding order placing the documents in the Antitrust Division at Chicago was amended by the District Court of Illinois at Springfield whereby these documents and others were impounded into the care and custody of the Antitrust Division, Department of Justice, Washington, D. C., for use in preparation for trial of the criminal case growing out of the indictment returned by the St. Paul Grand Jury. On

January 23, 1962, the Minnesota Court, upon motion of defendants, ordered the Government to transfer the documents from Washington, D. C. to Minneapolis, Minnesota, to permit defendants to copy and inspect them in order to prepare for the impending criminal trial.

Judge Nordbye rejected all of defendants' contentions that irregularities occurred in the handling of the grand jury proceedings, stating that allegations of violations of grand jury secrecy both before the St. Paul grand jury and at trial are not pertinent to the question of production of documents under Rule 34. In response to the contention that the Government attorneys were not authorized to appear before the Springfield grand jury, the Court held that the authority of Government attorneys to appear before the grand jury is coterminous with that of the United States Attorney and therefore they could proceed in any Division within the District. The fact that some letters of authorization referred to the Northern rather than the Southern Division of the District was not such an irregularity as to quash subpoenas issued by the clerk of the Southern Division. The Court rejected the contention that authorizations signed by a Deputy Attorney General who left office before they were filed were invalid. The Court also rejected the contention that one of the letters of authorization had not been filed, holding that the authorization created the authority, not the filing thereof.

In response to the contention that an irregularity arose from the claimed change in venue from the Northern to the Southern Division of Illinois, the Court ruled that no irregularity arose by reason of any change in venue from one Division to another in the same District. The Court noted that the documents to be obtained by the initial subpoenas were impounded by order of the court in the Southern Division; no objection had been made to the subpoena or to the impounding of the documents before consideration thereof by the Springfield grand jury, nor to the delivery thereof to the Antitrust Division, Chicago field office; and no objection had been made to consideration by the second Springfield grand jury of the documents subpoenaed by the first Springfield grand jury.

In response to the contention that it was improper to shift the grand jury proceeding from Springfield, Illinois to St. Paul, Minnesota, the Court held that the failure of one grand jury to conclude its investigation or the return of a no bill would not prevent a grand jury in another District from considering the same matter.

In response to the contention that the documents were obtained by illegal search and seizure in violation of constitutional rights because the original subpoenas were issued while the first Springfield grand jury was in recess and before the second Springfield grand jury was summoned, the Court ruled that Government attorneys with proper authority could issue subpoenas out of theoffice of the clerk and inspect the documents while the grand jury was in recess before presenting them to the grand jury, citing Rule 17c, F.R. Crim. The Court concluded that the documents had been produced by subpoenas in connection with a grand jury investigation, a portion of them had been presented to the grand jury for whose consideration they were subpoenaed, and the documents were later used by the Government and the defendants for and during the trial of an indictment returned by a grand jury [the St. Paul grand jury] regularly and legally impaneled; and were lawfully in the possession of the Minnesota court.

It should be noted that although the subpoenas were issued while the Springfield jury was in recess they were returnable on a day when the jury would be sitting. Prior to that day defendants sought to quash or modify the subpoenas and succeeded in postponing the return date. The Court had also provided that the documents be returned to the Chicago Antitrust office and, though subpoenaed under one grand jury, the documents would be considered as being returned to a new jury, to be impaneled shortly, and which would be dealing with the rock salt investigation at the time of the new return date.

In essence the Court found nothing improper in the Government's handling of the grand jury proceedings in this case.

Staff: John W. Neville, Herbert F. Peters and Jerome A. Hochberg (Antitrust Division)

Damage Case Filed in Hawaii. United States v. Flynn-Learner, et al. (D. Hawaii). A civil action was filed on December 11, 1962 charging Flynn-Learner, the Learner Company and National Metals, Ltd. with submitting rigged bids to the Government for the purchase of scrap metal.

The suit charged that defendants have deprived the Government of a fair price for scrap metal sold by the Armed Forces in Hawaii by submitting rigged bids.

The complaint asked for damages of twice the amount of the total sales prices of all the rigged bids as provided for by the Federal Property & Administrative Services Act. The amount of sales, it is estimated, exceeded $280,000. An alternative count asked for single damages under the Clayton Act.

Flynn-Learner and National Metals, Ltd. were the only dealer-exporters of scrap metal in Hawaii during the period of the conspiracy. The Learner Company of Oakland, California, is the parent company of Flynn-Learner.

An indictment in the same matter was returned against these and other defendants on June 25, 1962 in the District of Hawaii and is still pending.

Staff: Raymond M. Carlson and Carl L. Steinhouse (Antitrust Division)

* * *

CIVIL DIVISION

Acting Assistant Attorney General Joseph D. Guilfoyle

COURT OF APPEALS

CIVIL SERVICE COMMISSION

Award Under Federal Employees Compensation Act Non-Reviewable. Soderman v. United States Civil Service Commission (C.A. 9, December 10, 1962). This action for personal injuries suffered by the plaintiff while employed by the United States and for which he had previously received compensation under the Federal Employees Compensation Act was held barred for two reasons, viz., (1) suit against the Civil Service Commission will not lie, since the Congress has not authorized such suits, and (2) the Federal Employees Compensation Act provides the sole remedy for injuries received by federal employees and awards thereunder are not reviewable.

Staff: United States Attorney Cecil F. Poole (N.D. Calif.)

COMMODITY EXCHANGE ACT

Finding That Petitioners Had Manipulated the Cotton Futures Market Unsupported. Volkart Brothers, Inc., et al. v. Freeman, et al. (C.A. 5, December 5, 1962.) This petition sought review of a suspension by the Secretary of Agriculture of petitioners' trading privileges and registration, after he found that petitioners had manipulated the cotton futures market in violation of Sections 6(b) and 9 of the Commodity Exchange Act, 7 U.S.C. 9, 13.

Petitioners had a long position in the 1957 market. At the close of trading for that market, the shorts holding unliquidated contracts which require delivery by the close of trading had to cover 13,400 bales. There were on that day only 5,000 bales of certified cotton [in warehouses, graded and certified] and 1,300 bales of long contracts owned by persons other than petitioners. Thus the shorts had to meet demand out of petitioners' long contracts or whatever cotton was in the process of certification. The latter, the Secretary found, was not readily available to shorts. The Secretary's finding of manipulation on the last day of trading on this set of facts was held by the Court of Appeals to be unsupported. The court held this was an unintentional squeeze, not a manipulation. The court pointed out that petitioners did not control the available supply of certified cotton. It further disagreed with the Secretary's conclusion that the supply of uncertified cotton [then about a million and a quarter bales] would be disregarded in determining the size of available supply; that would be punishing the longs for the lack of diligence of the shorts. Further a finding of manipulation based upon the nonavailability of cotton to the shorts in these circumstances rests on the erroneous premise that the shorts are not held to performance of their contracts and diligence in such performance.

The order of suspension of registration and trading privileges was, therefore, set aside.

Staff: Neil Brooks (Department of Agriculture)

SOCIAL SECURITY

Disability Freeze, Scope of Review in Court of Appeals Not Limited, Evidence Supports Finding of Secretary that Condition Remediable. Ward v. Ribicoff (C.A. 5, December 11, 1962). This action sought review of a denial by the Secretary of Health, Education, and Welfare of appellant's application for a disability freeze. The Secretary, relying on medical reports, had found appellant's back impairment remediable by surgery. In affirming the judgment in favor of the Secretary, the court held that finding supported in the record. Additionally, the court refused to accept the Government's contention that review in the court of appeals should be restricted to a determination of whether the district court misinterpreted or misapplied the substantial evidence test, holding that it would examine the record for substantial evidence de novo.

Staff: Murray H. Bring (Civil Division)

Old Age Benefits, Finding That Claimant Was Rendering Services For Compensation And Was Therefore Unretired Supported by Substantial Evidence. Newman v. Celebrezze (C.A. 2, November 23, 1962). This was an action seeking review of a denial by the Secretary of Health, Education, and Welfare of appellant's application for old age insurance benefits. Appellant had ostensibly retired, but there was evidence to show that he was actually rendering services to family corporations. Additionally, a salary being paid to appellant's son, who was paying appellant's rent, was found by the examiner to be a sham device to mask the service-compensation relationship. The district court's summary judgment in favor of the Secretary was affirmed by the court of appeals on the ground that substantial evidence supported the finding that appellant had not retired.

Staff: United States Attorney Vincent L. Broderick, Assistant United States Attorney Anthony J. D'Auria, and Assistant United States Attorney Philip H. Schaeffer (S.D. N.Y.)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Police Brutality, United States v. Clinton E. Savage, et al., Hammond Cr. #3285 (N.D. Ind., Hammond Div.). This case, involving the beating of a prisoner by two Gary, Indiana, police detectives in an effort to obtain a confession from him was previously discussed in Bulletin, Vol. 10, No. 23, page 639.

Motions for a new trial were filed on behalf of the defendants and on December 6, 1962, after a hearing, motions were denied. On the same date the court imposed sentence. Savage was sentenced to a term of one year and a fine of $100.00. Kennedy was sentenced to a term of six months and a fine of $100.00. Execution of these sentences was suspended and the court placed the defendants on probation for a period of five years.

The defendant Kennedy, when asked by the court if he had anything to say before sentence was imposed, admitted to the court that he and his co-defendant had beaten the victim in an effort to force him to confess to crimes; however, he contended that the beating was not as severe as that described by the victim. The court, recalling that each of the defendants had taken the stand and denied beating the victim, observed that it was evident that the defendants had given false testimony under oath on the trial. For this reason, the court seriously considered requiring the defendants to serve jail terms. However, in view of the defendants' good records as police officers, the court decided to suspend execution of the terms of imprisonment in favor of lengthy probation. In doing so, the court admonished the defendants that in the event they committed any violation of the terms of their probation, their probation would be revoked and they would be required to serve their full terms.

Staff: Assistant United States Attorney
Kenneth P. Fedder (N.D. Ind.);
John L. Murphy and Gerald W. Jones
(Civil Rights Division)

CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

PROSECUTIONS

Request that Assistant United States Attorneys Give Detailed Supporting Reasons for Declination of Prosecutions. It has been noted that in many cases Assistant United States Attorneys in declining prosecution will tell the Federal Bureau of Investigation agent that there is no evidence of a Federal violation, insufficient evidence of a violation, no credible evidence of a violation, no prosecutable offense, or that no Federal violation has occurred. No detailed supporting reasons are given for these general conclusions.

Under these circumstances Criminal Division attorneys must review the investigative reports de novo and in detail without having the benefit of the Assistant United States Attorney's analysis of the facts or other reasons supporting the conclusion given. Quite frequently it is necessary to write to a United States Attorney and ask that an assistant furnish us his detailed views. In our opinion this additional correspondence can be eliminated by the provision of detailed views by an assistant at the time he declines prosecution, which views would be set forth in the closing investigative report. This would eliminate much expenditure in time required by the additional correspondence and increase the efficiency of the Criminal Division and of the United States Attorneys' offices.

Accordingly, it is strongly urged that Assistant United States Attorneys give detailed supporting reasons in support of their declinations of prosecution in all future cases reviewed by the Criminal Division.

FEDERAL FOOD, DRUG, AND COSMETIC ACT

Conviction for Interstate Shipment of Misbranded Drugs Affirmed; Therapeutic and Medicinal Claims made Orally During Public Lectures Held to Reflect Intended Purposes or Uses of Drugs Required to be Shown on the Labeling of Such Products. Nature Food Centres, Inc. v. United States (C.A. 1). On November 13, 1962, the Court of Appeals affirmed the convictions of Nature Food Centres, Inc. and its directors, Henry K. Rosenberger and Andrew G. Rosenberger, "health food" distributors, on all 13 counts of an information charging interstate shipments of drugs misbranded because they bore inadequate directions for use, in that their labeling failed to state the purposes, conditions and diseases for which they were intended. Defendants shipped bottles of tablets and capsules from Massachusetts to their retail stores in Philadelphia and Chicago. The labeling on the bottles showed the contents to be a "dietary supplement," containing various specified ingredients. Thereafter, Andrew G. Rosenberger gave a series of public lectures and sold notes regarding these products in Philadelphia and Chicago; he made extravagant claims as to the

preventive and curative qualities of the products. The Government contended that these oral claims related to purposes and uses for which the drugs were intended and, as such, should have appeared on the labeling of the products. Defendants argued that this was unnecessary since purchasers at its stores had never attended the lectures and, therefore, did not know of the claims made there. The Court of Appeals rejected defendants' argument, noting that the pertinent regulations required drug labeling to reflect all "oral, written, printed, or graphic advertising." Also rejected was defendants' contention that the lecture notes would satisfy the labeling requirements. The Court observed that the statements made in the notes were not identical to the oral claims made at the lectures, and held further, that even had they been identical, this would not have been sufficient for labeling purposes since the notes were not made available to purchasers at defendants' stores.

Defendants filed a petition for writ of certiorari on December 7, 1962.

Staff: United States Attorney W. Arthur Garrity, Jr.; Assistant United States Attorney Stanislaw R. J. Suchecki (D. Mass.); Assistant General Counsel William W. Goodrich, Department of Health, Education, and Welfare.

OBSCENITY

Devices Which Convey Prurient Thoughts, Emotions or Suggestions within Scope of 18 U.S.C. 1462 (a) and (c). United States v. John Anthony Gentile, et al. (D. Md., December 7, 1962). In a recent prosecution under § 1462 prohibiting transportation of obscene matter by any express company or other common carrier, the Court, sitting without a jury, convicted two defendants for causing the carriage in interstate commerce by common carrier and taking from the carrier articles of contraceptive rubber goods which had been offensively modified.

The indictment charged that these goods were of an indecent character under sub-paragraph (a) of § 1462 and were articles designed and adapted for indecent immoral use under sub-paragraph (c). In this connection, the Court noted with emphasis that the Government did not charge in the indictment that the goods were designed, adapted or intended to prevent conception, for in order to make out an offense the Government would be required to prove that the alleged violator had the specific intent that the contraceptives be used for promotion of illicit sexual intercourse or otherwise be unlawfully employed, citing inter alia Youngs Rubber Corp. v. C. I. Lee & Co., 45 F. 2d 103, 108 (C.A. 2, 1930) and United States v. Nicholas, 97 F. 2d 510, 512 (C.A. 2, 1938).

Applying the test enunciated by Mr. Justice Harlan in Manual Enterprises v. Day, 370 U.S. 478 (1962), and observing that this case did not involve any rights under the First Amendment, the Court concluded the articles were both patently offensive and possessed the requisite prurient interest appeal. The

Court concluded that the items listed in sub-paragraph (a) of § 1462 involve the communication of thoughts, emotions or suggestions and that the predominant appeal of four of the five types of articles with the extensions was to communicate prurient thought, emotion, or suggestion if exhibited at a "party" as suggested by the accompanying advertisements or otherwise exhibited to ordinary people. He also concluded that the articles fell withing the proscription of sub-paragraph (c) as articles or things designed and adapted for indecent and immoral use, stating that he was convinced beyond a reasonable doubt that four of the five types shipped were:

> "designed and adapted for indecent and prurient use in stimulating desire for such intercourse, that they go substantially beyond customary limits of decency, and that they are patently offensive."

This case is the first known to us in which conviction has been predicated solely on rubber devices of this nature. We regard this case as significant not only because it is a first under the Federal obscenity laws but also because it provides us with possible precedent for prosecution in other cases involving devices and objects generally which communicate prurient thoughts, emotions and suggestions. However a notice of appeal has been filed by one of the defendants, and how useful this decision will be as a precedent must await the outcome of the appeal.

Staff: United States Attorney Joseph D. Tydings; Assistant United States Attorney Stephen H. Sachs (D. Md.).

LANDS DIVISION

Assistant Attorney General Ramsey Clark

Condemnation; Public Roads; Compensability of Loss of Access of Individual Owner in Proceedings to Condemn His Tract "Subject to Existing Easements for Public Roads"; - Jurisdiction of Condemnation Court to Enlarge Estate Taken; Decision Believed Erroneous. United States v. Cleveland Smith, 307 F. 2d 49. Following normal procedure with regard to dam and reservoir projects, the United States brought a series of proceedings to acquire the needed lands, taking fee title "subject to existing easements for public roads and highways," etc., one tract being owned by Cleveland Smith.

In July 1957, a separate proceeding was instituted to acquire "all outstanding right, title and interest in roads" located below the ultimate water level of the reservoir. A jury trial was had on the issue whether substitute roads were needed to replace those taken and, if so, the cost thereof. In the evidence, witnesses for both the County and the United States took into consideration the question of access to Smith's store. The Court charged the jury that Hall County was the only party that could come into Court and legally contend for compensation resulting from the taking of the roads and bridges and the part of the roads making up the road system of Hall County; that the private users of the bridges and roads had no legal remedy for the recovery of compensation; and that the proceeding was the legal remedy afforded Hall County, and was the only one that could be maintained to recover compensation for county roads taken by the United States.

The jury returned a verdict of $1,750,000 as the cost of necessary substitute roads.

Subsequently, both at pretrial and at the trial as to compensation for the taking of the Smith property, the Government sought to exclude from consideration any loss in value because of inundation of public roads and highways. The district court refused to do so and admitted evidence valuing the property after the taking without access.

Upon appeal from the resulting judgment, the court affirmed, Chief Judge Tuttle dissenting and Judge Brown concurring specially. We believe the decision to be clearly erroneous and it should not be followed. The Department should be specially notified of any case presenting similar questions or when the landowner is relying on this opinion. The Solicitor General has determined that no petition for certiorari should be sought at the present time on this issue.

Our views are: The public authorities, as representatives of all the users of the roads, are the only proper claimants to recover the cost of necessary relocation and theirs is the liability to Smith if they do not want to furnish him substitute access. As the Ninth Circuit has directed, State of California v. United States, 153 F. 2d 558 (C.A. 9, 1946), all claims as to the streets or highways within a project area should be treated in a separate trial apart from the trials as to the private ownerships taken.

The majority opinion here suggests that each segment of the street or road should be tried in connection with the trial of each parcel. This fragmentation of the single claim is, we believe, legally unsound, practically impossible of application, and contradictory to the relocation measure of compensation.

Despite the exclusion of the roads from the condemnation proceeding, the majority opinion held that compensation could be awarded for the taking of Smith's access in this proceeding. We believe that Chief Judge Tuttle's dissent on this point is clearly correct and that condemnation courts lack jurisdiction to expand the estate taken, regardless of what the actual facts may be.

The suggestion of the opinion that the adoption of Rule 71A somehow superseded the relocation principle is also believed to be plainly wrong.

Staff: William B. West III (Executive Assistant, Lands Division)

Eminent Domain; Interpretation of Declaration of Taking Containing Mineral Reservation to Owners of "Subsurface Estate," as Excluding Gravel. United States v. 707.63 acres of land in Greenwood County, Kansas. In connection with construction of the Toronto Dam and Reservoir Project, the fee simple title to a parcel of land was acquired by a declaration of taking which reserved to the owner of the subsurface estate "all oil, gas and other minerals in and under said land." The landowner was paid just compensation and the case was closed. Thereafter, the landowner began to remove gravel from the surface of the land claiming that the ownership of the gravel was reserved to him, under the estate taken, by the words "and other minerals." The Government asked for a writ of assistance to prevent such removal, contending that gravel was not included within the words "other minerals" in this case. The district court granted the writ, citing cases in its memorandum of decision holding that intention governs the interpretation of a mineral reservation. In construing the declaration of taking, the court said it is common knowledge that gravel is obtained in Kansas by open pit operations and, in order to be useful and economical, such materials must be closely related to the surface. It further stated this was the situation in the instant case, and it was reasonable to assume they should be considered as part of the soil and as belonging to the surface of the estate. This case is of particular importance since similar reservations are contained in many dam and reservoir proceedings. The landowner is expected to appeal. Copies of the memorandum decision may be obtained from Ralph J. Luttrell, Chief, Land Acquisition Section, Lands Division.

Staff: Assistant United States Attorney Clarence J. Malone (D. Kansas), and Anne S. Bell (Lands Division).

Eminent Domain; Interest on Funds Deposited in Registry of Court; Perimeter Descriptions. United States v. 355.70 acres of land in Rockaway and Jefferson Townships (D. N.J.) Some $26,675 was deposited in the registry of the court as estimated just compensation on May 15, 1958. On July 16, 1958, an additional $1,500 was deposited. A perimeter description in the

declaration of taking described the entire 355.70-acre area. There was no allocation of the boundary lines of the individual owners within the taking area, nor was there an indication of the amount of land taken from each owner. A motion to withdraw their portion of the money deposited in the registry was made by parties named Voorspuys on October 29, 1958. A hearing on that motion was adjourned so as to permit the various parties involved to work out a stipulation as to interior boundary lines, or some other arrangement that would permit the Voorspuys to draw out at least part of the money on deposit. At the hearing, Government counsel indicated that the Voorspuys' title was not questioned, but that the titles of all other claimants were in doubt. The parties were unable to agree among themselves as to their respective interests and no further action was taken in the case for over a year.

Subsequently, other parties filed similar applications to withdraw their shares of the money on deposit, and the Government filed a motion asking that claimants submit proof of title before the Court on March 31, 1960. At this hearing, Government counsel stated that of the various parties only the Realty Transfer Company need prove title, since the Government had title insurance to cover the other claimants; that Realty Transfer attempted to prove its title, but that the hearing was adjourned so that the parties could try to work out a stipulation with respect to interior boundaries. On April 25, 1960, no stipulation having been agreed upon, Realty Transfer resumed its proof of title before the Court. Decision was reserved on this issue pending the receipt by the court of a certified chain of title to be furnished by Realty Transfer, but the record does not disclose that any such certified chain of title was ever submitted.

A stipulation signed by all claimants was filed, which stipulation defined the interior boundary lines and the amount of land owned by each of the claimants.

A trial of the issue of just compensation as to Voorspuys, Realty Transfer, and Oak Ridge resulted in judgments of $10,595, $24,412.50, and $6,020, respectively. The Government conceded that interest at the rate of 6% was due on $12,852.50, which represented the excess of the total amount of the awards ($41,027.50) over the deposit in the registry ($28,175), from May 14, 1958, to June 14, 1962, the date the $12,852.50 was paid into Court. The Government disputed claimants' assertions of their right to additional interest at the rate of 6% on the $28,175 in the registry, from May 14, 1958, to the date of payment.

On a motion to settle that dispute, the District Court pointed out that no court order denying withdrawal of registry funds was ever made in the case and held that the absence of such an order precluded the payment of interest on the deposited funds. With respect to the Government's failure to allocate the interior boundary lines of the condemned property, the Court held that "* * * it is not incumbent on the Government to make a definite allocation among the various claimants."

The opinion contains a good review of pertinent authorities. Copies can be obtained upon request to Mr. Ralph J. Luttrell, Chief, Land Acquisition Section, Lands Division. The United States Attorney is being requested to suggest to the District Judge that the opinion be designated for publication.

Staff: United States Attorney David M. Satz, Jr., and
Assistant United States Attorney James D. Butler (D. N.J.)

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS

District Court Decisions

Motion Denied to Strike Government's Defenses Alleging Lack of Jurisdiction of Action to Enjoin Collection of Taxes and for Declaratory Judgment as to Taxes. Iraci v. Scanlon (E.D. N.Y., September 6, 1962), CCH 62-2 U.S.T.C. ¶9729. This is an action to enjoin collection of assessments of 100 percent penalties for willful failure to pay over withholding taxes under Section 2707(a) and (d) of the Internal Revenue Code of 1939 and Section 6677 of the Internal Revenue Code of 1954, and for declaratory judgment that the plaintiffs are not liable for the assessments. The Government moved to dismiss, on the ground, inter alia, that the Court lacks jurisdiction under Section 7421(a) of the 1954 Code and 28 U.S.C. 2201, prohibiting actions of this kind. The Court denied this motion, indicating that, since a penalty rather than a tax was involved, Section 7421(a) was inapplicable. On rehearing the Court conceded that since Section 6671(a) of the 1954 Code defines the word "tax" as including penalties, Section 7421(a) applies to penalties, but held that the case comes within the exception where special and extraordinary circumstances are alleged, and adhered to its prior decision (202 F. Supp. 42).

The Government then filed an answer alleging the same jurisdictional defenses as those on which its motion had been grounded. The plaintiffs moved to strike these defenses on the ground that they were insufficient in law and had already been decided against the Government on its motion to dismiss. The Court denied this motion, holding that the defenses alleged present difficult questions of fact and law, decision of which should be reserved to the trial. Based upon Enochs v. Williams Packing & Navigation Co., Inc., 370 U.S. 1, which was decided by the Supreme Court just a few days prior to the hearing on the motion to strike, the Court commented that upon a bare showing of good faith at the trial, the Government might be entitled to dismissal of the action.

Staff: United States Attorney Joseph P. Hoey and Assistant United States Attorney Stanley F. Meltzer (E.D. N.Y.); and Robert L. Handros (Tax Division).

Federal Tax Liens Enforced Against Cash Surrender Value of Insurance Policies Where Taxpayer-Insured Fled Country Before Assessment and Demand Were Made. United States v. Lomas E. Ball, et al. (W.D. Va., September 21, 1962), CCH 62-2 USTC ¶9779). A federal income tax assessment was made against Lomas E. Ball on March 27, 1957. Prior to the making of the assessment Lomas E. Ball left the place of his residence, Big Stone Gap, Virginia, and on February 27, 1957 he fled to Mexico. On April 1, 1957 notice and demand for the tax assessment were made by means of certified mail, addressed to Lomas E. Ball, Big Stone Gap, Virginia, his last known address, and a receipt was signed by Billie Thompson, Big Stone Gap, Virginia, who was the

secretary of Lomas E. Ball and authorized to handle his mail. Notice of tax lien was filed on April 1, 1957 in Wise County, Virginia.

The Home Life Insurance Company issued two insurance policies and guaranteed annuity contracts to Lomas Ball in 1943. The beneficiary was the mother of the insured. He retained the right to change the beneficiary and the policies are non-negotiable. The tax lien was served on the company on April 23, 1957. The Franklin Life Insurance Company issued two guaranteed life insurance contracts to Lomas Ball in 1947. The primary beneficiary was his mother and the contingent beneficiary his sister. He retained the right to change the beneficiaries and the policies are non-negotiable. The tax lien was served on the company on April 23, 1957.

The Government sought enforcement of its tax liens against the cash surrender value of the insurance policies. The beneficiaries denied the Government has the right to subject the cash value of the insurance policies toward payment of the tax claims. In Bess v. United States 357 U.S. 51, it was held that federal tax liens attach to the cash surrender value of an insurance policy. In United States v. Metropolitan Life Insurance Company, 256 F. 2d 17 (C.A. 4th), the Court held the tax lien enforceable against the cash surrender value of life insurance policies issued to taxpayer who had fled the country and was beyond the in personam jurisdiction of the Court. One difference between the facts in that case and the instant case is that there the assessment and demand were made before the taxpayer left the jurisdiction, thus the tax lien had arisen before he fled the country. It was pointed out however to the Court in the instant case that although in the Metropolitan Life Insurance case the Court stated that the lien was perfected by the Commissioner's demand on the insured before he absconded the jurisdiction of the District Court, the Court did not state the Government could not enforce a lien if the assessment and demand were made after he fled the country. The Government contended that a proper demand was made by mailing it to taxpayer's last known address pursuant to Section 6303 of the Internal Revenue Code. It was further contended that where a proper assessment and demand are made the mere fact that the taxpayer may have previously left the state or country should not defeat the lien. The Court agreed with the Government's position stating that the Government should not have to look helplessly at the fugitive's property left in the jurisdiction. Notices of appeal have been filed by the defendants.

Staff: United States Attorney Thomas B. Mason (W.D. Va.); and Paul T. O'Donoghue (Tax Division).

Action to Reduce Tax Claims to Judgment and to Foreclose Federal Tax Liens Against the Cash Surrender Value of Four Life Insurance Policies Owned by the Defendant-Taxpayer. United States v. Louis H. Mitchell, et al. (S.D. Ala.), CCH 62-2 USTC ¶9802. The Commissioner of Internal Revenue made assessments on August 20, 1949 against Louis H. Mitchell for tax deficiencies for the years 1943 through 1946, and for the years 1947, 1951, 1952, and 1953 individually and for 1948 against Louis H. and Betty K. Mitchell, jointly.

Louis Mitchell owned four life insurance policies insured by the Travelers Insurance Company, John Hancock Mutual Life Insurance Company, The Prudential Insurance Company of America, and The New England Mutual Life Insurance Company. On September 1, 1949 notices of levy were served upon each of these companies and all refused to honor the notice of levy unless and until the insured surrendered the policy.

The insurance policies had automatic conversion provisions whereby in the event the insured failed to pay premiums, the policies were converted into extended term insurance. The cash surrender value was then applied to pay the premiums of the term insurance until the amount of the cash surrender value was used up in funding the extended term insurance.

Subsequent to the notice of levy served on the insurance companies, Louis Mitchell failed to pay the premiums and the insurance policies were converted to extended term insurance and expired before the judgment was entered.

The Government contended it was entitled to the cash surrender value at the time the assessments were made and the tax lien cut off the automatic conversion provisions of the policies. The reason advanced for this contention was that the insurance companies could not use the cash surrender value to convert the policies after the notice of levy was served.

The Court concluded however that the Government could not rewrite the policies of the insurance companies and that it was the duty of the insurance companies to make use of the cash surrender value of such policies.

Therefore, the United States took nothing from Travelers, John Hancock, or Prudential, but did receive the maturity value of the policy insured by New England Mutual.

The Court also awarded judgment to the United States in the amount of $667,959.29 against Louis H. Mitchell and $10,277.23 against Louis and Betty Mitchell, jointly. The Solicitor General has not determined whether an appeal will be taken in this case.

Staff: United States Attorney Vernol R. Jansen, Jr. (S.D. Ala.).

CIVIL TAX MATTERS
District Court Decisions

Addition of Rural Route Number Not Necessary to Constitute Last Known Address as Required by Section 6212(b), Nor Is Mention of Such Addition, in Correspondence Regarding Another Year Notice to Division Handling Collection of Liability Set Out in Notice of Deficiency. Miles S. Firnhaber v. Nelson and United States (E.D. Wis.). Plaintiff sought an injunction restraining the collection of a deficiency assessed for the year 1956, contending that a timely notice of such deficiency had not been mailed as required by Section 6212(b), I.R. Code 1954. This contention was based on the fact that the notice was sent on December 19, 1960 to plaintiff at his home address, but without the rural route number, and after he had notified Internal Revenue on December 15, 1960, in a letter transmitting payment of estimated tax for 1960, that a rural route number would be required for delivery. The route number was not used in the tax return for 1956 and the testimony indicated that mail would be delivered without the rural route number.

The Court held that in these circumstances, the address was sufficient for the purposes of Section 6212(b) without the rural route number. The Court further held that the notice of December 15, 1960 did not constitute notice of a change of address, since it was properly sent to the Collection Division and could not with due diligence have been associated with the files for the 1956 taxes, which files were in the Review Division. It would appear that, in these circumstances at least, notice to one Division of the District Director's office is not notice to another Division of the same office.

Staff: United States Attorney James B. Brennan; Assistant United States Attorney William J. Mulligan (E.D. Wis.); and John W. Adler, Jr. (Tax Division).

Injunctions; Foreign Branch Banks of United States National Bank Enjoined From Selling or Disposing of Bank Accounts of Taxpayer, a Foreign Corporation. United States v. Omar, S.A., First National City Bank of New York, et al. (S.D. N.Y.). Jeopardy assessments were made against Omar, S.A., a Uruguayan corporation, in the sum of $19,269,156, for corporate income tax deficiencies. Omar had substantial holdings in the United States, and the Government's affidavits in support of the motion for a preliminary injunction showed a course of liquidating said assets and transferring them to nominees and banks outside the United States. The Government obtained a temporary restraining order against the named defendants who have or have had assets of the taxpayer corporation or its nominees in this country. In addition, the Government sought to enjoin the foreign branches of the First National City Bank from disposing of any accounts of the taxpayer therein.

The Court granted the Government's injunction in all respects, holding that while it is true that the Court may have no effective power over persons outside its jurisdiction, there is no problem when the persons to be enjoined are within its jurisdiction. Here the Court has personal jurisdiction over the officers of the bank and therefore

has power against them respecting their foreign branches, which may be effectively exercised. The Court also held that if a violation of foreign law is shown by the bank to occur through obedience to the injunction, a different ruling might issue, but that no proof of any such violation has been presented.

Another defendant, Lehman Brothers, forcefully argued that the wording of the injunction, extending not only to assets of the taxpayer, but also to assets held for the "account of the taxpayer" imposed upon it an unreasonable burden of investigating which corporations or agents, besides the named taxpayer were actually trading for the account of the taxpayer. The Court held that such a burden is incumbent upon any party enjoined, since the Government is less knowledgeable of those with whom the investment houses deal than they are.

Staff: United States Attorney Robert M. Morgenthau and Assistant United States Attorney Morton L. Ginsberg (S.D. N.Y.; and John F. Beggan (Tax Division).

Dealer's Reserve Account Transferred After Filing of Notice of Federal Tax Lien Was Not Transfer of "Money" as That Word Is Included in Term "Security" as Defined in Section 6323(c)(2), Code of 1954. United States v. A. V. Worley and E. Floyd Hall (N.D. Calif, 1962). On November 27, 1956, after the Government had duly filed Notices of Federal Tax Liens for assessments totalling $16,576.23 against the defendant, Hall, defendant Worley gave Hall $10,000 in return for a promissory note in the amount of $12,000 and documents directing the Northrift Finance Company and the Pacific Finance Corp. to make payments due Hall from Hall's dealer reserve accounts jointly to Hall and Worley until the sum of $6,000 had been paid from each account.

Hall filed a voluntary petition in bankruptcy on October 25, 1957, and was adjudicated bankrupt. Worley filed a proof of claim; the Government took no action. In January of 1958 with the approval of the trustee, Northrift paid $2,000 to Worley; thereafter funds accumulated in these dealer reserve accounts were paid to Worley and the trustee jointly; Worley endorsed the checks; they were deposited in the trustee's account; and the trustee drew like checks payable to Worley. In this manner Worley recieved $5,830.89 and $3,788.87 from Hall's dealer reserve accounts with Pacific and Northrift respectively. As a defense against a suit by the United States to enforce its tax lien against these dealer reserve accounts and to collect from Worley the sums received indirectly by him from these accounts, Worley asserted that the security for his loan was, in fact, the money in these accounts; that, therefore, the Notice of Federal Tax Lien was not valid against him as pledge of money; and that he was entitled to actual notice as provided in Section 6323(c)(1), I.R. Code of 1954, for the tax lien to be valid against him. This section provides that a Notice of Tax Lien properly filed shall not be valid against a pledgee with respect to a security, which is defined in Section 6323(c)(2) to include money. Worley contended that these dealer reserves were money. The Court upheld the Government's contention that the property transferred was not money but an account receivable.

Staff: United States Attorney Cecil F. Poole (N.D. Calif.); and Clarence J. Grogan (Tax Division).

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