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UNITED STATES ATTORNEYS
BULLETIN

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NEW APPOINTEES

The name of the following appointee as United States Attorney has been submitted to the Senate:

Louis M. Janelle - New Hampshire

MONTHLY TOTALS

During the month of January, reductions were made in all categories of work. Total civil cases and criminal matters pending showed substantial reductions, and the largest single decrease was registered in total cases and matters pending, which dropped 768 items. This drop was the largest such reduction since the present force of United States Attorneys took office more than two years ago. The following analysis shows the number of items pending in each category as compared to the total of the previous month.

	December 31, 1962	January 31, 1963	
Triable Criminal	8,660	8,631	- 29
Civil Cases Inc. Civil Less Tax Lien & Cond.	15,984	15,889	- 95
Total	24,644	24,520	-124
All Criminal	10,216	10,159	- 57
Civil Cases Inc. Civil Tax & Cond. Less Tax Lien	19,091	18,815	-276
Criminal Matters	13,368	13,089	-279
Civil Matters	15,208	15,052	-156
Total Cases & Matters	57,883	57,115	-768

The good news for the month of January is that terminations continue to rise and the pending caseload continues to fall. The figures set out below show that both filings and terminations were up substantially over the first 7 months of fiscal 1962. The most encouraging aspect of the rise in terminations is that it has been a consistent one. In July 1962 the gap between filings and terminations was 11.8 per cent, and this gap widened until in September 1962 it had increased to 18.8 per cent. In October 1962, an upsurge in terminations decreased the gap to 11.9 per cent, and this decrease has continued every month down to January 1963 when the gap between filings and terminations was only 5.3 per cent, or approximately one-third of what it was at the end of September. Corresponding to this increase in terminations has been the reduction in the pending caseload. During the first 3 months of fiscal 1963, the caseload increased each month. During October the first reduction in the caseload was seen and this reduction has continued each month through January. While the consistency of the caseload reduction is encouraging, the size of the reduction is not. Since September 30, the pending caseload has been reduced by 572 cases. The Attorney General's announced goal of 25% reduction in caseload was based on the caseload as of June 30, 1962, which amounted to 32,267 cases. A 25% reduction in this amount would require the disposition of 8,066 more cases than are filed during fiscal 1963. With an average legal force of 650 Assistants, this works out to approximately one more termination per assistant per month than was done in fiscal 1962 - not a very heavy burden, especially when

it is considered that 93.2% of all civil cases and 88.9% of all criminal cases were terminated without trials in fiscal 1962. With more than half of the present fiscal year over, the remaining 5 months will have to show tremendous increases in terminations, if the Attorney General's goal is to be met.

	First 7 Mos. F.Y. 1962	First 7 Mos. F.Y. 1963	Increase or Decrease Number	%
Filed				
Criminal	17,443	18,720	+ 1,277	+ 7.32
Civil	14,208	15,163	+ 955	+ 6.72
Total	31,651	33,883	+ 2,232	+ 7.05
Terminated				
Criminal	16,059	17,903	+ 1,844	+11.48
Civil	12,188	14,245	+ 2,057	+16.88
Total	28,247	32,148	+ 3,901	+13.81
Pending				
Criminal	9,807	10,158	+ 351	+ 3.58
Civil	22,599	23,476	+ 877	+ 3.88
Total	32,406	33,634	+ 1,228	+ 3.79

The following figures for filings and terminations show that during the month of January the United States Attorneys filed and terminated the second highest number of cases since the beginning of the fiscal year. A very satisfying aspect of these figures is that terminations outnumbered filings for the third successive month.

	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	1,887	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
Dec.	2,179	1,795	3,974	2,273	1,764	4,037
Jan.	2,864	2,351	5,215	2,897	2,413	5,310

For the month of January 1963, United States Attorneys reported collections of $3,119,407. This brings the total for the first seven months of fiscal year 1963 to $34,906,346. Compared with the first seven months of the previous fiscal year this is an increase of $5,827,346 or 20.04 per cent over the $29,079,000 collected during that period.

During January, $3,235,000 was saved in 81 suits in which the government as defendant was sued for $3,949,492. 43 of them involving $1,719,229 were closed by compromises amounting to $136,450 and 19 of them involving $1,469,019 were closed by judgments against the United States amounting to $578,042. The remaining 19 suits involving $761,244 were won by the government. The total saved for the first seven months of the current fiscal year aggregated $29,899,734 and is a decrease of $4,441,705 from the $34,341,439 saved in the first seven months of fiscal year 1962.

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ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

Supreme Court Rules For Government In Robinson-Patman Act Case. United States v. National Dairy Products Corporation. (W.D. Mo.). On February 18, 1963, the Supreme Court held that Section 3 of the Robinson-Patman Act is not unconstitutionally vague. Appellees had been indicted under both Section 3 and the Sherman Act for selling milk below cost in Kansas City, Missouri and in six adjacent local markets for the purpose of eliminating competition from smaller, independent dairies. The District Court for the Western District of Missouri, without opinion, granted appellees' motion to dismiss the Robinson-Patman Act counts of the indictment on the ground that the statutory proscription of sales "at unreasonably low prices for the purpose of destroying competition" is unconstitutionally vague and indefinite.

On direct appeal under the Criminal Appeals Act, the Supreme Court reversed. In an opinion by Mr. Justice Clark, the Court held that "void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed . . . . In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged." The Court held that if appellees were warned by the statute that selling below cost for the purpose of destroying competition is unlawful, the statute is constitutional as applied to them.

The Court observed that sales below cost for the purpose of destroying competition have long been proscribed by the Sherman Act, and that the original Section 2 of the Clayton Act was passed to strengthen the prohibition against such conduct. Noting that the Robinson-Patman Act was passed to give further support to this aspect of the antitrust laws, the Court found that the conduct charged in the indictment -- below-cost sales in some markets, financed by higher prices elsewhere -- is precisely of the kind sought to be prevented. The Court therefore concluded that the prohibition on purposefully anti-competitive sales at unreasonably low prices necessarily reaches sales below cost for the purpose of destroying competition, and that appellees could reasonably understand from the statutory language that the conduct described in the indictment was proscribed by the Act.

Turning to appellees' contention that "below cost" is as vague as "unreasonably low prices", the Court observed that the meaning of "cost" cannot be decided in the abstract, and that it may be shown at trial that appellees sold at prices below "cost" however that word is defined. Hence the Court declined to elaborate on the meaning of "cost" in Section 3 prosecutions.

Finally, the Court stated that the requirement in Section 3 of specific anti-competitive purpose provides additional justification for upholding the standards of the Act.

The Court warned, however, that sales below cost "are not condemned when made in furtherance of a legitimate commercial objective, such as the liquidation of excess, obsolete or perishable merchandise, or the need to meet a lawful, equally low price of a competitor," since such sales are neither at unreasonably low prices nor made for anti-competitive purposes.

Mr. Justice Black, joined by Justices Stewart and Goldberg, dissented on the ground that the substitution of unambiguous standards for the vague prohibitions used by Congress in Section 3 is a legislative and not a judicial task.

Staff: Lionel Kestenbaum and Joel E. Hoffman (Antitrust Division)

Court Denies Defendant Motion To Dismiss Indictment Because Of Immunity Granted During Grand Jury Hearings. United States v. A. P. Woodson Company, et al. (D. D.C.). On February 8, 1963, Judge George R. Hart, Jr. ruled from the bench that a motion by defendant Joseph H. Deckman to dismiss the indictment as to him by reason of immunity obtained during the course of his appearance before the grand jury under 15 U.S.C. 32 be denied. This motion was originally made in July of 1961, together with other pre-trial motions, but was rendered moot by Judge McLaughlin's decision dismissing the indictment as to all the individual defendants for failure to indict them under section 14 of the Clayton Act. This order of dismissal was subsequently reversed by the Supreme Court and the Deckman motion was scheduled for rehearing.

Essentially, the motion rested on three points: 1. Deckman's voluntary testimony of his connection as president with the corporation under subpoena duces tecum; 2. His voluntary statements of financial losses (by way of defense); and 3. Alleged questions as to location of documents not produced.

Judge Hart, during the course of counsel's argument, pointed out that it was the corporation, not Deckman, that was subpoenaed; that Deckman was an intelligent businessman and had advice of counsel prior to the production of documents before the grand jury; that Deckman, by his own statement, knew that certain papers were not called for by the subpoena; that he voluntarily produced papers in support of his defense of financial losses; that many of his responses were voluntary and unresponsive to Government counsel's questions; and that he was repeatedly warned by Government counsel concerning his voluntary statements. The Court observed that in these circumstances, it could be inferred that Deckman's testimony was planned and contrived in a fashion to obtain personal immunity under the statute and that the motion should be denied.

Staff: Wilford L. Whitley, Jr., Marshall C. Gardner and Ernest T. Hays (Antitrust Division)

Court Holds That Deposition Of Individual In Private Suit Could Not Challenge Grand Jury Subpoena To Corporate Defendants. In Re Application Of Ten Eyck And In Re Application Of International Ore and Fertilizer

Corporation, et al. (D. D.C.) On February 8, 1963, the Court held in an oral opinion that an individual whose deposition had been taken in a settled private antitrust action lacked standing to challenge grand jury subpoenas, addressed to corporate defendants in the private litigation, demanding copies of his deposition. The Court also held that, if standing were conceded, an asserted claim of immunity resulting from the fact of the deposition and/or the subpoena demanding it, prior to indictment, was premature. In a companion case the Court orally upheld, against challenge by the corporation, subpoenas demanding copies of all depositions taken in the concluded suit, along with all exhibits used or mentioned in connection with the taking of the depositions.

On January 6, 1963, several corporations, defendants in a settled private antitrust action, were served with grand jury subpoenas duces tecum, demanding copies of all depositions taken in the course of the litigation; all exhibits used or proposed in connection with those depositions; and all correspondence, memoranda, or other communications passing between the defendants, their officers, directors, or agents, and the officers, directors, or agents of several other corporations, involving the concluded litigation. The deposition of Ten Eyck, the President of International Ore & Fertilizer Corporation, one of the defendants, had been specifically demanded by the subpoena. His motion asked the court for an affirmative statement of his immunity from antitrust prosecution, based on the antitrust immunity statute, 15 U.S.C. 32, 33. Without establishing any factual basis therefor, he also alleged participation by Government attorneys in the private litigation and demanded a hearing. His petition was dismissed in its entirety. Oral notice of appeal was given, and a seven-day stay on enforcement was granted.

International Ore & Fertilizer Corporation moved to quash or modify the subpoenas on several grounds. The allegation that a subpoena demanding uncorrected, unsigned, and unfiled depositions taken in a settled private action was unreasonable was rejected. Questions concerning the scope required by the demand for exhibits were corrected by restatement.

Staff: Charles R. Esherick, Albert P. Lindemann, and L. David Cole (Antitrust Division)

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CIVIL DIVISION

Acting Assistant Attorney General John W. Douglas

COURTS OF APPEALS

ADMINISTRATIVE LAW

Suit To Prevent Agency From Taking "Proposed" Action Is Premature; F.T.C. Not Precluded From Taking Action Because of Prior Termination of Proceedings Against Plaintiff by Post Office Department; Appellant Not Entitled to District Court Adjudication of Charges Brought by Post Office When Post Office Proceedings Had Been Dismissed Without Prejudice. Carl Brandenfels v. J. Edward Day, Postmaster General (C.A. D.C., February 14, 1963). The Post Office Department had charged plaintiff with sending fraudulent advertising material through the mails. After a hearing and an initial decision by the Deputy Postmaster General, the administrative proceedings had been dismissed without prejudice to the institution of proceedings again in the future. Plaintiff then challenged this administrative adjudication, seeking a reconsideration by the Post Office. An agreement was entered, whereby the Post Office agreed to reconsider and either affirm the prior determination or dismiss the charges with prejudice. Upon reconsideration, the Post Office reaffirmed the earlier dismissal without prejudice. Plaintiff thereafter brought this action in the district court against both the Post Office and the Federal Trade Commission, alleging that the F.T.C. proposed to institute proceedings against him growing out of the same activities involved in the Post Office proceedings. He sought a declaratory judgment that the advertising material was not fraudulent and an order enjoining both agencies from future action against him in connection with this particular charge of mailing fraudulent advertising material. The district court dismissed the complaint.

The Court of Appeals, in an opinion by Mr. Justice Reed, affirmed. Initially, the Court held that the action against the F.T.C. was premature, for the Commission had not yet taken any action against plaintiff. The Court held that only final action of the F.T.C. would be reviewable, not "proposed" action, and that plaintiff would also have to exhaust his administrative remedies before the F.T.C. Furthermore, in answer to one of plaintiff's arguments, the Court stated that a decision in the postal proceedings would not preclude further action by the F.T.C., for the two agencies act under different statutes employing different standards.

With respect to the Post Office proceedings, the Court of Appeals held that plaintiff was not entitled to a district court adjudication of the charges where the postal proceedings had been terminated without a decision that plaintiff's practices were fraudulent and without the agency having imposed any sanctions. The Court did state as dictum that, if the Post Office had, after completing lengthy hearings, arbitrarily discontinued its proceedings without reaching a decision either adverse to plaintiff or in his favor by dismissing the charges with prejudice, then plaintiff would be entitled under the Administrative Procedure Act to an order

compelling the Post Office to reach such decision. However, as the Court pointed out, plaintiff here had no right to complain of the dismissal without prejudice, as he had in effect entered an agreement permitting the Post Office Department to do this.

Staff: United States Attorney David C. Acheson; Assistant United States Attorney Barry Sidman (Dist. of Columbia)

SMALL BUSINESS ADMINISTRATION ACT

Loan Agreement Not Altered So As To Discharge Guarantors. United States v. Houff (C.A. 4, December 21, 1962). As assignee from a bank of a note evidencing a loan and a loan agreement, pursuant to the Small Business Administration Act, the United States brought this action against the loan guarantors for the deficiency remaining after sale of the security. The collateral for the loan consisted of merchandise belonging to the debtor corporation, which, under the loan agreement, was to be placed in a warehouse, and warehouse receipts issued to the bank. The loan agreement had further provided that the debtor could, with the consent of the bank, withdraw collateral upon prior payment to the bank of 65 per cent of the market value of the collateral. About a year and a half later, the bank, for the stated purpose of inspecting the condition of the collateral, unilaterally ordered the warehouseman not to permit any withdrawal of the collateral. Defendants argued that this action by the bank constituted a material alteration of the loan agreement to which the guarantors had not consented, and, therefore, it operated to discharge the guarantors.

The Court of Appeals, however, in affirming a judgment in favor of the United States, held that the bank's action in not permitting any withdrawal of the collateral did not constitute a material alteration of loan agreement. The Court pointed out that the contract provision allowing withdrawl required the "written consent of the Bank," and, that, therefore, the bank had the right to refuse completely any withdrawal of merchandise. The Court also rejected defendant's argument that the intention of the parties was contrary to this interpretation of the contract language, holding that the circumstances failed to establish any such contrary intent.

Staff: United States Attorney Thomas B. Mason (W.D. Va.)

SOCIAL SECURITY ACT

Compromise Settlement Of Lawsuit Held Not To Constitute Payment of Wages Under Social Security Act. Bradshaw v. Celebrezze (C.A. 4, January 21, 1963). This was an action for old age insurance benefits under the Social Security Act. The Act provides that such benefits are to be paid only to a person who has a specific number of quarters of coverage, and defines a quarter of coverage as a calendar quarter in which the claimant has been paid $50 or more in wages. Appellant contended that a compromise settlement of a lawsuit which he brought against his alleged corporate employer for (a) wages, (b) legal services, and (c) money advanced

to the corporation should be treated as a payment of wages and spread over the quarters he needed to qualify for benefits. The Secretary determined that the settlement did not constitute a payment of wages, but that, even it it were so treated, appellant still lacked the quarters of coverage he needed under the Act. Both the district court and the Court of Appeals upheld this determination as substantially supported by the evidence.

Staff: Edward A. Groobert (Civil Division)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Voting and Elections: Civil Rights Acts of 1957, 1960. United States v. Joseph Walton Crawford, et al., (W.D. La.). This suit instituted under the Civil Rights Act of 1957, as amended, was filed on February 18, 1963 against the Registrar of Voters of Red River Parish, Louisiana, and against the State of Louisiana. The complaint alleges that the defendants have engaged in racially discriminatory acts and practices in the registration process in Red River Parish which have deprived Negro citizens of the right to register to vote without distinction of race or color. The Government seeks an injunction forbidding such acts and practices and a finding of a pattern and practice of discrimination. Specifically, the complaint alleges that a constitutional interpretation test was applied, until September 1962, more stringently to Negroes than to white persons, creating a situation in which 99% of the registered voters are white persons. Thus, the complaint alleges, due to past racially discriminatory acts and practices, and the institution of a new qualification test, Negroes who now attempt to register are required to meet higher standards than those applied to white persons already registered.

Staff: United States Attorney Edward L. Shaheen (W.D. La.); John Doar, Frank M. Dunbaugh (Civil Rights Division)

Voting and Elections: Civil Rights Acts of 1957, 1960. United States v. Winnice J. P. Clement, et al. (W.D. La.). This suit instituted under the Civil Rights Act of 1957, as amended, was filed on February 18, 1963 against the registrar of Webster Parish, Louisiana and against the State of Louisiana. The complaint alleges that the defendants have engaged in racially discriminatory acts and practices in the registration process in Webster Parish which have deprived Negro citizens of the right to register to vote without distinction of race or color. These include applying to Negroes any test not required of other applicants for voter registration. The Government seeks an injunction forbidding such acts and practices and a finding of a pattern and practice of discrimination.

Staff: United States Attorney E. L. Shaheen (W.D. La.); John Doar, Frank M. Dunbaugh (Civil Rights Division)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

KIDNAPPING
18 U.S.C. 1201

Sufficiency of Indictment; Enticement of Six Year Old Child Into Automobile Constitutes Involuntary and Illegal Seizure and Restraint. Davidson v. United States (C.A. 8, January 21, 1963). Appellant was convicted of kidnapping in violation of 18 U.S.C. 1201. The contention of the Government was that appellant, while in Kansas City, Missouri, enticed a six-year-old girl into his automobile and drove her to Kansas City, Kansas and back. The Government further claimed that the appellant, at some unknown time and place during the drive, sexually molested the child.

The significant arguments of the appellant presented to the Court of Appeals were that the indictment failed to state an offense, and that the offense charged did not come within the purview of the Federal Kidnapping Act.

The indictment charged as follows:

> That on or about April 29, 1961, in the Western Division of the Western District of Missouri, Doyle Francis Davidson did unlawfully, wilfully, knowingly and feloniously transport in interstate commerce from Kansas City, Missouri, to Kansas City, Kansas, one Marilyn Anita Ashley, who had theretofore been unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted and carried away, and held for ransom, reward and otherwise, to wit, sexual molestation, that the said Marilyn Anita Ashley, a minor, was liberated unharmed, in violation of Section 1201(a), Title 18, United States Code.

The Court of Appeals upheld the sufficiency of the indictment and quoted from its opinion in Hewitt v. United States, C.A. 8, 110 F. 2d 1, 6 (cert. denied 310 U.S. 641), to the effect that "An indictment which fairly informs the accused of the charge which he is required to meet and which is sufficiently specific to avoid the danger of his again being prosecuted for the same offense should be held good."

Appellant cited Chatwin v. United States, 326 U.S. 455 (1946), in support of his contention that there was neither an involuntary seizure nor restraint, and that the Federal Kidnapping Act was not intended to apply to the instant facts, but that the actions of the appellant should be regarded, if at all, as a local crime.

The Court of Appeals, "not without some misgivings", held that the Chatwin case did not require a reversal of the instant conviction. In noting that the Chatwin case "involved no semblance of involuntary restraint," the Court held that "/w/hen the defendant /appellant/ enticed

the six-year-old child into his automobile and drove away with her, that, . . ., constituted an involuntary and illegal seizure and restraint, and brought his conduct within the Act." Accordingly, the judgment of conviction was affirmed.

Staff: United States Attorney F. Russell Millin; Assistant United States Attorney John L. Kapnistos (W.D. Mo.).

FALSE STATEMENTS

False Statements in Application for Temporary Employment. Alire v. United States (C.A. 10, December 9, 1962). Appellant was tried and convicted in the District of Colorado for a violation of 18 U.S.C. 1001, arising out of his answer of "no" to the question whether he had ever been arrested, contained in an application for temporary employment with the Post Office Department. He received a sentence of three years.

On appeal the Court of Appeals rejected the contention that Section 1001 should be limited to false statements made in applications for employment in national defense industries or those directly affected with the national security. The Court held that it was proper for the Post Office Department to inquire into the police records of applicants, and that the false answer was as to a material fact. The Court also held to be baseless the appellant's arguments that the sentence imposed violated his right to due process under the Fifth Amendment and constituted cruel and unusual punishment within the meaning of the Eighth Amendment.

Staff: United States Attorney Lawrence M. Henry; Assistant United States Attorney James P. McGruder (D. Colo.).

THEFT FROM INTERSTATE SHIPMENT
18 U.S.C. 659 and 2

"Piggyback Shipment"; Theft of Trailer Containing Whiskey. United States v. Raymond Joseph Fletcher, et al. (D. Md.). A two-count indictment was returned by the Grand Jury for the District of Maryland on October 2, 1962, charging three defendants with (1) theft from interstate shipment of a Burlington Trailer and (2) theft from interstate shipment of 1100 cases of Imperial whiskey which had a total value in excess of $35,000.

Two of the defendants, Jacque Charles Tomalavicz and Raymond Joseph Fletcher, were convicted on November 1, 1962 and sentenced to terms of three years and six years, respectively.

Approximately five years ago a new procedure for shipping goods in interstate commerce, commonly referred to as "piggyback shipment" was innovated. Under this method of shipment, goods are carried from the consignor by tractor and trailer over roads to a railroad terminal where the trailer containing the goods is detached from the tractor and placed on a railroad flatcar for shipment to the railroad terminal in the area

where the consignee is located. On arrival, the flatcar containing the trailer is then detached from the train, rolled to an area called the "piggyback yard" where the trailer is unloaded from the flatcar and later attached to a tractor for delivery of the goods to the consignee. The trailer is then returned either empty or loaded with goods to the channels of interstate commerce by virtue of an agreement between the various railroad carriers concerned.

In this instance, the defendants, by use of a stolen chauffeur's license, rented a tractor, went to the Western Maryland Railroad Station (Port Covington Yard), hooked it to the trailer containing the whiskey consigned to Gillet-Wright, Inc., and drove it from the railroad station to a wooded area in Anne Arundel County where the trailer was disengaged and the tractor returned to the place from which it was rented. A 16-foot van truck was then rented from another rental company using the same license, driven to the wooded area and loaded with some of the whiskey from the trailer. The whiskey was delivered to various places in Baltimore.

The theory of the Government's case as to the first count was that the trailer was a chattel moving in or a part of an interstate shipment of goods. It is believed that this is the first indictment of this type charging theft of a trailer under those circumstances. The defendant Raymond Joseph Fletcher filed an appeal but subsequently dismissed it.

Staff: United States Attorney Joseph D. Tydings; Assistant United States Attorney Arthur G. Murphy (D. Md.).

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IMMIGRATION AND NATURALIZATION SERVICE

Raymond F. Farrell, Commissioner

EXPATRIATION

Statutes Expatriating Citizens For Evasion Of Draft By Departing From And Remaining Out Of United States Ruled Unconstitutional. Kennedy v. Francisco Mendoza-Martinez, No. 2; Rusk v. Joseph Henry Cort, No. 3 (Sup. Ct., February 18, 1963.) In these cases the Supreme Court by a 5-4 decision struck down as unconstitutional section 401(j) of the Nationality Act of 1940, as amended (58 Stat. 745), and section 349(a) (10) of the Immigration and Nationality Act (8 U.S.C. 1481(a) (10)),which statutes declared as expatriated citizens who departed from or remained out of the United States to avoid training and service in the armed forces. The prevailing opinion, written by Justice Goldberg, finds the statutes to be punitive in nature and that under these circumstances the 5th and 6th Amendments of the Constitution demand that prior to the imposition of the punishment of the statutes, expatriation, a criminal trial be had with all its incidents, including indictment, notice, confrontation, jury trial, assistance of counsel, and compulsory process for obtaining witnesses. Since the statutes automatically imposed expatriation, they were ruled unconstitutional.

Justices Douglas and Black, while joining in the prevailing opinion, expressed their view that Congress has no power to expatriate native-born citizens. Justice Brennan wrote a concurring opinion aimed principally at refuting the arguments made in the dissenting opinions; one by Justice Stewart, joined in by Justice White, and the other by Justice Harlan, joined in by Justice Clark.

The opinion of Justice Stewart finds the statutes regulatory rather than punitive and constitutionally sound as an exercise of the war powers of Congress. He reasoned that it is hardly an improvident exercise of constitutional power for Congress to disown those who have disowned this Nation in time of ultimate need. Justice Harlan differed only with Justice Stewart as to the disposition of the Cort case. Justice Stewart believed that evidentiary presumption of section 349(a) (10) was unconstitutional and that Cort was entitled to remand for a new hearing free of such presumption. Justice Harlan was of the opinion that there was nothing constitutionally wrong with the presumption, that the lower court did not rely on the presumption, and that the evidence without the aid of the presumption met the required standard of proof in expatriation cases.

Staff: Solicitor General Archibald Cox and Oscar H. Davis former Assistant to the Solicitor General, Herbert J. Miller, Jr. Assistant Attorney General and Beatrice Rosenberg; Patricia R. Harris; Jerome M. Feit, Attorneys (Criminal Division).

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Condemnation Tracts Pending at Post War Low

As of March 1st the number of condemnation tracts pending had been reduced to approximately 24,900, the smallest number of condemnation tracts pending at any time since World War II. As of June 30, 1961, there were over 32,000 tracts pending. This accomplishment is the result of much hard work and perseverance on the part of many United States Attorneys and Assistant United States Attorneys across the Country, to each of whom the Staff of the Lands Division says "thanks for a job well done".

Indian Welfare; Availability of Minnesota Poor Relief to Members of Red Lake Band of Chippewas. In re Application of Beltrami County to determine legal settlement for poor purposes of Joyce, William, Frank and Geniva Beaulieu (Supreme Court of Minnesota, January 11, 1963). Alice Beaulieu, an enrolled member of the Red Lake Band of Chippewas, moved with her four illegitimate childrem from the Red Lake Reservation, in Beltrami County, Minnesota, to Minneapolis, in Hennepin County. After her commitment to a state hospital, a dispute arose between the two counties over which was to pay the children's poor relief, which depended on where the children were "settled" within the meaning of the Minnesota poor relief statutes. Because the settlement of illegitimate children derives from the settlement of their mother, and because Alice Beaulieu had not lived in Hennepin County long enough to obtain settlement there, this case turned on whether she had obtained settlement in Beltrami County while living on the Red Lake Reservation. If not, then Hennepin County was liable for the support of the children as unsettled paupers.

The Beltrami County District Court held that residents of the Red Lake Reservation could not obtain settlement in Beltrami County because (1) the State of Minnesota has no jurisdiction over the reservation and (2) the welfare of the Indians is exclusively a federal problem. The Court relied on the fact that the Chippewas had never ceded the Red Lake land to the United States, and it suggested that therefore the reservation was not in the United States or the State and that the tribe might be eligible for United Nations membership. It further asserted that the United States has the exclusive obligation of supporting its Indian wards. Because of these erroneous notions of federal law, the United States filed a brief as amicus curiae when Hennepin County appealed the judgment.

The Supreme Court of Minnesota affirmed the judgment on narrow grounds of state law, carefully side-stepping the federal issues. It held that to acquire settlement for poor relief, a pauper must not only

have uninterrupted residence of the character prescribed by statute, but must also be subject to such state jurisdiction as will permit the enforcement of obligations imposed by the provisions of the Minnesota poor relief laws viewed collectively. Because the Red Lake Band of Chippewas has insisted on remaining under federal jurisdiction, Congress has excepted their reservation from the general grant to the states of full civil and criminal jurisdiction over Indian reservations. Act of August 15, 1953, 67 Stat. 588, as amended, 18 U.S.C. 1162, 28 U.S.C. 1360. Thus the jurisdiction necessary for the enforcement of the Minnesota poor relief laws does not extend to an enrolled member of the Red Lake Band while residing on the Red Lake Reservation, and therefore such residence does not ripen into legal settlement within Beltrami County.

The Court concluded by pointing out that since its decision did not deprive the children of support, but only determined which of two political subdivisions was responsible for it, there was no question of their being denied the equal protection of the laws guaranteed by the Fourteenth Amendment. As to whether a tribal resident of the reservation is entitled to relief from Beltrami County as an unsettled pauper, the Court said that while the reasoning of its decision may be relevant to that problem, the decision should not be regarded as determinative of it.

Staff: Hugh Nugent (Lands Division.)

Condemnation; Exclusion of Comparable Sale Prices as Hearsay Evidence Held Error; Revenue Stamps Are Reliable Means of Checking Self-serving Testimony of Owner as to Sale Price of Realty. United States v. 18.46 Acres of Land, More or Less, situate in the Town of Swanton, Franklin County, Vermont (C.A. 2, January 21, 1963). The United States appealed from the judgment of the United States District Court for the District of Vermont, which awarded compensation for property condemned by the United States. The appeal presented two issues, each involving the exclusion of testimony.

The first error raised by the United States was the exclusion of expert testimony as to the prices paid for comparable property which was used by the Government expert in arriving at his opinion of value. The District Court had held that any statement of a price with respect to comparable sales would be impermissible hearsay unless the witness was present when the sale was consummated. The Court of Appeals held this to be error. The Court also stated that this exclusion was not a ruling which rested on the exercise of discretion and, had it been stated to be, it would have been an erroneous exclusion on the basis of the record. Appellee contended on appeal that no foundation had been laid by the United States showing that the sales were comparable. The Court of Appeals found that a prima facie showing of comparability had been made and that any attack upon it should have been developed upon cross-examination.

The second error raised related to the limitation of cross-examination of the appellee landowner concerning the subsequent sale of his remaining property. The Court of Appeals held that revenue stamps provide a reliable

means of checking the self-serving testimony of the landowner as to the actual consideration received for his realty. The Court also held that the exclusion of testimony by one who was present when a sale of property was closed, who was prepared to testify concerning instructions he had received as to the number of revenue stamps to be purchased, was error.

Staff: George R. Hyde (Lands Division).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
Appellate Decision

Suit to Enjoin Enforcement of Internal Revenue Summons; Internal Revenue Service Not Precluded From Investigating Taxpayer's Financial Affairs for Years Barred by Statute of Limitations, as Investigation Sought Was Not "Unnecessary" Within Meaning of Section 7605(b) of Internal Revenue Code. Demasters v. Arend (C.A. 9, January 24, 1963.) An internal revenue agent, who suspected the taxpayers of fraud, served a summons upon a bank to produce records pertaining to taxpayers' transactions with the bank during the years 1940 to 1957. Taxpayers sought to enjoin enforcement of the summons on the ground that investigation of years prior to 1955 was barred by the statute of limitations; that there was no probable cause to suspect that any fraud existed with respect to those years; and that investigation of the bank records was therefore prohibited by Section 7605(b) of the Internal Revenue Code which declares that "no taxpayer shall be subjected to unnecessary examinations or investigations." The district court, after a hearing, concluded that the Government did not have reasonable ground to suspect the existence of fraud, and permanently enjoined the Government from examining any records with respect to years barred by the statute of limitations. The Ninth Circuit reversed, holding that under the circumstances of this case, the investigation sought was not "unnecessary" within the meaning of Section 7605(b). After noting that the broad powers and duties of the Internal Revenue Service should be liberally construed in light of their "vital public purposes", the Court reasoned that an investigation if not "unnecessary" if it may "contribute to the accomplishment of any of the purposes for which the Commissioner is authorized by statute to make inquiry." Since the Commissioner has the power to determine a taxpayer's correct tax liability, such a determination, said the Court, "surely includes liability which may be assessed on a finding of fraud." In so holding, the Court rejected the notion expressed in various opinions (the cases are collected in footnote 28 of the opinion) that the investigative power of the Internal Revenue Service, when years barred in the absence of fraud are involved, depended upon a showing of "probable cause" that fraud or the "possibility" thereof exists. While noting that the expiration of the period for assessment absent fraud is relevant to the question of whether an investigation is "unnecessary", the Court declared that the real inquiry is whether the decision to investigate "was in fact reached as a matter of rational judgment based on the circumstances of the particular case." An investigation will not be deemed "unnecessary," concluded the Court, when it is shown, as in the instant case, (1) to be within the Commissioner's statutory authority and (2) that the decision to proceed was not arbitrary.

Staff: Joseph M. Howard; Norman Sepenuk, Burton Berkley (Tax Division).

District Court Decisions

Defendant Not Entitled to Jury Trial in Federal Lien Foreclosure Suit; Taxpayer's Default on Defendant's Cross-Claim Does Not Bar Government's Right to Establish Claim Against Defendant. United States v. Raymond J. Rentz, et al. (N.D. Iowa, December 31, 1962), 63-1 USTC ¶9140. The United States filed a lien foreclosure action against a contract debt owing to the taxpayer, M.C.S. Corporation, from Rentz and his wife. Rentz cross-claimed against the taxpayer requesting a rescission of the contract and money damages. A jury trial was requested by Rentz.

The Government moved to strike the jury demand. Following an entry of default against the taxpayer on the cross-claim, Rentz moved to dismiss the complaint.

The Court ruled that a lien foreclosure suit as provided by Section 7403, Internal Revenue Code, is equitable in nature. Thus, there is no right to a jury trial on that aspect of the case. As to the cross-claim, Rentz is entitled to a jury since the claim is one for money damages.

Although Rentz' rights against the taxpayer were fixed by the default judgment, taxpayer's default did not bar the Government's right to establish its claim that Rentz held property of the taxpayer subject to the federal tax lien. Plaintiff neither consented to nor approved taxpayer's default and consequently cannot be affected thereby. The federal tax lien can only be extinguished in this proceeding by the Court's adjudication of the Government's claim on the merits as provided by Section 7403 of the Internal Revenue Code. The motion to dismiss was denied. The motion to strike the jury demand was granted.

Staff: United States Attorney Donald E. O'Brien (N.D. Iowa); and Lorence L. Bravenec (Tax Division).

Internal Revenue Service Summons Quashed as to Time-Barred Years Due to Failure of Government to Show Existence of Reasonable Grounds for Suspecting Fraud; Records of Sole Shareholder Corporation Privileged From Production as Personal Records Would Be; Information Obtained by Summons Restricted Solely to Enforcement of Revenue Laws; Government Not Immune From Suit to Quash Summons. Application of John A. Howard (W.D. Pa., November 2, 1962), 63-1 USTC ¶9201. This is a proceeding brought to quash an Internal Revenue Service summons issued to Howard under Section 7602, Internal Revenue Code of 1954. The summons was addressed to him in his capacity as president of Langley-Howard, Inc., directing him to produce books and records of the corporation and to give testimony relating to the individual tax liability of him and his wife for the years 1956 to 1959, inclusive.

The Court held that it had jurisdiction to entertain and quash an Internal Revenue Service summons. Application of Colton, 291 F.2d 487 (C.A. 2, 1961). Contra: Reisman v. Caplin (C.A. D.C., February 7, 1963), 63-1 USTC ¶9255.

With respect to the years 1956, 1957, and 1958 which were barred from assessment in the absence of fraud, the Court held that the Government failed to show the existence of reasonable grounds to suspect fraud; and, therefore, the summons would be quashed as to those years. The mere recital in the Special Agent's affidavit that fraud existed was not a sufficient showing of fraud but rather "merely a statement of conclusions." The Court in making this finding placed its reliance upon Zimmerman v. Wilson, 105 F.2d 583 (C.A. 3, 1939). However, this reliance appears to have been misplaced. See Zimmerman v. Wilson, 105 F.2d 583, 585.

As to the open year, 1959, the summons was not quashed. However, as to that year the applicant did not have to produce any record "which would not have been kept as a corporate record by an ordinary business corporation, as distinguished from a personally owned company in which no person other than the sole stockholder has any pecuniary interest." The Court reasoned to this unique conclusion by assuming that since Howard was the sole shareholder of Langley-Howard, Inc., and the only person having a pecuniary interest therein that the records of the corporation would be considered personal records. This finding was made despite the fact that there was nothing in the record to support such a finding except for the naked allegation of Howard to that effect. The Court recognized that a corporate officer has no personal constitutional standing to object to the production of corporate records, United States v. White, 322 U.S. 694, 698-99 (1944); however, "We shall assume arguendo that Howard can overcome this hurdle, and that, as he alleges, the records involved are his own personal papers."

The principal reason Howard had for seeking to quash the summons was that since he was under indictment for alleged violation of the Securities Act of 1933, the Government was attempting to use the Internal Revenue Service summons to obtain information to shore up its criminal case against him. As to this aspect, the Court found that the statutory authorization under 26 U.S.C., 7602 covers both civil and criminal investigations; however, that if the records demanded were sought for the Securities Exchange Commission's violation, it would be an improper use of the summons. United States v. O'Connor, 118 F. Supp. 248 (Mass., 1953). While the Court did not find that the Government was employing the summons for this purpose; nevertheless, it felt that safeguards should be imposed to prevent misuse of the information obtained pursuant to the summons. Accordingly, it was ordered that any such information shall not be communicated to other than duly authorized Internal Revenue Service employees and in particular that no such data or information shall be communicated to or used by Government counsel or employees concerned in the prosecution of the criminal trial of Howard for the alleged Securities Exchange Commission's violations.

An appeal will be taken from this decision.

Staff: United States Attorney Joseph S. Ammerman; Assistant United States Attorney Thomas J. Shannon (W.D. Pa.); and Frank J. Violanti (Tax Division).

Suit for Judgment for Taxes, Enforcement of Tax Liens, Counterclaim Against United States for Tortious Acts. United States v. United States Chain Company, et al. (N.D. Ill.), 63-1 USTC ¶9223. The Court awarded judgment for the taxes asserted by the Government, denied taxpayer's counterclaim against the United States, upheld the Government's enforcement of liens against personalty, but upheld the claims of the purchaser at a local tax sale over Government liens as to realty. Defendant put the merits of the taxes in issue, one of the questions being whether the chains sold by taxpayer to the military services were sold for export and were exported in due course so as to come within the exemption from excise tax liability and whether under the bid contracts it was liable for excise taxes. The Court awarded judgment for all taxes asserted. Taxpayer counterclaimed for $250,000 alleging tortious acts relating to contracts with the military services and acts by Internal Revenue Service personnel, alleging negligence, duress, interference with contractual relations, taking of property without due process of law, alleged statements as to non-liability for excise taxes, threats of criminal prosecution, failure to return property seized, etc. The Court upheld the Government's defense with respect to such allegations and dismissed the counterclaim.

The Court granted the Government first priority in regard to foreclosing its tax liens against taxpayer's personalty but upheld the claim of a purchaser at a local tax sale over the liens of the Government, the local tax sale proceeding having been filed, and judgment having been entered, in the County Court before the first federal tax lien arose, although the tax sale took place after some of the federal liens arose. Among other cases, the Court placed reliance on United States v. Brosnan, 363 U.S. 237, in holding that the local procedure extinguished the federal tax liens. The facts in this case were similar to those in United States v. Meyer, 199 F. Supp. 508 (S.D. Ill.), except that in the Meyer case the state tax sale took place before the first federal tax lien arose. No appeal was taken in that case. Decision has not been reached concerning appeal in the instant case.

Staff: Former United States Attorney Robert Tieken; Assistant United States Attorney Harvey M. Silets (N.D. Ill.); and Paul T. O'Donoghue (Tax Division).

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