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UNITED STATES ATTORNEYS
BULLETIN

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Vol. 11 May 31, 1963 No. 10

IMPORTANT NOTICE

As stated in Memo No. 334, dated November 28, 1962, the reason for having the United States Attorneys report, on Form No. USA-5, the number of man-hours spent in court each month was to achieve a more equitable basis for evaluating the United States Attorney's workload. It was intended that this report cover only the man-hours spent in court by the United States Attorney and his regular Assistants. It was not intended to cover the man-hours in court of attorneys from the several Departmental divisions, who are temporarily in the district, or attorneys from other Government agencies, who have been specially authorized by the Department to appear in particular cases.

Accordingly, each United States Attorney is requested to see that the report of man-hours in court, submitted by his office each month on Form No. USA-5, includes only the man-hours of his regular legal staff.

MONTHLY TOTALS

During the month of April, the totals in all categories of work decreased. Triable criminal cases showed a sizeable drop, as did civil cases. As a result of the reduction all along the line, the aggregate of cases and matters pending showed some reduction. The following analysis shows the number of items pending in each category as compared to the total of the previous month.

	March 31, 1963	April 30, 1963	
Triable Criminal	9,276	8,954	- 322
Civil Cases Inc. Civil Less Tax Lien & Cond.	16,020	15,900	- 120
Total	25,296	24,854	- 442
All Criminal	10,850	10,491	- 359
Civil Cases Inc. Civil Tax & Cond. Less Tax Lien	18,836	18,706	- 130
Criminal Matters	12,640	12,607	- 33
Civil Matters	14,708	14,497	- 211
Total Cases & Matters	57,034	56,301	- 733

During April, the number of terminations was over double the number of filings. As a result, the gap between filings and terminations was reduced from 6.3 in March to 4.5 in April. An encouraging aspect of the increase in terminations is that more civil cases than criminal cases were terminated. As civil cases comprise two-thirds of the pending caseload, it is this category of cases which needs a stepped-up rate of terminations. While progress during April was good, it was not sufficient to effect a reduction in the pending caseload from the same date in fiscal 1962.

	First 10 Mos. F.Y. 1962	First 10 Mos. F.Y. 1963	Increase or Decrease Number	%
Filed				
Criminal	26,657	27,868	+ 1,211	+ 4.54
Civil	21,055	22,230	+ 1,175	+ 5.58
Total	47,712	50,098	+ 2,386	+ 5.00
Terminated				
Criminal	24,822	26,733	+ 1,911	+ 7.70
Civil	18,230	21,094	+ 2,864	+ 15.71
Total	43,052	47,827	+ 4,775	+ 11.09
Pending				
Criminal	10,097	10,419	+ 322	+ 3.19
Civil	23,206	23,515	+ 309	+ 1.33
Total	33,303	33,934	+ 631	+ 1.89

The following figures show that more cases were terminated in April than in any previous month of the fiscal year. Filings were not far behind with the second highest total for the year. The increase of almost 13% in terminations over the previous month, and the increase of 16.9% in civil terminations were not as large, however, as the increases during March. The number of civil cases terminated during April, however, was the highest such total in the present fiscal year.

	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
Feb.	3,073	2,102	5,175	2,375	1,912	4,287
March	3,106	2,449	5,555	3,069	2,276	5,345
April	2,969	2,516	5,485	3,386	2,661	6,047

For the month of April, 1963, United States Attorneys reported collections of $5,155,917. This brings the total for the first ten months of fiscal year 1963 to $46,176,437. Compared with the first ten months of the previous fiscal year this is an increase of $2,274,581 or 5.18 per cent over the $43,901,856 collected during that period.

During April $9,597,194 was saved in 164 suits in which the government as defendant was sued for $10,705,704. 88 of them involving $2,651,905 were closed by compromises amounting to $446,376 and 36 of them involving $2,045,104 were closed by judgments amounting to $662,134. The remaining 37 suits involving $6,008,695 were won by the government. The total saved for the first ten months of the current fiscal year aggregated $46,222,919 and is an increase of $785,426 over the $45,437,493 saved in the first ten months of fiscal year 1962.

DISTRICTS IN CURRENT STATUS

As of April 30, 1963, the districts meeting standards of currency were:

CASES

Criminal

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

CASES

Civil

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

MATTERS

Criminal

Ala., N.	Ill., E.	Mo., W.	S.C., E.	W. Va., N.
Ala., S.	Ill., S.	Neb.	S.D.	W. Va., S.
Alaska	Ind., N.	N.H.	Tenn., M.	Wis., E.
Ariz.	Ind., S.	N.C., M.	Tenn., W.	Wis., W.
Ark., E.	Iowa, N.	N.C., W.	Tex., N.	Wyo.
Ark., W.	Iowa, S.	Okla., N.	Tex., E.	C.Z.
Calif., S.	Ky., W.	Okla., E.	Tex., S.	Guam
Colo.	La., W.	Okla., W.	Tex., W.	V.I.
Ga., S.	Me.	Pa., M.	Utah	
Hawaii	Md.	Pa., W.	Vt.	
Idaho	Mich., W.	P.R.	Wash., E.	
Ill., N.	Miss., N.	R.I.	Wash., W.	

MATTERS

Civil

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

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ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

MEMOS AND ORDERS

The following Memoranda and Orders applicable to United States Attorneys Offices have been issued since the last published in Bulletin No. 6, Vol. 11 dated March 22, 1963:

MEMOS	DATED	DISTRIBUTION	SUBJECT
344	3-8-63	U.S. Attorneys & Marshals	Leave - Policies & Regulations
345	3-15-63	U.S. Attorneys & Marshals	Administration of Within-grade Salary Increases
254-S2	4-16-63	U.S. Attorneys & Marshals	Telegraphic Communications
106 Supp.4	4-29-63	U.S. Attorneys & Marshals	Political Activity--Rules for Federal Employees
336 Supp.1	5-6-63	U.S. Marshals	Determination of Veteran Preference; Deputy U.S. Marshal Applicants

ORDERS	DATED	DISTRIBUTION	SUBJECT
293-63	3-20-63	U.S. Attorneys & Marshals	Employee-Management Cooperation in Department of Justice
294-63	4-9-63	U.S. Attorneys & Marshals	Placing Assistant Attorney General John W. Douglas in Charge of Civil Division

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ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

Individual Found Guilty of Perjury For Giving False Testimony Before Antitrust Grand Jury. United States v. Alexander Nicholson (D. Conn.). Nicholson was indicted for perjury on December 19, 1962, by a grand jury sitting in Hartford, Connecticut, as a result of the willfully false testimony he had previously given to an antitrust grand jury sitting in New Haven, Connecticut. Following a two and one-half day trial, the petit jury returned a verdict of guilty to the single count indictment on May 10, 1963.

The antitrust investigation conducted by the grand jury in New Haven was directed at suspected activities of a major oil company and local fuel oil retailers to fix the retail price of fuel oil sold to consumers in the Westport, Connecticut area. Nicholson, who is the owner of a retail fuel oil business was the Gulf Oil Corporation fuel oil representative for its District of Connecticut during the period covered by the investigation, and his testimony frustrated the inquiry.

The indictment of Nicholson represents one of the few instances in recent years in which a willfully false statement made during a grand jury investigation of antitrust violations has resulted in an indictment and successful prosecution. The case was handled by the United States Attorney's Office for the District of Connecticut.

The case was prosecuted by Assistant United States Attorney Irving H. Perlmutter (D. Conn.); and John J. Galgay, Augustus A. Marchetti and Lionel E. Bolin (Antitrust Division) under the supervision of United States Attorney Robert C. Zampano.

Staff: John J. Galgay, Augustus A. Marchetti and Lionel E. Bolin (Antitrust Division).

Clayton Act Violation Alleged. United States v. Branch River Wool Combing Co., Inc., et al. (D. R.I.). On May 13, 1963 a civil complaint alleging a violation of §7 of the Clayton Act was filed against Branch River Wool Combing Co., Inc. and The French Worsted Company.

The complaint alleges that on March 24, 1959 French Worsted sold its wool top production facilities and leased its premises to Branch River. Branch River is the largest producer of wool top, manufacturing about 30% of the total produced in the United States in 1960.

In December, 1959 Branch River leased the machinery and sublet the premises back to French Worsted for a period of four years. This lease back had the effect of delaying the full effect of the asset

acquisition for the four year period. The contracts also provide that after the expiration of the lease back French Worsted will be prohibited from producing wool top in the Western Hemisphere, Great Britain and Western Europe for twenty years.

The industry is composed of topmakers that buy raw wool which they have processed into wool top by combing companies on a commission basis. The topmakers then sell the wool top to worsted yarn manufacturers. Some of the topmakers are integrated with combing companies so as to perform all of the necessary vertical steps in the marketing of wool top.

The complaint alleges that Branch River is vertically integrated with a topmaker; that the wool top production industry is dominated by five vertically integrated companies which in 1960 produced about 71% of all wool top combed and 80% of all wool top combed for sale; that these five companies have increased their size and dominance in the last ten years; and that since 1959 three large combing companies, which were not vertically integrated with a topmaker, were eliminated. French Worsted is the last non-integrated combing company of substantial size.

The complaint prays that the Court order divestiture and the elimination of the restrictive covenants. The prayer also asks that Branch River be enjoined from making further acquisitions without prior approval of the Court.

Staff: John J. Galgay, William J. Elkins, Bertram M. Kantor and Raymond W. Philipps (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURTS OF APPEALS

MILITARY DISCHARGE

Airman's Undesirable Discharge From Air Force Upheld Where Hearing Was Held Subsequent to Discharge. Redwine v. Zukert (C.A. D.C., April 4, 1963). Appellant, while on remote duty in Alaska as a member of the Air Force, pleaded guilty to a civilian charge of burglary for which he was sentenced to prison for 2 1/2 years. He was thereafter undesirably discharged from the Air Force without a hearing. Subsequently, he requested and received a hearing at which he was represented by counsel and in which the discharge was affirmed. The district court granted appellee's motion for summary judgment.

The Court of Appeals affirmed. The Court rejected the contention that due process required a hearing prior to discharge since appellant made no claim of actual prejudice due to the fact that the hearing he did receive was held subsequent to discharge. The Court went on to hold that appellant could not attack the validity of his guilty plea, upon which his undesirable discharge was predicated, in the Air Force discharge proceeding.

Staff: United States Attorney David C. Acheson (District of Columbia)

NATIONAL SERVICE LIFE INSURANCE

Authority of Veterans Administration to Supervise Guardianship of Minor Beneficiaries Entitled to NSLI Benefits Upheld. Waters v. United States (C.A. 5, March 29, 1963). This suit was brought by appellant on behalf of her minor children to recover National Service Life Insurance benefits which were due them. VA had refused to pay the benefits unless appellant agreed to furnish a corporate surety bond, to render an annual accounting to the VA, and to conserve the funds for the childrens' benefit. The district court dismissed the complaint on the ground that VA had not either allowed or disallowed the claim, and, accordingly, the dispute fell short of being a "disagreement" within the meaning of 38 U.S.C. 784.

The Court of Appeals affirmed. While agreeing with appellant's contention that the imposition of unlawful and unauthorized requirements as a condition precedent to payment of a claim amounts to a denial of the claim, the Court rejected plaintiff's contention that the Administrator was without authority under the statute and regulations to maintain supervision over guardianship cases. The Court held that under the statute and regulations the Administrator had supervisory authority over payments of benefits to minors including supervision over the payment of National Service Life Insurance benefits and that, since the requirements imposed

upon plaintiff were lawful, the complaint failed to show "a denial of the claim" as required by the statute.

Staff: United States Attorney Louis C. LaCour (E.D. La.)

PACKERS AND STOCKYARDS ACT

Meat Packer's Discriminatory Sale of Picnic Hams Held Violative of Packers and Stockyards Act. Swift & Company v. United States (C.A. 7, April 22, 1963). The Secretary of Agriculture found that Swift had sold picnic hams to the Kroger Company in Nashville, Tennessee, at prices substantially lower than prices charged by Swift to Kroger's competitors in that area. Relying on Section 202 of the Packer's and Stockyards Act, 7 U.S.C. 192, which forbids any packer to use any "unfair and unjustly discriminatory practice or device in commerce" and to give any person "undue or unreasonable preference or advantage," the Secretary issued an order requiring Swift to cease and desist from such discriminatory pricing.

On Swift's petition to review and set aside the Secretary's order, the Court of Appeals, upholding the order in every respect, held that the facts established a violation of the statute. The Court did not pass on the Secretary's conclusion that proof of injury to competition was unnecessary to establish the violation charged, since it found that there was substantial evidence of injury to competition in the record in that Swift's discriminatory pricing had caused Kroger's competitors to suffer a decline in gross sales.

Staff: Neal Brooks, Assistant General Counsel, Department of Agriculture; Morton Hollander (Civil Division)

PRIVILEGE

Air Force Colonel's Allegedly Defamatory Statements Held to Be Absolutely Privileged. Denman v. White (C.A. 1, April 24, 1963). Appellant brought suit to recover damages for defamation from appellee, a Colonel in the United States Air Force. The allegedly defamatory statements were made during a press conference called by Colonel White to answer charges made by appellant that Texas Tower No. 4, an Air Force radar installation located in the Atlantic Ocean, had collapsed during a storm, causing the death of 28 persons, because of negligence of the Air Force. The district court held that applicable Air Force regulations authorized Colonel White to release information to the press and that, since his statements that appellant's charges were "irresponsible" and "distortions of the fact" were made in the course of official duties, they were absolutely privileged under the rule of Barr v. Mateo. 360 U.S. 564.

The Court of Appeals affirmed. The Court rejected appellant's contention that Colonel White's comments were not authorized to be made by the applicable Air Force regulations and noted that, even if his conduct

were not in "technical" compliance with the regulations, it was sufficient if his making the statements was "within the 'outer perimeter' of his line of duty."

Staff: Mark R. Joelson (Civil Division)

DISTRICT COURT

TORT CLAIMS ACT

Government Not Liable to Visitor Bitten by Bear in National Park. Ashley v. United States (D. Neb., March 6, 1963). Plaintiff, an adult visitor to Yellowstone Park, was bitten by a bear, after he had been fully warned that bears were dangerous and should be watched from a safe distance. He was bitten by the bear after he fell asleep in his car with his elbow out the window. The District Court held that the United States was not absolutely liable for harboring wild animals, as plaintiff had claimed, since the Federal Tort Claims Act requires a "negligent or wrongful act or omission" as a condition precedent for liability. The Court went on to hold that the Government was not negligent in not removing the bear since the bear involved was not known to have molested other persons on previous occasions.

The Court also noted that, in any event, the question of how to handle a troublesome bear called for an exercise of discretion by Government employees and that this discretion had been exercised in the establishment in statute and regulations of a basic plan for the control of bears. Therefore, this matter comes within the discretionary function exception, 28 U.S.C. 2680(a). This ruling, although salutary, should be used with a great deal of caution. It clearly applies to the adoption of basic policy in the statute and regulations; it has questionable application in the handling of individual bears within particular situations.

Staff: United States Attorney Theodore L. Richling; Assistant United States Attorney Russell J. Blumenthal; John T. McMahon (Civil Division)

Tender of Payment of Full Amount Demanded in Administrative Claim Bars Institution of Suit Under Federal Tort Claims Act Despite Later Refusal of Plaintiff to Accept Amount Tendered by Agency. Schlingman v. United States (S.D. Calif., April 25, 1963). Plaintiff sued the Government under the Tort Claims Act for $25,000 as a result of injuries sustained in a collision with a Post Office vehicle. Prior to suit, plaintiff had executed an administrative claim for $235. Plaintiff's attorneys mailed the claim to the Post Office Department, a few days after suit was filed. By the provisions of the administrative claim form, plaintiff expressly agreed to accept the amount in full satisfaction and final settlement of her claim. The claim was approved and a check was issued in the amount of $235. payable to plaintiff and her attorneys, and was mailed to plaintiff's attorneys, who subsequently returned it to the Post Office Department.

The Court held that, because of 28 U.S.C. 2672, 2675, plaintiff was barred from suing under the Act by the filing of the administrative claim and the subsequent approval and tender of the full amount by the Post Office Department. In addition, the Court found that plaintiff in no event would be entitled to receive more than $235, the amount of her administrative claim.

Staff: United States Attorney Francis C. Whelan; Assistant United States Attorney Clarke A. Knicely; Vincent H. Cohen (Civil Division)

STATE COURT

AGRICULTURAL ADJUSTMENT ACT

ASC County Committee Lacks Authority to Make Second Reconstitution and Thereby Vitiate Its Initial Reconstitution of a Farm and Acreage Allotment. Clubb v. DeKeyser (Louisiana Third Circuit Court of Appeal, April 9, 1963). One Fontenot, the owner of a 3800-acre Louisiana rice farm, sold plaintiffs a 1645-acre tract and agreed, after informal approval by the ASC County Committee, to convey to them the farm's full rice acreage allotment. Following sale, the County Committee formally reconstituted the farm and allotment in accordance with the parties' agreement, without regard to the proportion of the total cropland on the conveyed and retained tracts; it purported to find authority for such reconstitution in the proviso to 7 C.F.R. 719.8(a)(2), which permits disparate allocation of allotments when considerations of availability and adaptibility of cropland so dictate. Subsequently, Fontenot conveyed the remainder of his farm to a third party, who complained to the County Committee that the latter tract was entitled to a proportional share of the acreage allotment. Upon reconsideration the County Committee agreed, finding no justification for its earlier reliance on the proviso to 7 C.F.R. 719.8(a)(2), and reconstituted the farms and allotment in the manner requested. On review, pursuant to 7 U.S.C. 1363, defendants (in their capacity as members of the local Review Committee) approved the second reconstitution, with minor modifications.

On judicial review, pursuant to 7 U.S.C. 1365, the Louisiana Twelfth Judicial District Court struck down the second reconstitution on the ground that the sales agreement between Fontenot and plaintiffs could not be abrogated by what it found to be merely permissive regulations. The Government then appealed to the Louisiana Third Circuit Court of Appeal on the ground that the applicable regulations are mandatory and that the required allotment allocation cannot be altered by private agreement. The Court of Appeal affirmed, holding that while the second reconstitution would have been valid if untainted by earlier administrative action, the County Committee cannot disregard the initial reconstitution on which the parties have relied to their financial detriment.

The Solicitor General has authorized the filing of a petition for review in the Louisiana Supreme Court.

Staff: United States Attorney Edward L. Shaheen; Assistant United States Attorney E. V. Boagni (W.D. La.)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Discrimination in Interstate Terminals. United States and Interstate Commerce Commission v. City of Jackson, (S.D. Miss.) et al. (C.A. 5, May 13, 1963.) On March 8, 1962, the United States and the Interstate Commerce Commission moved the United States District Court for the Southern District of Mississippi for a preliminary injunction requesting that the City of Jackson, its Commissioners, and its Chief of Police be enjoined from (a) maintaining or displaying in or near the terminals of interstate carriers signs indicating or suggesting that any of the terminal facilities are for the use of persons of any particular race or color; (b) failing to remove such signs; (c) enforcing sections 2351.5, 2351.7, or 7787.5 of the Mississippi Code; and (d) otherwise seeking to enforce or encourage racial segregation in the use of terminal facilities. On March 14, 1962, a hearing on the motion was held before Judge Mize. At the hearing it was brought out that since 1956 the City of Jackson had placed and maintained on the public sidewalks adjacent to the Greyhound, Trailways and Illinois Central terminals certain signs reading "Waiting Room For White Only--By Order Police Dept." and certain other signs reading "Waiting Room For Colored Only--By Order Police Dept." Other testimony and evidence at the hearing demonstrated that these signs and the policy behind them were being enforced by police officers of the City of Jackson. Despite this, on April 23, 1962, the District Court held it was not justified in granting a preliminary injunction under the facts of the case, and it retained jurisdiction over the defendants for such further orders as may be appropriate on final hearing, including the entry of a declaratory judgment with respect to the inappropriate language ("Only" and "By Order Police Dept.") contained on the signs if that language was not removed.

An appeal was taken to the United States Court of Appeals for the Fifth Circuit and on May 13, 1963, that Court reversed the judgment of the District Court and remanded the case with instructions that a permanent injunction be issued as prayed for by plaintiffs. The Court of Appeals did not treat it as a preliminary injunction because it found the District Court had "disposed of all the issues, factual and legal." In its opinion the Court of Appeals took judicial notice that the State of Mississippi has a "steel-hard, inflexible, undeviating policy of segregation" and found that the segregation signs at the terminals in Jackson, with or without the mandatory words, carry out that policy, and constitute state action in violation of the Interstate Commerce Act, the Fourteenth Amendment, and the Commerce Clause. It held that it was not material whether the signs are in the terminal or on the sidewalks, because "the sovereign power of the United States under interstate commerce is not confined within the walls of the terminal: it extends over every inch of ground in the State of Mississippi."

In sustaining the standing of the United States to bring the action, the Court held that the United States has standing, with and without statutory authorization. Statutory authorization was held to stem from the Interstate Commerce Act, as amended by the Elkins Act, and this supported not only the right of the United States to enjoin discrimination

in interstate commerce, but to obtain such injunctive relief against a municipality. Non-statutory standing was found under the Commerce Clause: "When a State, not by some sporadic act against a particular individual but by a law or pattern of conduct, takes action motivated by a policy which collides with national policy as embodied in the Consititution, the interest of the United States 'to promote the interest of all' gives it standing to challenge the State in the courts. When the action of a State violative of the Fourteenth Amendment conflicts with the Commerce Clause and casts more than a shadow on the Supremacy Clause the United States has a duty to protect the 'interests of all'. The courts offer the first avenue for counter-action by the Nation. Such thinking may take us down the road to recognition of Government standing to sue under the Fourteenth Amendment or under any clause of the Constitution. But this case is only a way station. The issue here is framed by the Commerce Clause. Under that clause there is authority for the United States to sue without specific congressional authorization."

The Court also held that a proprietary interest provides a non-statutory basis for standing of private persons and would provide a basis for the United States, but refused to restrict the Nation's non-statutory rights of action within the same limits established for private persons, stating that "the Constitution cannot mean to give individuals standing to attack state action inconsistent with their constitutional rights but to deny to the United States standing when States jeopardize the constitutional rights of the Nation."

On the matter of standing under the Fourteenth Amendment, the Court stated that "in the circumstances of this case, therefore, the rights of the traveling public, national policy, and the fundamental law of the land are protected without the necessity of holding that the United States has standing to sue under the Fourteenth Amendment and without resorting to the Necessary and Proper Clause to make effective the Supremacy Clause" but noted that "a great deal can be said for allowing the United States to sue to prevent a State from using its governmental powers to bring about a systematic deprivation of the rights of its American citizens guaranteed by the Constitution."

Staff: United States Attorney Robert E. Hauberg (S.D. Miss.); St. John Barrett, Harold H. Greene, Gerald P. Choppin, Howard A. Glickstein (Civil Rights Division) Bernard A. Gould, Attorney, Interstate Commerce Commission

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

REVERSAL OF CASE BY SUPREME COURT

United States Attorney Should Take Steps to See Defendant is Returned to Place of Trial for Determination as to Bail. It has been forcefully brought to the Department's attention that a defendant whose case was reversed upon review by the Supreme Court was kept in the penitentiary for an unnecessarily long time pending a decision as to another trial by the United States Attorney. When the mandate has been received upon a reversal of a conviction by the Supreme Court or the court of appeals, the Criminal Division believes that the United States Attorney should immediately take appropriate steps to insure that the defendant is returned to the place of trial so that a decision as to bail may be made. It is pointed out that the defendant in such a case is in the same position as he was prior to his trial and he should not continue to serve an invalid sentence.

NATIONAL STOLEN PROPERTY ACT

Credit Cards: Falsely Made and Forged Security Caused to Be Transported in Interstate Commerce. United States v. Michael Snedeker Mingo (M.D. Florida, May 2, 1962). Defendant was charged in a two-count indictment; the first count was dismissed on the Government's motion: the second count charged that defendant caused to be transported in interstate commerce "a falsely made and forged security, to wit: an evidence of indebtedness showing that merchandise costing $24.67 had been purchased on credit" by the use of a Richfield Oil Corporation Credit Card.

After a trial, without a jury, Judge Joseph P. Lieb, in a memorandum opinion, found defendant guilty as charged. The opinion pointed out that the question presented for the Court's determination was "whether or not the invoice involved in this case was, in fact, an evidence of indebtedness and, therefore, a security within the meaning of Section 2314, Title 18, United States Code Annotated. . ."

In finding that the invoice was a security, the Court discussed the purpose and wording of the credit card which was stamped on the invoice by a card machine; the blank spaces of the invoice which are filled in by the dealer; and, finally, the signature of the purchaser.

The Court concluded that "The 'hard copy' of invoices presented by the dealer to the oil company for cash or credit were then forwarded to the home office of the oil company. . .", and that "It is evident that by the treatment accorded by the parties to the invoice involved it became an 'evidence of indebtedness' in a commercial sense." (See Ingling v. United States, 303 F. 2d 302.)

Staff: United States Attorney Edward F. Boardman; Assistant United States Attorney Joe H. Mount (M.D. Fla.).

PRIVILEGE

Government Informants; Government Privilege Not to Disclose Identity of Informants Upheld. United States v. Samuel Joseph Rugendorf (C.A. 7, April 30, 1963). Defendant was convicted of receiving, concealing and storing merchandise of a value in excess of $5,000. One of the three issues raised by defendant on appeal was that the trial court erred in refusing to require the Government to reveal the source of the information used to obtain a search warrant. Defendant relied on Roviaro v. United States, 353 U.S. 53, which held that when the disclosure of the name of the informer is "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way" (pp.60-61).

The Court of Appeals in affirming the conviction pointed out that the Government's privilege not to disclose the identity of its informants as stated in In re Quarles and Butler, 158 U.S. 532, 535-536, is the rule, and that Roviaro is an exception to the rule. The Court noted the view expressed in Jones v. United States, D.C. Cir., 271 F. 2d 494, 496, certiorari denied, 362 U.S. 918, that Roviaro is applicable only when the informer helped to set up the commission of the crime and was present at its occurrence.

In the instant case the Court accepted the view that when an informer is simply an informer and nothing more, the Government's privilege not to disclose his identity is valid, subject only to the rule as enunciated by Roviaro at page 62: "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense . . . ."

Staff: United States Attorney James P. O'Brien (N.D. Ill.).

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Motion to Suppress (Rule 41(e) F.R. Cr. P.); Order Granting Motion To Suppress Does Not Benefit Co-defendant Under Rule 41(e). United States v. George W. Sawyer (E.D. Pa.) Defendant Sawyer was jointly indicted with Garlan Markham in the Eastern District of Pennsylvania for bribery, unlawful conveyance of government documents and transferring national defense information.

Subsequent to the return of the indictment, Markham moved to suppress the documents and materials which were seized from his home during a search thereof conducted on June 3, 1961, at Arlington, Virginia. This motion was granted on January 11, 1963.

On April 15, 1963, the Government dismissed the indictment against Markham and announced its intention to proceed with the case solely against Sawyer, utilizing the evidence which had been seized from Markham. Sawyer then moved to suppress the evidence from use at his trial on the ground that Rule 41(e) F.R. Cr. P. precluded from use at any trial or hearing evidence which has been declared the subject of an illegal seizure. In support of his position defendant relied on McDonald v. United States, 335 U.S. 451; Hair v. United States, 289 F.2d at 897; Schoeneman v. United States (D.C. Cir. No. 17,395, decided April 4, 1963).

The motion was denied by District Judge Francis L. Van Dusen (E.D. Pa.), the Court holding: "The Motion to Suppress must be denied in view of the recent decisions of the Supreme Court of the United States stating that the defendant Sawyer is not 'a person aggrieved' within F.R. Crim. P. 41(e). See Jones v. United States, 362 U.S. 257, 261, 267 (1960); Wong Sun v. United States, 371 U.S. 471, 491-2 (1963) . . . "Defendant's contention that the order of Judge Lord, granting the Motion to Suppress of the former co-defendant Markham, precludes the use of this evidence in the prosecution against the defendant Sawyer because of the following sentence of F.R. Crim. P. 41(e), must be rejected in view of the above cited decisions: 'If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial.' It is clear from the foregoing decisions, among others, that such evidence is not 'admissible in evidence at any hearing or trial' of the person filing the Motion to Suppress, which in this case would be the trial of the former co-defendant Markham."

"In connection with the earlier Federal cases, including decisions of the Supreme Court of the United States, relied on by defendant Sawyer, it is noted that this is not a situation where a ruling is being made after a joint trial in which evidence which should have been suppressed as to one co-defendant was admitted as to all co-defendants. Cf. McDonald v. United States, 335 U.S. 451 (1948); Schoeneman v. United States (D.C. Cir. No. 17395), opinion of April 4, 1963, and cases cited

in footnote 5 of that opinion. This matter comes before the court at a time when there is a sole defendant remaining in this criminal prosecution and the case has not yet been assigned for trial, although such assignment may be made at any time and will probably be made before the end of this week."

"It is also noted that this is not a situation where the evidence was seized without a warrant in violation of important constitutional or congressional guarantees so that a strong public policy should require that everything which followed such violation should be tainted. Cf. McNabb v. United States, 318 U.S. 332 (1943). It is recognized that the warrant in this case was void and, hence, the search was equivalent to one without a warrant for most legal purposes, but the considerations which were present in such cases as McDonald v. United States, supra, at 457-460, are not present in this case. Cf. 62 Harv. L. Rev. 1229 (1949). It is also noted that none of the items covered by the present motion were even the property of Markham, much less the property of the defendant Sawyer . . . It is also noted that Judge Lord did not order the return of the documents covered by the former co-defendant's Motion to Suppress to Markham."

The foregoing is believed to be the first case to deal directly with the effect of Rule 41(e), F.R. Crim. P. upon the admissibility of suppressed evidence at the trial of a person other than the one aggrieved by the illegal search and seizure.

Staff: Edwin C. Brown, Jr. (Internal Security Division)

Foreign Assets Control; Falsity of Certificate of Origin. United States v. 50 Cases Black Dyed Bristles (S.D. N.Y.). The certificate of origin of the bristles listed Canada and South America as the countries of origin whereas the true origin of at least a portion of the merchandise was Communist China or Tibet. As the certificate of origin covered the entire lot and was false, the United States seized the entire lot of 50 cases for violation of 19 U.S.C. 1592.

The importer answered the libel, and made an offer of compromise which was rejected by the Government. When the importer refused to submit to examination upon his deposition, the District Court ordered the answer stricken under Rule 37(d), F.R. C. P., and the merchandise forfeited to the United States.

Staff: Assistant United States Attorney Arthur S. Olick (S.D. N.Y.)

Subversive Activities Control Act of 1950; Registration of Communist Party Members. Attorney General v. Samuel Kushner and Attorney General v. Flora Hall. After hearings on February 18, 1963 before Hearing Examiner Robert L. Irwin of the Subversive Activities Control Board and pursuant to his Recommended Decision of April 2, 1963, the Board on April 26, 1963 entered an order determining that respondents were members of the Communist Party and directing that they register as such. (See United States Attorneys Bulletin, Vol. 10, No. 25, December 14, 1962)

Staff: James A. Cronin, Jr., Thomas C. Nugent, and Carl H. Miller (Internal Security Division)

Registration as Communist-front Organization Under Internal Security Act of 1950 as Amended. National Council of American Soviet Friendship v. Subversive Activities Control Board. (C.A. D.C.) On May 16, 1963, the Court of Appeals set aside an order of the Subversive Activities Control Board requiring the National Council of American-Soviet Friendship, Inc., to register under the Internal Security Act of 1950, as amended, as a Communist-front organization. The Court held that the Government failed to establish by a preponderance of the evidence the first requisite in the statutory definition of a Communist front, i.e., that the organization was at the time of the hearing before the Board substantially directed, dominated, or controlled by a Communist-action organization, a Communist foreign government, or the World Communist Movement. In view of this disposition, the Court did not pass on the evidence with respect to the second part of the statutory definition of a Communist-front organization, i.e., that the organization is primarily operated for the purpose of giving aid and support to a Communist-action organization, a Communist foreign government, or the World Communist Movement. Neither did the Court find it necessary to pass upon the constitutional questions raised under the First and Fifth Amendments. However, the Court expressly rejected petitioner's argument that the finding by the Board in the Communist Party case that the Party is a Communist-action organization, is not binding in a proceeding against the Communist front.

Staff: Lee B. Anderson (Internal Security Division) argued the appeal. With her on the brief were George B. Searls (Internal Security Division) and Frank R. Hunter, General Counsel, and Charles F. Dirlam, Subversive Activities Control Board.

Mootness of Proceeding Before Subversive Activities Control Board. Labor Youth League v. Subversive Activities Control Board (C.A. D.C., April 25, 1963). In April of 1953 the Attorney General filed a petition with the Board for an order requiring the Labor Youth League, an unincorporated association, to register as a "Communist-front organization" under the Subversive Activities Control Act. After hearing, the Board on February 15, 1955, issued an order requiring the League to register. The League filed a petition for review with the Court of Appeals. On February 23-24, 1957, delegates from various subdivisions of the League met and voted to dissolve the organization.

The case was held in abeyance pending the final decision in the Communist Party case. Subsequently the League filed with the Court a motion that the case be remanded to the Board with directions to vacate the order and dismiss the petition as moot, setting up the alleged dissolution in 1957. On January 8, 1962, the Court remanded the case to the Board with directions to hold a hearing on the questions of dissolution, present nonexistence of the League, and the effect of any dissolution, and to report its findings and conclusions to the Court. The Board held a hearing March 1, 1962, at which a Mr. Durham, former acting chairman of the League, testified.

The Board reported to the Court that the League had been inactive since February, 1957, and had no national office and no officers, but held in its report that the possibility of reactivation of the League precluded a holding that the appeal was moot (10 Bull. p. 420). (Prettyman, Cir. Judge)

The Court held that the League had ceased all activity by February, 1957, that its members had left it, and that as an organization it had been extinguished. To affirm the order, it said, would be a vain gesture, which might cast a cloud over people who had been members but who in fact had left the organization. To vacate the order, however, would wipe out the whole long record, and if the League were reactivated, the whole case would have to be tried again. For that reason, it remanded the proceeding to the Board with instructions to place it in an inactive status indefinitely; if the League should be reactivated, the Board could take evidence to bring the record up to date. The Court denied the League's motion to vacate the order of the S.A.C.B.

In view of the action taken, the Court said that it was unnecessary to decide whether the League, if in existence, would be a Communist-front organization, or whether the statute would be constitutional if applied to it and its members.

Staff: The case was argued by Kevin T. Maroney and George B. Searls (Internal Security). With them on the briefs was Carol Mary Brennan (Internal Security).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Court Disapproves Finding That Alien Will Not Suffer Physical Persecution if Deported to Yugoslavia. Stefano Sovich vs. Esperdy (C.A.2, May 15, 1963.) Appellant is a Yugoslav national who fled from Yugoslavia in 1956 and found refuge in Italy. In 1958 he entered the United States as a seaman and upon his failure to depart was made subject to deportation proceedings. After being ordered deported to Yugoslavia he applied under section 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1253(h), for a stay of deportation on the ground that he would be physically persecuted in Yugoslavia for political and religious reasons. In support of his application he contended, inter alia, that upon his return to Yugoslavia he would be convicted and imprisoned for having departed from that country without official permission. A Special Inquiry Officer and a Regional Commissioner of the Service, who denied his application on the ground that this possible prosecution did not measure up to the physical persecution contemplated by the statute, were upheld by the lower court in a declaratory judgment action challenging such denial. The lower court found that the alien had been accorded procedural due process and fair consideration of his section 243(h) application.

Circuit Judge Waterman, speaking for himself and Circuit Judge Medina, reversed the lower Court and directed that appellant be given the opportunity to renew his section 243(h) application. He reasoned that the criminal sanction imposed by Yugoslavia for illegal departure is politically motivated and that if the penalty for violation were a long prison sentence it would constitute physical persecution under the statute. He observed that there was a dispute as to the nature, duration and grounds for the punishment threatened the appellant; that appellant was not in a position to obtain information on this matter; and that it was available to the Service from national intelligence sources. Since it might be favorable or unfavorable to the appellant he could not say how the officers of the Immigration and Naturalization Service would rule upon appellant's application when it was considered anew in conformance with the opinion.

Circuit Judge Moore dissented vigorously on the ground that the holding here was contrary to Diminich vs. Esperdy, 299 F.2d 244 (C.A.2, 1961), which held that punishment under the Yugoslav law of a seaman for desertion was reconcilable with generally recognized concepts of justice and did not amount to physical persecution.

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

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Public Lands: Mineral Leasing Act; Oil and Gas Leases; Rentals; 1960 Revision of Leasing Act Requires Secretary of Interior to Condition Issuance of Oil and Gas Leases Upon Payment of Higher Rental Rate Than Was in Effect When Offers to Lease Were Filed; Offers to Lease Do Not Create Vested Rights to Lease. Duncan Miller v. Udall (C.A. D.C., April 25, 1963). Plaintiffs filed applications for oil and gas leases on public lands under the provisions of the Mineral Leasing Act of 1920, 41 Stat. 437. Prior to the issuance of leases, the Mineral Leasing Act of 1920 was amended by the Mineral Leasing Act Revision of 1960, 74 Stat. 781. The Secretary of the Interior thereafter declined to issue leases to plaintiffs at the rental rate in effect when the applications to lease were filed.

Plaintiffs brought this suit asking that the decision of the Secretary requiring consent to the changes in the Mineral Leasing Act be set aside on the grounds that it was arbitrary and capricious, that a declaratory judgment be entered declaring the respective rights and duties of the parties, and that the Secretary be enjoined from requiring appellants to consent to lease terms required by the Mineral Leasing Act Revision of 1960. The Court of Appeals in affirming the judgment of the District Court stated that it agreed in substance and result with the reasoning of the Secretary "at least insofar as it relates to rentals." The Secretary had held that the filing of oil and gas lease offers did not give an applicant a valid existing right to a lease and cited Haley v. Seaton, 281 F. 2d 620 (C.A. D.C. 1960), as authority. The Court went on to hold that the Secretary of the Interior's authority was limited, after the passage of the Mineral Leasing Act Revision of 1960, to the issuance of leases imposing the new and higher rentals set by Congress. The saving clause upon which plaintiffs relied, was held to be intended primarily to protect the rights of existing lessees.

Staff: George Hyde (Lands Division).

Eminent Domain: Government's Dominant Servitude in Navigable River for Mooring Ships of Hudson River Reserve Fleet; Applicability of Commerce Clause. Scozzafava, Springstead v. United States (two cases, S.D. N.Y., April 2, 1963). Plaintiffs filed separate suits under the Tucker Act to recover $10,000 each as compensation, representing the rental value of submerged lands extending 250 feet into the Hudson River at Jones Point, New York, which were used by the Maritime Administration for mooring and berthing "Liberty" ships of the Hudson River Reserve Fleet.

Plaintiffs claimed title to the submerged lands under patents from the State of New York which were issued in 1814. The United States claimed that these lands had been included in certain leases with plaintiffs which were in effect between 1946 and 1959, and that after the leases expired the ships were moved to other points in the Hudson River outside the alleged boundaries

of plaintiffs' properties, and that in any event plaintiffs were not entitled to recover as a matter of law because the United States, as the owner of a dominant servitude in the Hudson River, had the right under the commerce clause of the Constitution to berth the ships at any place in the river below high water mark.

The outcome of this litigation was of national importance since there are thousands of "Liberty" ships berthed in navigable waters in many parts of the Nation. The Department of the Navy was also extremely interested in these cases because it has many "moth balled" fighting ships moored below high water mark along the shores of navigable rivers.

The legal and factual aspects of these cases were carefully and thoroughly investigated by Assistant United States Attorney John F. X. Peloso, and considerable research was done in the Department relating to the questions of law presented. As a result the United States Attorney's Office was well prepared at the pre-trial conferences. These actions were to have been tried during the latter part of April, but at the request of plaintiffs' attorney the complaints were dismissed with prejudice on April 2, 1963.

Staff: Assistant United States Attorney John F. X. Peloso (S.D. N.Y.).

Tucker Act; Franchise Right of Telephone Company to Maintain Facilities on Public Highway Terminates When Highway Is Abandoned; No Implied Contract for Government to Pay Costs of Relocation of Telephone Facilities. General Telephone Company of California v. United States (S.D. Cal., April 18, 1963). This action was filed by the Telephone Company for the reimbursement of the costs of relocating its facilities from an old state highway to a new state highway. Pursuant to Section 7901 of the Public Utilities Act of California, plaintiff prior to 1960 had placed its facilities on a state highway. In May 1960, the State Division of Highways notified plaintiff of the proposed realignment of the highway where it abutted a Naval Missile Facility of the United States. The Government granted an easement to the State for highway purposes over the land where the new highway was to be located. The grant of easement was executed upon consideration that after the completion of the relocation of the state highway, the State would execute a quitclaim deed granting to the Government all of its right, title and interest in the old highway. The Government requested the Telephone Company to move its facilities before it received the quitclaim deed from the State, with the understanding of the parties that there was a doubt as to the compensability of the Company's franchise right and that the matter of compensation would be resolved later. The telephone facilities were moved to the new highway. After the relocation of the telephone facilities, the State executed a quitclaim deed of its interests in the old highway to the United States, and the old highway was abandoned.

The Court held, in construing Section 7901, that when the old highway was abandoned the Government took the land free from the franchise rights

of plaintiff in the nature of an easement which it had enjoyed during the time the property was being used for highway purposes. The Court further held that it was the intention of the parties that the respective obligations were to be determined as of the time the relocation was completed, and that plaintiff's removal of its facilities prior to the actual abandonment of the old highway did not bind the Government under an implied contract to pay the costs of removal, and no unjust enrichment accrued to the Government as a result of plaintiff's removal of its facilities prior to the abandonment of the highway. Judgment was entered in favor of the Government.

Staff: Assistant United States Attorney James R. Akers, Jr. (S.D. Cal.)

Prospective Purchaser of Property From Small Business Administration Lacks Standing to Subject Appurtenant Water Rights to Jurisdiction of State Engineer; Use of "Representation of Interest" by United States in State Court. In the Matter of the Application of Andrew F. Mitchell to Transfer Well (District Court for the County of Bernalillo, New Mexico, April 29, 1963). By the liquidation of a loan, the Small Business Administration became the owner of certain realty including the right to use water from two wells located on the property. Subsequent negotiations between S.B.A., Andrew F. Mitchell, and Charles W. Williams resulted in a contract whereby Mitchell and Williams were to purchase the property including the water rights. Prior to the intended consummation of the sale, Mitchell applied to the New Mexico State Engineer for a permit to transfer the location of the wells and to change the place and purpose of the use of the water therefrom. The State Engineer entered an order approving Mitchell's application but severely limiting the amount of water which could be diverted from the wells. Mitchell appealed this order to the state district court. In the meantime, Mitchell and Williams had defaulted in their payments on the purchase price for the property and the contract had therefore terminated. Mr. Mitchell nevertheless persisted in prosecuting his appeal. In order to avoid any contention that the water rights, still owned by S.B.A., were affected by the order of the State Engineer, the United States, in the interest of comity, specially appeared in the state court and filed a "Representation of Interest" which set forth the above facts. The "Representation" also noted that Section 75-11-7, New Mexico Statutes Annotated, 1953, provides for a change of water well location and use only by the owner of the water right. The "Representation" therefore suggested that Mitchell's appeal be dismissed and that the case be remanded to the State Engineer for vacating his order.

On April 29, 1963, District Judge John B. McManus, Jr. issued an order stating that Williams was not a proper party to make an application to the State Engineer concerning these water rights. He accordingly ordered the dismissal of the appeal and remand to the State Engineer for vacating the previous order. On May 2, 1963, the State Engineer vacated his previous order.

Staff: Assistant United States Attorney John A. Babington (D. N.M.); Arthur W. Ayers, Jr. (Lands Division)

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
Appellate Decisions

Enforcement of Internal Revenue Summons Upheld Over Claims of Attorney-Client, Fourth and Fifth Amendment Privileges; Enforcement Order Held Appealable. Royal G. Bouschor v. United States (April 22, 1962, C.A. 8), 11 A.F.T.R. 2d 1387. An Internal Revenue summons, issued pursuant to Section 7602 of the 1954 Code, was served on appellant, an attorney, in June, 1961, requiring him to produce certain workpapers, analyses, etc., which had been prepared by taxpayer's accountants in connection with their preparation of his income tax returns for the years 1954 through 1959. These workpapers had been turned over to Bouschor at the taxpayer's request in December, 1960. Bouschor appeared before the special agent and refused to comply with the summons on the grounds that the documents were protected by the attorney-client privilege, that the summons violated his client's privilege under the Fourth Amendment, and that compliance on his part would violate his client's privilege under the Fifth Amendment. The Government filed an enforcement action under Section 7604(b) of the 1954 Code, and an ex parte order was issued directing compliance. Bouschor moved to vacate the order, and a hearing was held before the District Court. At this hearing Bouschor raised the same defenses as before the special agent, and he also contended that Section 7605 (b) had not been complied with, inasmuch as no re-examination letter had been sent to the taxpayer. The Court ordered compliance, and Bouschor appealed.

The Eighth Circuit affirmed. It first held that the order was appealable, declining to reconsider the reasoning of its earlier decision in Brownson v. United States, 32 F. 2d 844, and Sale v. United States, 228 F. 2d 682, certiorari denied, 350 U.S. 1006. Turning to the merits, the Court held that the attorney-client privilege did not apply, inasmuch as these were pre-existing documents, and had previously been examined by revenue agents. The Fourth Amendment was held not to be applicable, inasmuch as it was Bouschor, not the taxpayer, who was being searched, and Bouschor made no claim that the search was unreasonable as to him. For the same reason the Court rejected the asserted application of Section 7605(b), for the papers being sought were not the taxpayer's books of account, and the person served with the summons was not the taxpayer. "* * * Bouschor is not the person protected by the statute and * * * the work papers are not its subject." 11 A.F.T.R. 2d at p. 1392.

Probably the most significant point in the decision was its ruling on the Fifth Amendment claim. The Court held that where an attorney is called to testify and produce documents, he cannot refuse to do so on the ground that the documents and his testimony may tend to

incriminate his client. The Fifth Amendment privilege is personal, and may only be invoked by a party on his own behalf. The Court specifically disagreed with Application of House, 144 F. Supp. 95 (N.D. Cal.) as to this point, and agreed with United States v. Boccuto, 175 F. Supp. 886 (N.J.).

The Court also noted that a taxpayer, when under investigation for fraud, cannot thwart the investigation by ordering his accountant to turn otherwise unprivileged documents over to his attorney.

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

Jurisdiction: Injunctions: No Suit to Enjoin Collection of Federal Taxes May Be Maintained in Any Court. Mortimer M. Caplin, Commissioner of Internal Revenue, et al. v. James J. Laughlin (C.A. D.C., May 15, 1963.) In this case the Court of Appeals entered a per curiam order, in lieu of opinion, reversing an order of the District Court which had enjoined the Commissioner of Internal Revenue from enforcing collection of federal income taxes with respect to which the District Director had made a jeopardy assessment against the taxpayer while a petition for redetermination of his tax liability was pending before the Tax Court. Taxpayer had not filed a bond to stay collection of the jeopardy assessment, as authorized by the provisions of Section 6863(a) of the 1954 Internal Revenue Code. In support of its ruling, the Court of Appeals cited Sections 7421(a) and 6863(a) of the 1954 Code and the recent decision of the Supreme Court in Enochs v. Williams Packing Co., 370 U.S. 1 (1962). Other pertinent cases, decided on the authority of Williams Packing Co., which support the proposition that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court" are Abel v. Campbell, 309 F. 2d 751 (C.A. 5); Botta v. Scanlon, 314 F. 2d 392 (C.A. 2); Caskey Pontiac Co. v. Hooks (W.D. Ky.), decided March 18, 1963 (63-1 U.S.T.C., par. 9368); Cohen v. Gross (C.A. 3), decided April 9, 1963 (63-1 U.S.T.C., par. 9395); and Licavoli v. Nixon, 312 F. 2d 200 (C.A. 6).

Staff: Joseph Kovner and George F. Lynch (Tax Division).

District Court Decisions

Injunction Denied For Failure to Show That, Under Liberal View of Law and Facts, Government Could Not Prevail in Proving Assessments. Caskey Pontiac Co. v. Hooks. (March 8, 1963, W.D. Ky.), CCH 63-1 USTC ¶9368. Plaintiff, Caskey Pontiac Co. Inc., brought this action to enjoin the District Director from enforcing jeopardy assessments, on the grounds of irreparable damage, non-liability of plaintiff, and inability of plaintiff to satisfy the tax liability as assessed. The case came on for hearing on plaintiff's motion for a preliminary injunction and the District Director's motion to dismiss.

The liabilities arose from the non-payment of employment taxes by Cabana Club and were assessed against plaintiff. The Court found that there were indications that plaintiff was either a partner or a joint venturer in the operation of the Cabana Club. The Court, in denying injunctive relief applied the holding of Enochs v. Williams Packing Co., 370 U.S. 1, and found that under the most liberal view of the law and the facts it could not be said that the United States could not establish its claim. The possible irreparable damage which might result from the enforcement of the assessments was not an issue in the case once the court had found that the Government under the most liberal view of the law and the facts might ultimately prevail. The Court denied the motion for a preliminary injunction and dismissed the complaint.

Staff: United States Attorney William E. Scent; Assistant United States Attorney Ernest W. Rivers (W.D. Ky.) and Arnold Miller (Tax Division).

Injunction; Right to Enjoin Collection of Taxes Admittedly Due. Eric H. & Constance M. Paige v. Douglas Dillon, et al. (March 29, 1963, S.D. N.Y.), CCH 63-1 USTC ¶9400. Plaintiffs filed a complaint demanding an injunction against collection of a tax which taxpayer admitted that he owed. In addition to the injunction, they prayed that the Court declare the regulations of the Internal Revenue Service unconstitutional, restore a sum of money seized by a revenue officer, compel defendants to accept plaintiffs' offer to pay his tax liability in installments, and restore their rights guaranteed under 4th, 5th, 7th, and 8th amendments to the Constitution. Defendants' motion to dismiss under Rules 6 and 12, F.R.C.P., was granted. The Court in its opinion held that the enjoining of the collection of a federal tax is forbidden by Section 7421 of the Internal Revenue Code of 1954, except, as outlined in Enochs v. Williams Packing Co., 370 U.S. 1 (1961). Since plaintiffs in the first paragraph of their complaint admitted that they owed the tax, their claim does not fall within any exception recognized by the Williams Packing case. The Court further held that it was prohibited by 28 U.S.C. 2201 from adjudicating the validity of regulations concerning federal taxes in a suit such as this. Where plaintiff was seeking the return of the money seized by a revenue officer it must be under one of three theories, i.e., (1) the revenue officer or others pocketed the money; (2) plaintiff is due a refund of taxes paid or (3) the plaintiff is demanding damages under the Federal Tort Claims Act. If the theory is 1, the complaint is defective in that it fails to plead jurisdiction; if it is 2, plaintiffs failed to comply with Section 7422(a), Internal Revenue Code of 1954, since no claim for refund was filed which would be a condition precedent to such a suit; if it is 3, the Federal Tort Claims Act specifically excepts claims arising from assessment or collection of tax. The prayer for acceptance of plaintiffs' offer is a claim seeking mandamus and, citing Jolles Foundation v. Moysey, 250 F. 2d 166, the Court determined there is no jurisdiction to order a public official

to act in regard to his official duties. As to the final item of the prayer, i.e., the deprivation of constitutional rights, the Court determined that plaintiffs' claim was based on nothing more than a proper discharge of duties imposed by law in the collection of a tax which plaintiff admits he owes the Government.

Defendants' motion to dismiss was granted.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorney Clarence M. Dunnaville (S.D. N.Y.).

Priority of Liens; When Status of Judgment Creditor Is Reached. Willow Grove Federal Savings and Loan Association v. Hartack. (July 23, 1962, Court of Common Pleas, Montgomery County, Pennsylvania), CCH 63-1 USTC ¶9364. Taxpayer, Hartack, contracted with a property owner for the construction of a dwelling. Taxpayer failed to complete the construction, leaving undone the driveway. The contract provided, in part, that upon default "....the contractor shall not be entitled to receive any further payment until the work is finished. If the unpaid balance of the contract price shall not exceed the expense of finishing the work ....such excess shall be paid the contractor." The contract also had a "no lien" clause which expressly prohibited subcontractors and materialmen from acquiring liens against the property or against the owner.

The interpleaded sum in this proceeding represented the unpaid contract price less $175, the cost of finishing the driveway. Claimants to the fund included the United States by reason of its tax liens and a claimant alleging priority under a judgment lien. The Court found that the sole obligation of the owner was to the contractor. Accordingly, the perfected federal tax liens against the contractor, Hartack, were entitled to priority. The judgment creditor was denied priority over a subsequently filed tax lien because of his failure to perfect his judgment lien, according to state law, prior to the filing of that tax lien. The sheriff's attachment was made after the stated return date of the writ of execution. Since no levy was made on or before the return date of the writ, state law provided that no perfected judgment lien was acquired.

Staff: United States Attorney Drew J. T. O'Keefe; Assistant United States Attorney Sidney Salkin (E.D. Pa.) and Arnold Miller (Tax Division).

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