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BULLETIN

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FORM USA-900, REQUEST TO DISMISS CRIMINAL CASE

A United States Attorney recently suggested that Form USA-900 prescribed for use in requesting Criminal Division approval to dismiss an indictment or information, be extended for use in criminal tax cases. Heretofore the Tax Division has preferred a letter in requesting authority to dismiss a criminal tax case.

After consultation with the Criminal and Tax Divisions, Form USA-900 has now been amended to permit its use for all criminal cases. Offices wishing to use the form in corresponding with the Tax Division should requisition a supply of the revised form at this time.

YEARLY TOTALS

	F.Y. 1962	F.Y. 1963	Increase or Decrease Number	%
Filed				
Criminal	31,911	33,235	+ 1,324	+ 4.15
Civil	25,242	26,371	+ 1,129	+ 4.47
Total	57,153	59,606	+ 2,453	+ 4.29
Terminated				
Criminal	31,017	32,546	+ 1,529	+ 4.92
Civil	22,899	26,473	+ 3,574	+ 15.61
Total	53,916	59,019	+ 5,103	+ 9.46
Pending				
Criminal	9,301	9,990	+ 689	+ 7.41
Civil	22,728	22,626	- 102	- .45
Total	32,029	32,616	+ 587	+ 1.83

CASELOAD REDUCTION DRIVE

The drive to reduce the pending caseload in fiscal 1963 did not produce the results expected from it. Half of the districts achieved a reduction in their caseloads but this reduction was more than offset by the increases registered in the other half. As a result, the pending caseload at fiscal year's end showed a small increase, rather than a decrease. It should be noted, however, that the United States Attorneys filed and terminated more civil cases than in any of the preceding eight years. The number of criminal cases filed was the highest since fiscal 1956 and the number terminated was the highest since fiscal 1957. In addition, more matters were received, more trials were held, and more grand jury proceedings were conducted than in any of the preceding eight years. With an influx of 2,500 new cases received during the year, it is remarkable that the United States Attorneys

were able to hold down the caseload increase to less than two per cent. Set out below is an analysis of the districts according to the percentage of caseload reduction on June 30, 1963, as well as a comparison of the work done in fiscal 1962 and 1963.

Per Cent of Reduction or Increase	No. of Districts
Reduction of Over 30 Per Cent But less than 35 Per Cent	2
Reduction of Over 25 Per Cent But less than 30 Per Cent	1
Reduction of Over 20 Per Cent But less than 25 Per Cent	3
Reduction of Over 15 Per Cent But less than 20 Per Cent	6
Reduction of Over 10 Per Cent But less than 15 Per Cent	14
Reduction of Over 5 Per Cent But less than 10 Per Cent	11
Reduction of Under 5 Per Cent	9
Increase of Over 100 Per Cent	1
Increase of Over 50 Per Cent But less than 100 Per Cent	2
Increase of Over 40 Per Cent But less than 50 Per Cent	1
Increase of Over 35 Per Cent But less than 40 Per Cent	1
Increase of Over 30 Per Cent But less than 35 Per Cent	1
Increase of Over 25 Per Cent But less than 30 Per Cent	7
Increase of Over 20 Per Cent But less than 25 Per Cent	4
Increase of Over 15 Per Cent But less than 20 Per Cent	4
Increase of Over 10 Per Cent But less than 15 Per Cent	6
Increase of Over 5 Per Cent But less than 10 Per Cent	8
Increase of Under 5 Per Cent	9

For fiscal 1963, United States Attorneys reported collections of $42,111,304. This represents a decrease of $1,843,796 from the amount recovered in fiscal 1962. The figure for 1962, however, has been adjusted to reflect deletions of amounts erroneously reported by one district.

Total expenditures for United States Attorneys' offices for fiscal 1963 was $16,141,358. This is an increase of $1,663,662, or 11.4 per cent, over fiscal 1962.

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ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

SHERMAN ACT - ROBINSON-PATMAN ACT

Jury Finds For Government. United States v. National Dairy Products Corporation, et al. (W.D. Mo.). Trial in this case began on June 13, 1963, and on August 16, 1963 the jury case returned a verdict of guilty on all counts of a fifteen-count indictment except two. On these latter two counts the defendant National Dairy Products Corporation was acquitted. Raymond J. Wise was a defendant in three counts only and he was convicted on all three.

The indictment charged eight separate violations of the Sherman Act and seven violations of Section 3 of the Robinson-Patman Act. The case was originally filed on September 16, 1959 and on March 20, 1961 the Court sustained a motion to dismiss Wise on the ground that he was wrongfully indicted under the Sherman Act because in the opinion of the Court he should have been indicted under Section 14 of the Clayton Act. At the same time, the Court sustained a motion to dismiss all Robinson-Patman Act counts on the ground that Section 3 of that Act was unconstitutional. These adverse rulings were appealed to the Supreme Court which reversed the dismissal of Wise, but required further argument on the Robinson-Patman Act. The Robinson-Patman Act dismissal was finally reversed and the case proceeded to trial. The Court has set September 30, 1963 for the filing of motion for a new trial and briefs in support thereof; the Government is allowed until October 21, 1963 for its brief in opposition thereto; and defendants have been granted until October 31, 1963 for their reply brief.

Staff: Earl A. Jinkinson, James E. Mann, Robert L. Eisen, Raymond P. Hernacki, Thomas S. Howard, John T. Cusack and Howard L. Fink. (Antitrust Division)

CLAYTON ACT

Railroad Indicted Under Section 10. United States v. Boston & Maine Railroad, et al. (D. Mass.). On August 13, 1963, a grand jury at Boston returned a two-count indictment charging violations of section 10 of the Clayton Act and 18 U.S.C. 660 (originally section 9 of the Clayton Act) and naming as defendants the B&M, Patrick B. McGinnis, George F. Glacy, Daniel A. Benson, International Railway Equipment Corporation and Henry Mersey.

The indictment charges in Count I that on August 14, 1958, defendant B&M violated Section 10 of the Clayton Act by selling ten railway coaches without competitive bidding to International Railway Equipment Corporation, a corporation in which the indictment charges the railroad's president and its selling officer had a substantial interest. The indictment also charges that the individual defendants McGinnis, Glacy and Benson aided and abetted in this violation.

In Count II the individual defendants McGinnis, Glacy and Benson are indicted together with International Railway Equipment Corporation and Mersey for violations of 18 U.S.C. 660. It is alleged that defendants McGinnis, Glacy and Benson wilfully misapplied property of the B&M causing the ten coaches to be sold to International Railway Equipment Corporation for $250,000 and converted to their own use moneys, funds, credits, securities, property and assets of the B&M by accepting and retaining for their own use various payments totalling $71,500 which International Railway Equipment Corporation paid them out of $425,000 which it received from a resale of the coaches to the Wabash Railroad the next day. International Railway Equipment Corporation and Mersey, its president, are named in Count II as aiders and abettors of this violation.

Staff: John H. Dougherty and Jack Pearce (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

Clearance With Agriculture Department Before Compromising Marketing Quota Penalty Cases. Justice Department Memorandum No. 119, dated December 8, 1954 delegates authority to the United States Attorneys to compromise and close Marketing Quota Penalty claims arising under the Agriculture Adjustment Act of 1938, as amended, 7 U.S.C. 1311-1376, where the gross amount due the United States does not exceed $5,000. Paragraph E. of Memorandum No. 119 provides that no claim shall be compromised or closed by a United States Attorney without having first obtained the views of the Department of Agriculture. The enforcement of these penalties is a matter of concern to the Department of Agriculture and it has asked that the requirements of Memorandum No. 119 with respect to the compromise and closing of these claims be brought to your attention again. The general supervision of these penalty matters has been transferred from the Antitrust Division to the Civil Division of the Department of Justice.

COURTS OF APPEALS

ADMINISTRATIVE PROCEDURE ACT

District Courts Have Jurisdiction to Review Propriety of Removal of Examiners Appointed Pursuant to Section 11 of Administrative Procedure Act, 5 U.S.C. 101. McEachern v. United States. (C.A. 4, July 25, 1963). Appellant, removed from office as a hearing examiner for the Social Security Administration by order of the Civil Service Commission, sought judicial review of that order. The district court, finding that the decision of the Commission was procedurally correct, held that it was without jurisdiction to review the merits of the removal decision and accordingly, dismissed the complaint. The Court of Appeals disagreed. It recognized the general rule that the merits of a removal order are not reviewable in court but is a matter within the exclusive province of the Executive Department. However, the Court held that Section 11 of the Administrative Procedure Act (5 U.S.C. 1010) established a special exception for Hearing Examiners and made orders removing them judicially reviewable.

Staff: John C. Eldridge (Civil Division)

FORECLOSURE SALES

Trustee May Alter Terms of Foreclosure Sale by Oral Announcement Prior to Sale and Purchaser with Notice of Oral Modification Is Bound Thereby. Metals Development Co., Inc. v. United States (C.A. 5, August 13, 1963). The Small Business Administration made a loan of $250,000 to the Mongoose Gin Company, which loan was secured by contemporaneous mortgages on land, building, gin machinery and equipment. Following default and foreclosure proceedings initiated by the SBA, a sale was conducted by a substitute trustee on November 7, 1961. At 10 a.m., just prior to the sale, the substitute trustee announced

that he was selling the land and buildings only and not any machinery or equipment "of any nature." An agent for Metals was the successful bidder at $30,000. At 11 a.m. the trustee offered for sale the remainder of the mortgaged property consisting of the equipment and rolling stock in and around the buildings previously sold. The SBA was the successful bidder and thereafter endeavored to conduct an auction sale of the property it had purchased. Metals, however, characterizing the chattels as "fixtures" and appurtenances of the real estate already purchased by it, claimed title to most of that property. The United States obtained a preliminary injunction enjoining Metals from interfering with the sale, the court directing that the sale would be subject to its confirmation. The sale was subsequently held and on May 1, 1962, the court confirmed the sale, rejecting Metals $80,000 counterclaim for monies it had expended in acquiring the chattels at the auction. Metals' appealed.

The Court of Appeals affirmed. Holding first that the district court's finding that an agent of Metals had actual knowledge of the substitute trustee's oral modification of the terms of the foreclosure sale was not "clearly erroneous," the Court went on to reject the contention that the substitute trustee could not sell the chattels apart from the land and buildings. It noted that the deed of trust provided that "the said trustee, or his successor or substitute, may sell said mortgaged property either as a whole or in lots or parcels as may seem expedient ***." (Emphasis supplied by Court). Additionally, the Court held that the district court did not err in admitting parol evidence bearing on the trustees' modification of the terms of sale.

Staff: United States Attorney, Woodrow Seals and Assistant United States Attorney, Robert C. Maley, Jr. (S.D. Tex.).

SOCIAL SECURITY ACT

Parent Employed by Partnership Composed Solely of Her Children in State Which Regards Partnership as Separate Legal Entity Is Engaged in Employment Within Meaning of Social Security Act. Celebrezze v. Kilborn (C.A. 5, July 30, 1963). Claimant brought this action to review a decision of the Secretary of Health, Education and Welfare denying her claim for old-age benefits. The Secretary had found that the employment upon which claimant based her insured status was not creditable under the Social Security Act. The Act excluded from its coverage wages earned by a parent in the employ of his or her child (42 U.S.C. 410(a)(3)) and by regulation the Secretary has excluded wages earned in the employ of a partnership whose partners are all children of the wage earner. 20 C.F.R. 404.1011. As that was the situation here, coverage was denied. The district court, finding that a partnership is a separate legal entity under the law of Alabama and that the partnership, and not the individual partners, was the claimant's employer, upset the Secretary's determination. The Court of Appeals affirmed. The Court held that whether Congress intended the common-law or the Internal Revenue Code definition of partnership to apply, either required the result reached by the district court; i.e., that a partnership is a legal entity apart from its constituent partners.

Staff: Terence N. Doyle (Civil Division).

TORT CLAIMS ACT

United States May Not Be Held Liable in Tort for Discretionary Acts of Its Officers Performed in Connection With Carrying Out of Governmental Operations. Builders Corp. of America, etc., v. United States (C.A. 9, August 7, 1963). This action was brought under the Federal Tort Claims Act to recover damages for alleged loss of rental income from 275 dwelling units constructed and owned by plaintiffs near an Army Ordnance Depot in California. Plaintiff's theory was that the rental loss was attributable to the negligent failure of Army officers to encourage depot personnel to rent the dwelling units in question. In this connection, plaintiffs relied on communications between the Commanding General of the Sixth Army and the Commanding Officer of the Depot, Colonel Leavitt. Plaintiffs argued that these communications were military orders and directed Colonel Leavitt to encourage the use of plaintiffs' dwellings. Plaintiffs further alleged that Colonel Leavitt willfully and negligently failed to carry out those orders and that he in fact made representations as to the undesirability of those dwellings to the Sixth Army, the FHA and the depot personnel, resulting in a loss of rental income. The district court, finding that the Government employees had not failed to carry out orders, ruled for the Government.

The Court of Appeals affirmed. However, the Court made clear that there was no need to reach the merits of plaintiffs' claims, holding that the district court was without jurisdiction. Noting that the communications required Col. Leavitt to determine, in his discretion, the desirability of plaintiffs' dwellings for depot personnel, the Court held that his actions and statements fell within the discretionary function exception to the Tort Claims Act (28 U.S.C. 2680(a)).

Staff: United States Attorney, Cecil F. Poole and Assistant United States Attorney Robert N. Ensign (N.D. Calif.).

DISTRICT COURT DECISIONS

NEGOTIABLE INSTRUMENTS

Payee Must Bear Loss Where Its Agent, Cloaked With Apparent Authority, Affixes Rubber Stamp Endorsement Unaccompanied by Any Signature to Check and Converts Proceeds; Subsequent Endorsers Who Had Guaranteed All Prior Endorsements Relieved of Liability. Peoples Cotton Oil Co., Ltd, v. United States, Whitney National Bank of New Orleans, et al (W.D. La., May 17, 1963). (CCH 63-2 USTC ¶9549). On March 30, 1959, the United States issued a refund check in the amount of $6,523 payable to Peoples Cotton Oil Company, Ltd. The check was received by Peoples Cotton Oil Company, Ltd. through the mail at Lafayette, Louisiana on April 27, 1959, and was presented to the Guaranty Bank & Trust Company of Lafayette, Louisiana for cash negotiation by Harry Harwell, the General Manager of Peoples Cotton Oil Company, Ltd. A rubber Stamp endorsement bearing the name "Peoples Cotton Oil Company, Ltd." was affixed to the back of the check without an accompanying signature. The bank cashed the check and Harwell converted the proceeds. Guaranty then endorsed the check with a guarantee of all prior endorsements and presented it to the Whitney National Bank of New Orleans who gave credit to Guaranty. Whitney endorsed the check, guaranteeing all prior endorsements, presented it to the Federal Reserve Bank,

and received payment. Peoples Cotton Oil Company, Ltd. then made demand on the United States for payment of the amount of the check on May 4, 1960. Thereafter the United States made demand upon the prior endorsers, which demands were denied by all parties.

The District Court acknowledged that generally a rubber stamp endorsement unaccompanied by any signature without express authority is not a good endorsement. It held, however, that where the evidence established that over a long period of time many checks were cashed and handled in this manner with the knowledge of the entire board of directors of the payee corporation, even though there was no express authority given, the man cashing the checks is deemed to be clothed with apparent authority and where one or two innocent parties must suffer a loss because of his defalcation, the party who employed such defaulting individual and held him out as having the apparent authority to handle the transaction must suffer the loss. Accordingly, as the check from the United States was received by the company in due course and the proceeds delivered to its agent who had apparent authority to receive same, the indebtedness must be considered paid.

Staff: United States Attorney Edward L. Shaheen (S.D. La.).

SWITCHBLADE KNIFE ACT

Validity of Seizure of Knives Pursuant to Switchblade Knife Act (15 U.S.C. 1241-1244) by Collector of Customs Is Not Within Exclusive Jurisdiction of Customs Court; Imports Included Within Meaning of "Interstate Commerce" for Purposes of That Act. Precise Imports Corp., etc. v. Kelly & Fishman (S.D. N.Y., June 14, 1963.). A group of importers brought a declaratory judgment action against the Collector of Customs challenging his action in ordering redelivery of, and forbidding importation of certain knives. The Collector had determined that the knives were being imported in violation of the Switchblade Knife Act, 15 U.S.C. 1241-1244. Defendant moved to dismiss on the ground that the Customs Court had exclusive juridsiction over the action, while plaintiff moved for summary judgment, asserting that the imports were not in "interstate commerce" within the meaning of the Switchblade Knife Act. On June 14, 1963, the Court denied both motions.

28 U.S.C. 1583 provides in part: "The Customs Court shall have exclusive jurisdiction to review on protest the decisions of any Collector of Customs . . . excluding any merchandise from entry or delivery under any provisions of the customs laws, . . .". The Court ruled that since the Switchblade Knife Act was a criminal statute, the action of the Collector of Customs was not taken under any provision of the customs laws. With respect to whether "imports" constituted "interstate commerce," the Court, noting that 15 U.S.C. 1241(a) provides that "the term 'interstate commerce' means commerce between any State, Territory, possession of the United States, or the District of Columbia, and any place outside thereof," held that the phrase "and any place outside thereof" indicated a Congressional intent to include imports. Additionally, the Court pointed to the legislative history of the Act which indicated that Congress was aware of the fact that many switchblade knives were coming in from overseas, and concluded that there would be no reason to except these knives from the statutory prohibition.

Staff: United States Attorney Robert M. Morgenthau and Assistant United States Attorney Thomas H. Baer (S.D. N.Y.).

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Election Fraud in September 12, 1962, Primary Election, Quitman County, Georgia. United States v. Mrs. Elton S. Friedman, et al. (M.D. Ga.)

On August 12, 1963, a grand jury in Macon, Georgia, returned an indictment in two counts charging two members of the Quitman County Democratic Executive Committee and four election officials with frauds in the September 12, 1962, Senatorial primary election in Georgetown, Quitman County, Georgia.

The first count, under 18 U.S.C. 241, charges all six individuals with conspiring to cast and count and to permit others to cast and count forged, fraudulent and fictitious votes for the duly qualified candidates for nomination to the office of United States Senator from the State of Georgia and thereby to dilute, diminish and destroy the value and effect of the votes legally cast.

The second count charges the four poll officials with a substantive violation of 18 U.S.C. 242, and the two members of the Democratic Executive Committee with wilfully aiding, abetting and counseling the poll officials in the commission of the offense.

An extensive investigation revealed that ballots were cast in the names of at least two dead people and that numerous ballots were voted in the names of people who no longer lived in Quitman County and were not qualified to vote there.

Staff: United States Attorney Floyd M. Buford (M.D. Ga.); Henry Putzel, Jr., William J. O'Hear (Civil Rights Division).

* * *

CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

GRAND JURY

Administration of Oaths to Witnesses Appearing to Testify Before Federal Grand Juries. It has recently been brought to the attention of the Criminal Division that in some districts United States Attorneys have been administering the oaths to witnesses appearing before Federal grand juries. It should be noted that Rule 6(c), Federal Rules of Criminal Procedure, provides that the foreman, and in his absence the deputy foreman, is authorized to administer the oath. It is the opinion of the Criminal Division that the United States Attorney is not empowered to administer the oath, nor can the foreman delegate his power to the United States Attorney. Where the United States Attorney has so acted, the oath has been improperly administered, and any false testimony given by such witness could not properly form a basis for a subsequent perjury indictment.

LABOR-MANAGEMENT REPORTING DISCLOSURE ACT SECTION 501(c)

Constitutionality Not Decided Since Defendant Not Prejudiced; Circumstantial Evidence Sufficient to Prove Embezzlement etc.; Proof of Demand for Accounting and Defendant's Refusal to Account Unnecessary for Conviction; Refusal of Requested Instructions Not Error. Henry Taylor v. United States (C.A. 9, June 21, 1963). Defendant, Henry Taylor, was tried under a twenty-three count amended information charging violations of Section 501(c) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 501(c). He was manager of the Hawaiian branch of the American Guild of Variety Artists (Guild). He appealed from a judgment of conviction and sentences entered upon a jury verdict of guilty on each count except the third.

Defendant first contended that because Section 501(c) provides for a fine of not more than $10,000 or imprisonment for not more than five years, or both regardless of the amount embezzled, stolen, abstracted or converted, in light of other Federal statutes which prescribe a lesser penalty for the embezzlement, stealing or purloining of less than $100 or of property worth less than $100, Section 501(c) violates the Due Process Clause of the Fifth Amendment as being discriminating against persons employed by labor organizations. The Court of Appeals on its own motion refused to decide this question holding that the statute is not unconstitutional as applied to defendant. On counts I, II, XI, and XII where the amounts involved were in excess of $100, defendant was sentenced to prison for three years on each count, sentences to run concurrently. Similar three-year concurrent sentences were imposed on convictions under other counts where the amount was less than $100. Defendant was, therefore, not prejudiced even assuming the lesser sentence was constitutionally required. He must serve

the concurrent three-year sentence on Counts I, II, XI, and XII and the sentences on the other Counts have added nothing to his penalty.

Secondly, defendant argued that the verdict was not supported by substantial evidence. The proof was sufficient to warrant a jury finding that defendant, appointed Hawaiian Branch Manager of the Guild, received checks in varying amounts from present and prospective Guild members for payment of dues and initiation fees, and that contrary to specific instructions he cashed the checks instead of depositing them, withheld the cash and made no record in the books of the Guild. Defendant, having testified to legitimate reasons for his conduct in regard to the money, the Court of Appeals denied his contention that the Government must prove beyond a reasonable doubt, by direct evidence only, that he intended to and did embezzle, steal or unlawfully and wilfully abstract or convert to his own use moneys of the Guild. The Court said that such a state of mind is generally not susceptible of direct proof, but must be inferred from facts and circumstances attending the act and that there is evidence here from which such an inference may be drawn. The jury was not required to believe the testimony of the defendant even though he was uncontradicted. Continuing, the Court maintained that no proof of a demand for and refusal to account needed to be shown here because the jury could find that the time for payment was definitely fixed and that defendant did not make the payments within that time or at all prior to the discovery of the shortages.

Finally, the Court of Appeals held that the refusal to give certain requested instructions did not constitute error since the substance of the three requested instructions was amply charged in other instructions.

Staff: United States Attorney Herman T. F. Lum; Assistant United States Attorney T. S. Goo (D. Hawaii).

FEDERAL FOOD, DRUG AND COSMETIC ACT

Drug Manufacturing Firm Enjoined From Engaging in Manufacturing Under New Amendment to Act. United States of America v. Bolar Pharmaceutical Co., Inc., et al. (E.D. N.Y., July 1963). This was an action by the Government for a permanent injunction under 21 U.S.C. 332(a) to enjoin and restrain defendant drug manufacturer from violating 21 U.S.C. 331(a). Bolar Pharmaceutical Co., Inc., a small drug manufacturer in Brooklyn, New York, commenced operations in 1959. Investigation by the Food and Drug Administration disclosed that the firm was manufacturing potent drugs in tablet form under unsafe and poor drug manufacturing conditions such as inadequate dust control, machinery and equipment, overcrowding, inadequate qualified personnel, failure to maintain clean equipment and failure to make and keep records. Subsequent periodic inspections showed that the corporation's business expanded but the poor manufacturing conditions continued, notwithstanding repeated warnings and several seizures of the firm's adulterated and misbranded drugs in interstate commerce.

The Food, Drug and Cosmetic Act (21 U.S.C. 351) was amended effective May 15, 1963, to include a provision [s 351(a)(2)(B)] that a drug is adulterated if it is manufactured under conditions "not in conformity with current good manufacturing practices". Food and Drug inspections made subsequent to May 15, 1963, constituted a part of the Government's case for the injunction. On June 20, 1963, Judge Dooling signed an ex parte order temporarily restraining defendants from engaging in such practices. This order was continued until July 25, 1963 when defendants consented to a decree of permanent injunction enjoining them from engaging in violations of the Act. As a result, Bolar Pharmaceutical is presently winding up its business.

This was the first case filed in which the Government sought to enforce the newly enacted section 351(a)(2)(B). The most persuasive reason why defendants consented to a decree of injunction was that under the new amendment the Government need not show specific instances of drug adulteration, but need only show that the drugs were being manufactured under conditions "not in conformity with current good manufacturing practices".

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorney George V. O'Haire (E.D. N.Y.)

IMPERSONATION

Reserve Officers Considered Officers Within Meaning of 18 U.S.C. 912; Definition of "Officer or Employee of the United States". United States v. Allen Gibraltar Harris (D. Md., August 17, 1963). In a petition for relief under 28 U.S.C. 2255, a prisoner claimed that his conviction under 18 U.S.C. 912, for impersonating a Lieutenant Colonel in the United States Air Force Reserves, was void in view of 5 U.S.C. 30r(d), which states that a Reserve "not on active duty, or . . . on active duty for training, . . . is not considered to be an officer or employee of the United States," etc. Chief Judge Roszel C. Thomsen, in dismissing the petition, held that 5 U.S.C. 30r(d), despite its broad wording, does not "eliminate from the coverage of 18 U.S.C.A. 912 a group of persons--reserve officers and enlisted personnel in the various Armed Forces Reserves--who are quite as clearly within the purpose of 18 U.S.C.A. 912 as officers and enlisted personnel in the active Armed Forces." The holding was based on the placement of 5 U.S.C. 30r(d) in the United States Code, as one of a series of statutes dealing with leaves of absence, annual leave, sick leave, and conflicts of interest, and on the legislative history of the codification, wherein the provision had been explicitly described as "of limited applicability."

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

NARCOTICS

Possession and Sale of Narcotics; Setting Price, Having Final Say as to Means of Transfer, or Having Ability to Assure Transfer Is Sufficient

Evidence to Support Finding of Constructive Possession. United States v. Douglas (C.A. 2, June 25, 1963). Appellant, Robert Walter Douglas, appealed from a conviction entered by the United States District Court for the Southern District of New York upon an indictment charging him, in two counts, with possession and sale of narcotics in violation of the Federal narcotics statute and with conspiracy to violate the statute. 21 U.S.C. 173, 174. He was sentenced to serve five years in prison on each count, the sentences to run concurrently. The evidence showed that appellant quoted various prices for various grades of heroin to a special narcotics agent, fixed the purchase price, accepted payment in advance from the agent and brought about the appearance of his co-defendant and the delivery of the narcotics within hours of his original conversation with the agent. These facts were held by the Court of Appeals, in a per curiam opinion affirming the conviction, to amply indicate the existence of a working relationship between the co-defendants sufficient to support a finding that Douglas had constructive possession of the narcotics, United States v. Hernandez, 290 F. 2d 86, 90 (C.A. 2, 1961), and bring the case within the exception set forth in United States v. Jones, 308 F. 2d 26, 31 (C.A. 2, 1962), that constructive possession may well be proved by "evidence showing that a given defendant set the price for a batch of narcotics, had the final say as to means of transfer, or was able to assure delivery."

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorneys John S. Martin, Jr. and Arnold N. Enker (S.D. N.Y.)

Ample Evidence to Support Convictions for Conspiracy to Smuggle and Smuggling Narcotics into United States; Affirmance of Convictions on Two Counts Necessarily Requires Reversal of Conviction on Count for Being Transferees of, and Failing to Pay Required Transfer Tax on Same Narcotics. Juan Marques-Anaya v. United States, (C.A. 5, June 25, 1963). The two defendants, who appealed, with two others who pleaded guilty, were tried and convicted under all three counts of an indictment which charged them with conspiracy to smuggle narcotics into the United States (Count I), smuggling narcotics into the United States in violation of 21 U.S.C. 1760 (Count II), and being transferees of such narcotics and failing to pay the required transfer tax in violation of 26 U.S.C. 4741(a), 4744(a)(2) (Count III). The Court of Appeals held in a per curiam opinion that evidence showing that the four persons named in the indictment held several meetings in Mexico at which plans were formulated to bring sixteen pounds of marihuana to the United States from Mexico; that they agreed not to act themselves, but instead hired another who drove across the border in a truck which contained the marihuana concealed in one of its tires; that they then met the truck driver in Texas in order to consummate the transaction; and, that they were apprehended soon thereafter by authorities who had trailed the truck from the border, was ample evidence to support the convictions on Counts I and II. However, because the convictions on Counts I and II, supported by ample evidence, were predicated upon defendants' having acquired the marihuana in Mexico while convictions on Count III were based upon their having obtained the same marihuana within

the United States, the obvious inconsistency of a guilty judgment on Counts I and II and Count III required, on the authority of Thomas v. United States, 314 F. 2d 936 (C.A. 5, 1963), reversal of the convictions on Count III.

Staff: United States Attorney Ernest Morgan; Assistant United States Attorney Andrew L. Jefferson, Jr. (W.D. Texas)

Decision in Prior Appeal Does Not Preclude Proof That Evidence Was Obtained Through Information Independent of Prior Illegal Search; Such Proof May Be Made by Testimony of Agents Who Received Information From Informer Later Unavailable; Failure to Strike Testimony of Prosecution Witness Upon Government's Failure to Produce Signed Statement Allegedly Made by such Witness, Not Reversible in Circumstances of Case. United States v. Paroutian, (C.A. 2, June 26, 1963). Defendant, Antranik Paroutian, was convicted in the United States District Court for the Eastern District of New York upon a two-count indictment charging separate violations of the Federal narcotics statute, 21 U.S.C. 174. He was sentenced to 20 years' imprisonment on each count, the sentences to run concurrently, and to pay a fine of $20,000 on each count, or a total of $40,000. A prior appeal resulted in a reversal of his conviction on the grounds that evidence seized during two unlawful searches had been illegally introduced and that a quantity of heroin introduced was "not shown to be other than fruit from the poisoned tree". United States v. Paroutian, 299 F. 2d 486 (C.A. 2, 1962). The heroin had been found in a secret compartment of a cedar-lined closet which, although broken open by agents during a third search was noticed by them during one of the previous unlawful searches. Upon remand, the District Court correctly permitted the Government to prove that the information which led to the discovery of the heroin in the cedar-lined closet had a source independent from the previous illegal searches. The Court of Appeals decision on the first appeal did not order suppression of this evidence but instead recognized the Government's opportunity upon remand to establish such an independent source.

The manner by which the Government was permitted to prove the independent origin of the information was also contested by defendant. The information was obtained from an informer who, at the time of the second trial, had disappeared, one of the agents being of the opinion that he had been murdered. The Court of Appeals held that the disappearance of the informer and his unavailability for cross-examination did not preclude the Government from making use of the information he gave. Two agents testified to receipt of the information. The question of their credibility was for the judge after cross-examination by defendant, and the unavailability of an impeaching witness, did not require automatic exclusion.

Finally, the Court held that there was no cause for reversal because the trial judge failed to strike the testimony of a prosecution witness [under the Jencks Act, 18 U.S.C. 3500(d)] after the Government failed to produce a statement which the witness allegedly gave to an Assistant United States Attorney and signed before trial. The witness' testimony

concerning the alleged statement was equivocal and uncertain. The Government informed the Court that its files contained no such statement; the Assistant United States Attorney testified he did not remember taking such a statement; and defendant let the matter rest without moving (1) to strike the testimony, (2) for a finding that the alleged fact existed, and (3) for an order that the Government produce its file on the witness.

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorney Jerome C. Ditore (E.D. N.Y.)

Information from Reliable Informer Concerning Arrival of Suspect With Narcotics Constitutes "Reasonable Grounds" for Lawful Arrest and Evidence Obtained From Search Pursuant Thereto Validly Admitted; Since Irrelevant Testimony Solicited on Direct Examination, Cross-examination on Same Subject Is Proper; Failure to Object to Hearsay Testimony Constitutes Waiver; Admissions Against Interest Not Tantamount to Judicial Confession and Require No Foundation. Henry Monroe v. United States (C.A. 5, July 18, 1963). Defendant, Henry Monroe, was indicted, tried and convicted on two counts of a three-count indictment charging a violation of 21 U.S.C. 174 and 26 U.S.C. 4724 relative to the possession and transportation of narcotics. He was sentenced to twelve years' imprisonment on the first count and 10 years on the second, the sentences to run concurrently.

The District Court had denied the defendant's motion to suppress evidence, 1764 capsules of heroin, discovered during a search of his person following his arrest on November 18, 1961, after he alighted from a train in New Orleans. The Court of Appeals affirmed the District Court opinion United States v. Monroe, 205 F. Supp. 175 (E.D. La., 1962), which held that the arrest and search incident thereto were lawful. The arrest was the culmination of a three-month investigation which began on information received from a reliable informer and who advised agents that the defendant was due to bring a supply of narcotics from Chicago to New Orleans on or about November 15, 1961. The arrest without a warrant was lawful under 26 U.S.C. 7607 which authorizes the arrest without a warrant where the violation is committed in the presence of the arresting person or "where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation." The agents had reasonable grounds for this arrest; it was lawful whether or not as the defendant contended, the agents had an opportunity to secure a warrant. The arrest being lawful, the search incident thereto was lawful and the motion to suppress was correctly denied.

The Court, on the defendant's contention that admissions obtained by the Government on cross-examination of defendant were thoroughly irrelevant in a hearing on a motion to suppress and thus were improperly obtained, held that since similar testimony was solicited on direct examination by his own counsel the cross-examination relating thereto was proper. Similarly, defendant's contention that the testimony of the agent to the effect that the agents had reliable information about the defendant's arrival in New Orleans was hearsay and should have been excluded, was held to be

without merit since the answers by the agent were solicited by defendant's own counsel which constituted "opening the door" for the answers solicited by Government counsel. Moreover, defendant's counsel did not object to the testimony. The trial Court committed no error.

Finally, the Court of Appeals determined that the admissions against interest in the testimony of the defendant at the hearing on the motion to suppress are not tantamount to a judicial confession and thus are admissible without the necessity of the Government laying a foundation prior to their admission into evidence.

Staff: United States Attorney Louis C. La Cour; Assistant United States Attorney Peter E. Duffy (E.D. La.).

UNIVERSAL MILITARY TRAINING AND SERVICE ACT

Class 1-A-O; Conscientious Objector Available for Noncombatant Military Service Only; Specific Authorization Required Before Instituting Criminal Proceedings. In Harshman v. United States, 372 U.S. 607, and Parker v. United States, 372 U.S. 608, the Supreme Court vacated the judgments of the United States Court of Appeals for the Seventh Circuit (Harshman reported at 307 F. 2d 590; Parker reported at 307 F. 2d 585) and remanded the cases to the United States District Court for the Northern District of Illinois with instructions to dismiss the indictments.

In view of that action, under no circumstances should criminal proceedings be initiated without specific authorization from the Criminal Division in any case where a registrant in Class 1-A-O is alleged to have refused to submit to induction. Criminal proceedings should be held in abeyance in any such case where an indictment is outstanding, and the matter should be immediately referred to the Criminal Division.

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

IMMIGRATION

Immigration and Naturalization Service Has No Predetermined Government Policy Against Granting Relief to Alien Crewmen. Dombrovskis et al v. Esperdy (C.A. 2, August 7, 1963.) Appellants are Yugoslav and Latvian seamen who appealed from judgments of the district court which dismissed their claims that they were unlawfully denied adjustment of status to permanent residents under Section 245 of the Immigration and Nationality Act, 8 U.S.C. 1255, and stays of deportation under Section 243(h) of the same Act, 8 U.S.C. 1253(h). Their appeals were dismissed.

Appellants admitted being deportable. They alleged in both claims that various adverse administrative determinations by the Immigration and Naturalization Service affecting their immigration status had been made not on the merits of their individual applications, but as the result of a predetermined Government policy against granting relief to aliens who entered the United States as crewmen.

The Second Circuit ruled that the first claim was properly dismissed by the lower court for failure to join the Secretary of State as party defendant. Appellants' Section 245 applications were denied by the Service because they had not showed that immigrant visas were available to them. Appellants had applied unsuccessfully to the State Department for "refugee-escapee" visas. Before the lower court they contended that the denial of such visas had resulted from an unlawful policy directive from the Attorney General to the Department of State that "refugee-escapee" visas be denied to crewmen. The lower court held that the Secretary of State was an indispensable party defendant and that since the Secretary neither had been nor could be joined, appellants' first claim should be dismissed.

Appellants' second claim arose from the denial by the Service of their applications for stay of deportation. They argued that the applications were denied, not because they would not suffer physical persecution if deported, but because of an unlawful policy of the Service to deny stays of deportation to all alien crewmen. The appellate court found it sufficient to say that it completely agreed with the lower court's conclusion that appellants wholly failed to adduce any proof that their applications were prejudged pursuant to an unlawful policy to exclude crewmen from relief under Section 243(h).

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

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

TOP DISTRICTS IN LANDS WORK 1963

After a careful analysis of the work of each United States Attorney's office for the last fiscal year, the Lands Division has determined that the following districts (which are listed in alphabetical order) performed the most outstanding work in lands matters:

California, Southern
Georgia, Middle
Idaho
Illinois, Northern
Indiana, Southern
Iowa, Southern
Kansas
Missouri, Western
Nebraska
New Hampshire
New Jersey
Oklahoma, Eastern
Oklahoma, Northern
Pennsylvania, Middle
Texas, Northern

In determining the districts named, the importance and quantity of lands work pending, the attorney power available for the task, and the quality and quantity of the work performed were considered. Important criteria were:

(1) Quality of legal representation as evidenced by pleadings, briefs, trial transcripts, letters and direct contact;

(2) Efficient and systematic effort to settle or litigate cases;

(3) Fair settlement or trial results;

(4) Efficient coordination with the Lands Division.

In addition to high quality and efficient work, the gross product of these 15 districts in condemnation cases exceeded the goals set. While a few other districts performed as well or better than the districts chosen in terms of statistics, for overall performance, these districts are believed to have excelled. Thus, a number of the districts exceeded their goals to a greater degree than those selected but considering matters such as the attorney power available to accomplish the task, the districts did not meet the general achievement level of the districts chosen.

Not all of the districts selected had a heavy Lands caseload. For example, the district of Idaho had only 44 tracts pending at the beginning of last fiscal year and its goal was 44 tracts. The district received 22 new tracts during the year and it closed 50 tracts. The 16 tracts pending at the end of the fiscal year were but a few months old -- the situation which we hope will soon prevail in all districts. Idaho had only a few Lands Division cases in addition to condemnation, but all were handled with expedition and excellence.

Seventy districts closed more tracts last year than were received. Many closed more than had been closed in the past five years combined. The Department is deeply appreciative of the diligent and time-consuming work which went into making fiscal year 1963 outstanding.

Indians: Tribal Membership; Lack of Federal Court Jurisdiction to Interfere With Distribution of Indian Claims Commission Judgment; Inapplicability of 28 U.S.C. 1361, P.L. 87-748. Prairie Band of Pottawatomie Tribe, et al. v. Mage N. Puckkee, et al. (C.A. 10, August 7, 1963). Certain members of the Prairie Band of the Pottawatomie Tribe brought suit against the tribal governing body and officials of the Interior Department, alleging, in substance, that the tribal roll, prepared by the tribal government with approval of Interior to serve as a basis for a per capita distribution of tribal judgment funds, contained many Indians who were not descendants of tribal members in 1846 and 1860; and that the judgment of the Indian Claims Commission awarding the funds to be distributed was only for the benefit of the descendants of those original members. The district court dismissed for lack of jurisdiction and the Tenth Circuit affirmed.

The Court of Appeals held that 28 U.S.C. 1353 had no application since it conferred federal jurisdiction only for suits for allotments in the first instance. The Court then held that under the Gully v. First National Bank rule, 299 U.S. 109, no substantial federal question was involved. The fact that the suit involved the construction of a judgment of a federal court (The Indian Claims Commission) did not, for that reason, create a federal question and the federal appropriation statute that paid the judgment does not purport to control or condition the distribution of the funds. The Court noted that this is nothing more than a private civil dispute between Indians of the same Band and federal jurisdiction over such controversies has traditionally been denied.

Appellants' attempt, on appeal, to find jurisdiction under the new mandamus provision in 28 U.S.C. 1361 was rejected with the observation that the Secretary of the Interior and the Commissioner of Indian Affairs were indispensable parties and, although named as defendants, they were never served.

Staff: Richard N. Countiss (Lands Division).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

SPECIAL NOTICE

Bail - Additional Bail. Requests for additional bail have been made in two criminal cases in the past few months. In one instance, defendant's attorney complained that the proceedings were ex parte and arbitrary. Because there is little recorded direction as to the proper procedure, the following is suggested to insure fair treatment of tax defendants and at the same time protect the Government's interest.

A statutory basis for requesting additional bail is set forth in 18 U.S.C. 3143 as follows:

> When proof is made to any judge of the United States, or other magistrate authorized to commit on criminal charges, that a person previously admitted to bail on any such charge is about to abscond, and that his bail is insufficient, the judge or magistrate shall require such person to give better security, or for default thereof, cause him to be committed; and an order for his arrest may be indorsed on the former commitment, or a new warrant therefor may be issued, by such judge or magistrate, setting forth the cause thereof.

Obviously this statute envisions the summary ex parte submission of proof to a judge or committing magistrate. Such ex parte procedure is, of course, necessary where there is reason to anticipate imminent flight from the jurisdiction by a person previously admitted to bail. In the usual case, however, the United States Attorney should be able to notify taxpayer's attorney or the bail bondsman and still make prompt proof to the court or magistrate. If time permits, the request for additional bail should be made by formal written petition to the court and notice to counsel or bondsman. Except where flight from the jurisdiction is a reasonable possibility, a minimum notice by telephone should be given.

CIVIL TAX MATTERS
District Court Decisions

Suit for Injunction Against Collection of Taxes by District Director Barred by Section 7421; 100% Penalty Assessment Under Section 6672 Within Purview of Prohibition of Section 7421; Irreparable Injury Alone Insufficient to Lift Bar of Section 7421. J. E. Ashworth v. George O. Lethert, District Director. (D. Minn. May 14, 1963.) (CCH 63-2 USTC ¶9504.) The suit involved here was one by a former corporate officer seeking to enjoin the Internal Revenue Service from collecting an assessment made against him for a 100% penalty assessment under Section 6672 of the Internal Revenue Code of 1954 for his willful failure to withhold, collect and turn over to the Internal Revenue Service withholding and social security taxes of the corporation.

The Government moved to dismiss the suit as being barred by Section 7421(a) of the Internal Revenue Code of 1954 which provides in part that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." Plaintiff admitted that if Section 7421 applied, the suit should be dismissed; however, he contended that the bar of Section 7421(a) applies only to taxes and not penalty assessments made under Section 6672 of the Code. The District Court in granting the motion to dismiss held that the penalty assessments under Section 6672 are within the purview of the inhibition under Section 7421 against suits to restrain the assessment or collection of taxes and cited in support thereof the recent Second Circuit case of Botta v. Scanlon, 314 F. 2d 392, which recognized that the overwhelming weight of authority supports the view that a penalty assessment under Section 6672 is "simply a means for insuring that the tax is paid" and is not a criminal penalty. The Court also observed that the mere showing of irreparable injury is insufficient to overcome the barrier of Section 7421(a). Enochs v. Williams Packing Co., 370 U.S. 1 (1960).

Staff: United States Attorney Miles W. Lord (D. Minn.); and Frank J. Violanti (Tax Division).

Internal Revenue Service Summons: Motion to Quash Denied For Failure of Witness to Show Demand Was Unreasonable or Immaterial. Mere Appearance in Response to Summons Does Not Violate Fifth Amendment Rights of Witness. In re McLott (E.D. Mich., March 5, 1963.) (CCH 63-2 USTC ¶9535). This action involves a motion brought by a third party (McLott) to quash an Internal Revenue Service summons addressed to him in connection with the tax liability of Mr. and Mrs. Rolland B. McMasters. Demanded were records of McLott for the years 1956 to 1960 consisting of flight log books, cash receipts records, invoices, etc. McLott instead of responding to the summons, brought a motion to quash the summons alleging that the summons was vague, indefinite, lacking in specific inquiry, and oppressive.

The Court found that the summons was issued pursuant to lawful authority under Section 7602 of the Internal Revenue Code of 1954, was specific in its demand, and relevant to the inquiry at hand, namely, the tax investigation of the McMasters.

The Government contended that the District Court was without jurisdiction to entertain the motion to quash; however, the Court tacitly rejected this contention by denying the motion to quash the summons. Accord: Application of Colton, 291 F. 2d 487 (C.A. 2, 1961). Contra: Reisman v. Caplin, 317 F. 2d 123 (C.A. D.C., 1963).

Although the demanded records related to years for which an assessment is barred under Section 6501 of the Internal Revenue Code, the Court held that the demand was neither onerous, oppressive or irrelevant. The Court reasoned that an affirmative showing of probable cause for an administrative summons is not required and that unless it could be shown that the demand is unreasonably oppressive or that the information sought is immaterial or irrelevant to the investigation, a District Court would not be justified in granting the motion to quash or any other relief.

It is pertinent to note that in a similar factual situation involving a summons enforcement action, the Court of Appeals for the Sixth Circuit reached the same conclusion. United States v. Bayard Edward Ryan, decided 8/1/63, 63-2 USTC ¶9635, 12 AFTR 5313.

Staff: United States Attorney Lawrence Gubow and Assistant United States Attorney William H. Merrill(E.D. Mich.); Frank J. Violanti (Tax Division).

Florida Judgment Creditor Has No Lien On Personal Property Not Specifically Described in Writ of Execution Issued on Judgment and Therefore Cannot Attack Application of Such Property to Tax Liability Although Application Made to Federal Tax Lien Filed Subsequent to Recordation of Judgment. United States v. American Casualty Co. of Reading, Pa.. (S.D. Fla., Decided July 1, 1963.) (CCH 63-2 USTC ¶9617). This action was for determination of relative rights to proceeds of a distraint sale of personal property belonging to a delinquent taxpayer. Defendant, a judgment creditor of taxpayer, had recorded such judgment subsequent in time to several tax liens but prior to others.

The Court held that in Florida a judgment creditor not specifically levying upon personal property has no lien thereon, and as to such property is a mere general creditor. Defendant therefore had no standing in Court to contest the Government's action in first applying the proceeds from the distraint sale to one of its various tax liens which were later in point of time to the writ of execution, rather than to its liens antedating the date of this writ. This result followed from the fact that defendant had not particularly levied on the involved personal property and hence had no lien thereon. The Court indicated that inasmuch as the distraint sale produced an involuntary payment, defendant might have been allowed to question the application and require certain adjustments had it held a lien on the property. Defendant's lack of a lien distinguished this case from Commercial Credit Corporation v. Schwartz (D.C. E.D. Ark., 1955) 130 F. Supp. 524. Although the Court considered the merits of defendant's right to challenge the application, it nevertheless held there was no jurisdiction in the Court over the counterclaim attempting to assert this alleged right.

Staff: United States Attorney Edith House and Assistant United States Attorney Lavinia L. Redd (S.D. Fla.); Raymond L. McGuire and Charles A. Simmons (Tax Division).

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