Published by Executive Office for United States Attorneys,
Department of Justice, Washington, D. C.

November 15, 1963

United States

DEPARTMENT OF JUSTICE

Vol. 11 No. 22

UNITED STATES ATTORNEYS

BULLETIN

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OBITUARY

It is with regret that the Executive Office for United States Attorneys announces the death of United States Attorney James P. O'Brien, Northern District of Illinois, on November 6, 1963. Mr. O'Brien, born in Chicago, Illinois, attended Northwestern University and received his LL.B. degree from National University Law School in Washington, D.C. He entered Government service in 1938 as an attorney in the Criminal Division of the Department of Justice, and rose to the position of Chief of the General Crimes Section of that Division. During World War II he served as a Lieutenant in the United States Navy. Appointed as United States Attorney for the Northern District of Illinois on March 17, 1961, Mr. O'Brien was one of the first two United States Attorneys nominated by President Kennedy.

A dedicated career employee during his service in the Department, Mr. O'Brien's tenure as United States Attorney was marked by outstanding achievement and devotion to duty.

JUDICIAL APPOINTMENT

On November 4, 1963, the nomination of United States Attorney Bernard T. Moynahan, Jr., Eastern District of Kentucky, to be United States Judge for that District was confirmed by the Senate.

MONTHLY TOTALS

During the month of September totals in all categories of work rose, with the exception of criminal and civil matters. The decrease in matters was reflected in the case increase, as matters progressed to the court stage. The greatest increase was in criminal cases, and the fairly low increase in civil cases was encouraging. The aggregate of pending cases and matters rose by 809 items during the month, but this was some 350 items less than the increase which occurred in August. Set out below are comparative totals for August and September, 1963.

	August 31, 1963	September 30, 1963	
Triable Criminal	8,774	9,506	+ 732
Civil Cases Inc. Civil Less Tax Lien & Cond.	15,684	15,954	+ 270
Total	24,458	25,460	+ 1,002
All Criminal	10,320	11,092	+ 772
Civil Cases Inc. Civil Tax & Cond. Less Tax Lien	18,331	18,563	+ 232
Criminal Matters	13,952	13,802	- 150
Civil Matters	13,936	13,891	- 45
Total Cases & Matters	56,539	57,348	+ 809

The first three months of the fiscal year compare favorably with the same period of the previous fiscal year. Total filings were up by some 3 per cent. Most of this increase was due to the almost 9 per cent rise in civil case filings. Civil terminations, however, were up almost 6 per cent over the prior year. Despite the large increase in the civil case filings, the total number of civil cases pending dropped by 145 cases, and the pending caseload increased by less than 1 per cent. The slight drop in civil cases pending is encouraging because this type of case represents approximately two-thirds of the pending caseload. Until civil case terminations catch up with, and exceed, civil case filings, the number of pending civil cases will continue to increase. The increase in this category each month is usually not very large but the cumulative increase at the end of the year is quite substantial, and we find that the civil caseload has risen by another one or two thousand cases. If the number of civil terminations each month would consistently outpace the number of filings, substantial inroads would be made in the civil caseload. Set out below is a comparison of activity for the first three months of fiscal 1963 and 1964.

	First 3 Months Fiscal Year 1963	First 3 Months Fiscal Year 1964	Increase or Decrease Number	%
Filed				
Criminal	7,921	7,862	- 59	- 0.75
Civil	6,386	6,951	+ 565	+ 8.85
Total	14,307	14,813	+ 506	+ 3.54
Terminated				
Criminal	6,461	6,660	+ 199	+ 3.08
Civil	5,573	5,901	+ 328	+ 5.89
Total	12,034	12,561	+ 527	+ 4.38
Pending				
Criminal	10,780	11,075	+ 295	+ 2.74
Civil	23,684	23,539	- 145	- 0.61
Total	34,464	34,614	+ 150	+ 0.44

The following table of filings and terminations shows that filings are showing a more substantial edge over terminations. In July, filings were only 371 ahead of terminations. In August, this increase had tripled to a difference of 850, and in September the gap between filings and terminations was over 1100. Should this imbalance continue for the remaining nine months of the year, the effect on the pending caseload as of June 30, 1964 is self-evident.

	Filed			Terminated		
	Crim.	Civil	Total	Crim.	Civil	Total
July	2,252	2,456	4,708	2,305	2,129	4,434
Aug.	2,245	2,228	4,473	1,771	1,852	3,623
Sept.	3,365	2,267	5,632	2,584	1,920	4,504

For the month of September, 1963 United States Attorneys reported collections of $3,931,457. This brings the total for the first three months of this fiscal year to $11,239,522. This is an increase of $2,067,744 or 22.54 per cent over the $9,171,778 collected during that period.

During September $2,373,162 was saved in 78 suits in which the government as defendant was sued for $3,017,325. 40 of them involving $1,195,552 were closed by compromises amounting to $496,092 and 11 of them involving $466,366 were closed by judgments amounting to $148,071. The remaining 27 suits involving $1,355,407 were won by the government. The total saved for the first three months of the current fiscal year was $12,469,362 and is an increase of $1,732,072 or 16.13 per cent over the $10,737,290 saved in the first three months of fiscal year 1963.

The cost of operating United States Attorneys' Offices for September, 1963 amounted to $4,314,542 as compared to $3,827,750 for September, 1962.

DISTRICTS IN CURRENT STATUS

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

CASES

Criminal

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

CASES

Civil

Ala., N.	Colo.	Ill., S.	Ky., E.	Miss., N.
Ark., E.	Fla., N.	Ind., S.	Ky., W.	Mo., E.
Ark., W.	Fla., S.	Iowa, S.	Mass.	Mo., W.
Calif., S.	Hawaii	Kan.	Minn.	N. J.

CASES (Contd.)

Civil (Contd.)

N. Y., E.
N. C., M.
N. C., W.
Ohio, N.
Ohio, S.
Okla., N.
Okla., E.
Okla., W.
Oregon
Pa., E.
Pa., W.
P. R.
S. C., E.
S. C., W.
Tenn., E.
Tenn., M.
Tenn., W.
Tex., N.
Tex., E.
Tex., S.
Tex., W.
Utah
Vt.
Va., E.
Va., W.
Wash., E.
Wash., W.
W. Va., N.
W. Va., S.
Wyo.
C. Z.
Guam
V. I.

MATTERS

Criminal

Ala., N.
Ala., M.
Ala., S.
Alaska
Ariz.
Ark., E.
Ark., W.
Calif., S.
Colo.
Del.
Fla., N.
Ga., M.
Ga., S.
Idaho
Ill., E.
Ill., S.
Ind., N.
Ind., S.
Iowa, N.
Iowa., S.
Ky., E.
Ky., W.
La., W.
Me.
Md.
Miss., N.
Miss., S.
Mont.
Nev.
N. H.
N. J.
N. Mex.
N. C., M.
N. C., W.
N. D.
Okla., N.
Okla., E.
Okla., W.
Pa., E.
Pa., W.
S. C., E.
S. C., W.
S. D.
Tenn., M.
Tenn., W.
Tex., N.
Tex., E.
Tex., S.
Tex., W.
Utah
Vt.
Va., W.
Wash., W.
W. Va., N.
W. Va., S.
Wis., W.
Wyo.
C. Z.
Guam

MATTERS

Civil

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

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ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

TRAVEL TO INTERVIEW WITNESSES AND DEVELOP INFORMATION

Requests for travel authority to interview witnesses outside the district are increasing daily. This is a new development since it has been customary in the past for the investigatory agencies to conduct such interviews and develop the necessary information required by the United States Attorneys' offices.

Some of these requests involve foreign as well as domestic travel at considerable expense of time and money.

The cost of such travel has increased to such a point that stricter controls are necessary and each request must be carefully scrutinized and justified strongly if it is to be approved.

The U. S. Attorneys' offices have enough to do in preparing cases and directing investigations to develop the facts. Therefore, unless there are strong and compelling reasons to interview witnesses in distant areas, all requests to do so will be denied unless it is clearly established that the local U. S. Attorney's office or the interested investigatory agency cannot handle the matter and that the trip is absolutely vital to the preparation of the case.

Very often your purposes can be served by requiring witnesses to report a day or two before the trial for conferences or interviews.

Unless we receive your cooperation in this effort to reduce travel costs, we may be faced with the prospect of shutting off all travel toward the end of the fiscal year.

The following Memoranda and orders applicable to United States Attorneys offices has been issued since the list published in Bulletin No. 18, Vol. 11 dated September 20, 1963:

MEMO	DATED	DISTRIBUTION	SUBJECT
354	8-29-63	U.S. Attorneys	Securing Tax Returns From Internal Revenue Service
355	8-26-63	U.S. Attorneys & Marshals	Psychiatric Examinations & Testimony
356	8-29-63	U.S. Marshals	Revised Method of Computing Premium Compensation
357-S1	9-27-63	U.S. Attorneys & Marshals	Voluntary Payroll Deductions for State Income Tax

MEMO	DATED	DISTRIBUTION	SUBJECT
359	10-16-63	U.S. Attorneys	Criminal Prosecutions Under 12 U.S.C. 95a or 18 U.S.C. 371 Involving Violations of Executive Orders and Regulations Concerning Gold.
360	10-16-63	U.S. Attorneys	Method of Trial In Condemnation Cases.
334-S1	10-29-63	U.S. Attorneys	Man Hour Data
361	10-29-63	U.S. Attorneys	Semi-Annual Reconciliation of Criminal Cases Pending In U.S. Attys & Clerks of Court Offices.

ORDER	DATED	DISTRIBUTION	SUBJECT
304-63	8-29-63	U.S. Attorneys & Marshals	Grievance Procedure - Title 28 Judicial Administration, Chapter I, Part 46
306-63	10-21-63	U.S. Attorneys & Marshals	Amending Regulations Relating To Equal Employment Opportunity With Respect To Policy And Procedure - Title 28 - Judicial Administration, Chapter I - Dept. Of Justice.

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ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

Method of Grand Jury Selection; Defendants Motion To Dismiss Denied. United States v. Blaw-Knox Company, et al. (S.D. N.Y.). On October 30, 1963, Judge McGohey signed an order denying defendants' motion to dismiss the indictment on the ground that the grand jury which returned the indictment was improperly constituted and impaneled. The motion was submitted on a stipulation which adopted the record in the leading case of United States v. Greenberg, et al., 200 F. Supp. 382 (S.D. N.Y. 1961) where the same motion was made and denied by Judge Bryan. In denying the motion Judge McGohey adopted the opinion of Judge Bryan in the Greenberg case.

This motion has been made in other recent criminal cases in the Southern District of New York and is based on the method of selection of grand jurors. In substance, defendants attack the use of voter registration lists as a source for 95 per cent of the jurors and the use of telephone directories, real estate lists, recommendations, etc., for the remaining 5 per cent. Defendants contend that this method of selection eliminates many persons, specifically those in lower income brackets, who would otherwise be qualified to serve as grand jurors. In other criminal cases in the Southern District of New York where motions to dismiss on the same ground have been made, the policy of the United States Attorney's Office is to stipulate the record in the Greenberg case if defendants desire a stipulation concerning the method of selection of grand jurors.

Staff: John C. Fricano, Walter W. Dosh and S. Robert Mitchell (Antitrust Division)

SHERMAN ACT

Restraint of Trade - Refuse Removal; Indictment And Complaint Under Section 1. United States v. Pennsylvania Refuse Removal Association, et al. (E.D. Pa.) On October 30, 1963, a grand jury returned a one-count indictment against the Pennsylvania Refuse Removal Association and four officials of the Association: Harry Coren, president and director; Salvatore Graziano, vice-president and director; Arnold Graf, former secretary-treasurer; and Edwin S. Vile, director. The indictment charges a conspiracy to restrain interstate trade and commerce in refuse removal in violation of Section 1 of the Sherman Act. A companion civil complaint was filed on the same date naming the Association, the indicted individuals and three additional officials of the Association as defendants: Edward Marley, treasurer and director; Robert J. Schaffer, former director; and George Tidman, director.

The indictment and civil complaint charge that beginning at least as early as 1960, and continuing thereafter up to and including the date of filing, defendants and co-conspirators conspired to allocate customers; refrain from competing for the customers so allocated; raise, fix and maintain prices for refuse removal to customers; submit collusive and rigged bids for refuse removal to customers; urge, induce and coerce other

removers to participate in the combination and conspiracy; and impede, obstruct, threaten, intimidate, harass and take action against persons and companies in order to exclude them from the refuse removal business or to compel them to join the combination and conspiracy.

The refuse removal business consists of the collection, removal, hauling and disposal of trash, rubbish and other waste materials. Customers of refuse removal companies include all types and classes of commercial, industrial and manufacturing establishments; hotels, restaurants; public and private institutions; and apartment houses and private households. During the period covered by the indictment and complaint, the annual dollar volume of the refuse removal business in the Philadelphia area done by members of the defendant Association was approximately $4,200,000.

The relief prayed for in the complaint includes, among other things, injunctive relief against all the defendants, to forbid them from engaging in any such conspiracy, and the dissolution of the defendant Association.

Staff: John J. Hughes and Warren Marcus. (Antitrust Division)

Court Rules in Favor of Government on Motion to Produce. United States v. Aluminum Company of America, et al. (E.D. Mo.). On October 31, 1963, the Court sustained practically all of the Government's outstanding objections to defendants' discovery. Defendants on August 16, 1963, had simultaneously served a Rule 34 motion and interrogatories, one of which required a description of all documents withheld from production on any claim of privilege. The Government objected to the production of certain categories of documents and, on the ground that they were so clearly privileged that production should not be ordered, also resisted describing them. Argument was had on September 20, 1963. The Court ruled that the Government need neither describe nor produce:

(1) Internal memoranda written by or for the Government's attorneys in connection with investigating or preparing this case for trial, including memoranda of interviews, and memoranda to the FBI. The Court held such documents to be "clearly a part of the work product of plaintiff's attorneys whether or not the memoranda records [sic] information obtained from third parties."

(2) Interview reports of the FBI "made pursuant to the request of the request of the government attorneys." The Court stated: "We believe the routine showing of potential relevance made by defendants is insufficient to warrant wholesale discovery of FBI reports in view of the relationship between the FBI and the attorneys in the Department of Justice responsible for preparing this case." In reaching this result the Court took into account the fact that the Government has been ordered to furnish considerable information in response to interrogatories, as well as the Government's "offer of any statistical summaries based upon data gathered by the FBI will be accompanied by FBI work sheets and summary schedules and signed statements of fabricators obtained by the FBI."

(3) Documents constituting a survey conducted by the Government's attorneys "early in this litigation" which the Government does not intend to use; these documents include questionnaires, responses thereto, and correspondence with the respondents. The Court held that defendants had shown insufficient good cause "for the invasion of plaintiff's preparation" to necessitate production of the "abandoned survey."

With respect to documents obtained in connection with other investigations or cases, the Court has ordered the Government to list documents not obtained pursuant to grand jury subpoena or the Civil Process Act which have been "examined by plaintiff's attorney in connection with investigating or preparing the instant case for trial." The Court has deferred ruling on whether such documents should be produced.

The last category of documents on which the Court ruled involved newspaper and other articles clipped by plaintiff's attorneys. When the Government contended that such clippings were attorney's work products, defendants stated that they did not seek production of newspaper clippings made by plaintiff's attorneys. The Court thereupon concluded that "presumably there remains outstanding the question of production of other published articles contained in plaintiff's files," and ordered that plaintiff "should produce any published studies or analysis of market conditions utilized in the preparation of its case." The Government has already produced all documents falling in that category.

Staff: Edna Lingreen, J. E. Waters, James F. Buckley and Lionel Epstein (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURTS OF APPEAL

MORTGAGE FORECLOSURE SALE

Mortgage Foreclosure Sale to FHA, the Mortgagee, Approved: Government May Bid on Property and Need Not Proceed Only by Condemnation. Magnolia Springs Apartments, Inc. v. United States (C.A. 5, October 25, 1963). The question in the case was whether a foreclosure sale to the mortgagee, the FHA, of a Wherry Housing Act apartment project should be confirmed. The apartment project, located near a naval base, was constructed by appellant in 1953 at a cost of $2,877,666. The FHA insured the mortgage and, as a result of an assignment, later became the mortgagee. Foreclosure proceedings were instituted on behalf of the FHA in 1959, as appellant had been for a substantial time in default on its mortgage payments. One of the reasons for the default was the abandonment by the Navy of the adjacent naval base, with the resulting decline in occupancy of the apartment project. A decree of foreclosure was entered, and a sale was ordered by the court. The Government was the only bidder at the sale, acquiring the property for $1,000,000. Over appellant's objections, the district court confirmed the sale. On appeal, appellant admitted the notes, the mortgage, and the default. It argued, however, that the sale should not have been confirmed because (1) the price was grossly inadequate, (2) the Government was guilty of improper conduct which "chilled" the bidding at the sale, consisting of announcements by the Navy that it intended to acquire the project, and (3) the Government was required to proceed by way of condemnation and could only acquire the property by paying "just compensation." The Court of Appeals, however, affirmed, accepting the Government's arguments that the sale price was not grossly inadequate, that there was nothing improper in the Navy's announcements which were made because of congressional pressure instigated by appellant, and that the Government had every right to enter a bid at the foreclosure sale instead of proceeding by condemnation.

Staff: John C. Eldridge (Civil Division)

TORT CLAIMS ACT

Finding of Contributory Negligence Sustained as Not "Clearly Erroneous." Glasscock v. United States (C.A. 4, September 23, 1963). This was a tort action by an employee of a Government contractor who was severely burned while working on an electric conversion project at Fort Belvoir. The district court held that (1) the Government had not been negligent, and (2) plaintiff had been negligent in the manner in which he performed his work and his injury was proximately caused by his own

negligence. The Court of Appeals affirmed, holding the latter finding not "clearly erroneous," despite the fact that "the majority of (the) court might be inclined to draw a contrary inference."

Staff: United States Attorney C. V. Spratley, Jr. and Assistant United States Attorney MacDouglas Rice (E.D. Va.)

SOCIAL SECURITY ACT

Secretary Need Show Only That Claimant Can Do Category of Employment That Generally Exists, Not That Such Category Exists in Claimant's Home Community. Celebrezze v. O'Brient (C.A. 5, October 23, 1963). The Secretary appealed from the district court's reversal of an administrative determination that claimant, although unable to continue his former work (form carpentry) because of a paralyzed hemi-diaphragm, was capable of gainful employment in sedentary work. Noting claimant's work experience in carpentry, his high school education, his relatively high residual physical capacities, and his professed desire to continue to earn a living, the Court of Appeals reversed the district court on the ground that the Secretary's determination was supported by substantial evidence. The Court of Appeals reaffirmed its position in the Hicks case that disability is not an unemployment concept. The Court made the first clear holding that disability does not depend upon a showing of the availability of jobs in a particular community. Rather, the Kerner inquiry into the availability of other kinds of jobs for the claimant was held to relate to the kinds of jobs which can be performed by the claimant. The Ferran and Butler decisions of the Fifth Circuit were distinguished as cases where the record showed that the claimant's inability to do his former work was tantamount to a showing that he could perform no work, in view of his limited experience and education.

Staff: Barbara W. Deutsch (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

BANKRUPTCY

Reports to Referee. Reference is made to United States Attorneys Bulletin, August 23, 1963 issue, Vol. 11, No. 16, p. 446, in which we discussed the responsibility of the United States Attorney in the light of the recent amendment of the Bankruptcy Section of the United States Attorneys Manual, Title II, p. 61. In view of recent inquiries concerning reports to be furnished to the Referees in Bankruptcy regarding the status of bankruptcy investigations, it appears essential to clarify and stress this important responsibility of the United States Attorney.

Title 18, United States Code, Section 3057(b) requires the United States Attorney to inquire into the facts of possible bankruptcy violations and to report thereon to the Referee. In implementing this aspect of Section 3057(b), the following procedure should be followed: Upon report of a possible bankruptcy violation, the United States Attorney shall notify the referee that (1) the case will be investigated, or (2) the case has been closed.

If further investigation is requested, the United States Attorney shall, at the termination of said investigation, make a second report to the referee stating that (1) prosecution has been initiated by return of an indictment or information or (2) the case has been closed. No explanation of the conclusions reached need be made to the referee. Of course, no reports will be made to the referees when any referee is the subject of an investigation. It should be noted that the above procedure is to be followed regardless of the method by which the investigation was initiated, that is, whether by complaint by the referee or other officers of the court, creditors, or other interested parties.

False Affidavits and Certifications. It has come to our attention that there has been an alarming increase in cases wherein attorneys have filed false affidavits stating that they have not received any fees in connection with bankruptcy proceedings or have induced bankrupts to falsely certify that attorney's fees have not been paid in order to take advantage of bankruptcy court rules which allow, upon such certification, court costs and filing fees to be paid in installments.

The Federal Bureau of Investigation should be requested, in cases of this nature, to conduct a thorough investigation with the specific view to instituting possible criminal prosecutions. While we are most anxious to cooperate with bar associations in their supervision of attorneys' conduct, referral to such bar associations should not be used in lieu of criminal investigation and/or prosecution.

NARCOTICS

Constitutionality of Presumption Under 21 U.S.C. 174 as Related to Cocaine Hydrochloride. Erwing v. United States (C.A. 9, October 17, 1963). A conviction under 21 U.S.C. 174 for concealment and sale of cocaine hydrochloride was reversed by the Ninth Circuit. The ground for reversal was that the statutory presumption of knowledge of illegal importation was arbitrary and unreasonable when there was evidence of domestic production of the drug but no evidence of illegal importation of cocaine in the form of cocaine hydrochloride. The Department does not read this opinion as precluding the Government from attempting to establish in subsequent cases that very minute amounts of cocaine hydrochloride are produced in the United States for medicinal purposes and there is substantial basis for believing that almost all cocaine hydrochloride which finds itself on the illicit market has a foreign source.

Nevertheless, United States Attorneys are urged to reconsider their prosecutive policies with respect to narcotics offenses and to avoid use of 21 U.S.C. 174 in non-customs cases in favor of 26 U.S.C. 4704 and 4705, whenever possible. For the previous views of the Department in this regard see United States Attorneys' Bulletin, December 14, 1962 issue, Vol. 10, No. 25, p. 690.

OBSCENITY

Contraceptives; Conviction on Indictment Charging Mailing of Price-List-Order Blanks for Sale of Contraceptives and Mailing of Contraceptives (18 U.S.C. 1461). In United States v. Abraham E. Gusman (E.D. N.Y., October 7, 1963), the Court, after a non-jury trial, found defendant guilty of all five counts of an indictment charging two instances of mailing packages containing contraceptive devices and price-list-order blank advertisements for re-orders and three instances of mailing unsolicited price-list-order blank advertisements for the sale of contraceptives. Three counts charged mailings to named individuals. Two counts charged unsolicited mass mailings of approximately 4,400 and 4,600 circulars, respectively.

The proof established that defendant, doing business under various company names, had utilized the mails for the purpose of the unsolicited distribution of graphic advertisements telling from whom, how, and at what price, contraceptives of various types and packaging could be obtained; that defendant had actually shipped contraceptives in response to orders placed with him; that he conducted a $185,000 a year business as a contraceptive jobber; that the recipients of the mass mailings had not solicited the receipt of such mail; that the recipients of the circulars were not members of a medical or pharmaceutical profession, registered nurses, wholesale jobbers in the trade or the like; that orders placed with defendant were not from persons within the categories enumerated above; that in all instances the defendant knew nothing about his customers' marital status, age, sex, or personal convictions, when they were first solicited by him through the mails; and that even after persons had pur-

that all the devices were designed and adapted to prevent conception and disease and that all packaging contained a legend to the effect that the devices were sold for the purpose of the prevention of disease only.

The form of the indictment employed read, in each count, substantially as follows:

On or about the 6th day of May 1960, within the Eastern District of New York, the defendant ABRAHAM E. GUSMAN, doing business as W. Reed Co., P.O. Box 64, Forest Hills 75, Long Island, New York, knowingly used the mails and caused said mails to be used for the mailing and delivering of unsolicited non-mailable matter consisting of approximately four thousand three hundred thirty-eight (4,338) writings, letters, circulars, price list order blanks and advertisements, which gave information how, at what price and by what means articles, things and devices designed and adapted for preventing conception might be obtained by purchase from the said W. Reed Co., P.O. Box 64, Forest Hills 75, Long Island, New York (Title 18 United States Code, Section 1461).

The case appears to be one of first impression on this type of contraceptive literature. The attack made by the Government was not on the grounds of immorality or for defendant's advertising in a manner calculated to lead another to use or apply a contraceptive for the purpose of preventing conception or for indecent or immoral purposes. It was an assault on a mail order house's practice of indiscriminatingly mailing advertising circulars telling where and at what price the products could be obtained. The case is also novel in that it is the first known conviction in the Second Judicial Circuit, for, in essence, the promiscuous selling of contraceptive devices through the mail. It is anticipated that an appeal will be made on constitutional grounds.

Previous Federal cases on contraceptives have made it clear that an unlawful contraceptive intent is a necessary element of proof and that legitmate uses of contraceptives are not to be proscribed by the Federal statutes. Therefore, United States Attorneys are urged to review prospective cases to ascertain such factors as unsolicited dissemination to the general public of an indiscriminate nature, that is, without knowledge of or regard to marital status, age, sex, occupation, health need and the like. Also, the kind and variety of contraceptives advertised, representations of efficacy, use and purpose, the nature of the defendant (e.g. jobber, health agency) all have a bearing on the intent element and the likelihood of successful prosecution.

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorney Raymond Bernhard Grunewald (E.D. N.Y.)

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Water Rights: Individual Obtains No Right to Seepage Water From Facilities of United States. Gregory v. United States (D. N. Mex., Oct. 4, 1963). Plaintiff sought damages as a result of work done by the Bureau of Reclamation in rehabilitating and maintaining ditches and canals surrounding a 14.7-acre tract of land in the Middle Rio Grande area of New Mexico. Several ponds had been created on the tract by the seepage of water from the ditches and canals into hollows dug by plaintiff's predecessor. Plaintiff used the ponds to raise fish and frogs. As a consequence of dredging and removing from the ditches and canals the silt and deposits which had accumulated over the years, water in the ponds seeped back into the surrounding ditches and canals. The ponds are now dry during times of the year, never approach their former depth, and are no longer used by plaintiff to raise fish and frogs.

In the first trial, plaintiff was awarded a judgment of $33,401. The District Court cited a New Mexico statute making it a misdemeanor to lessen or divert the flow of water so as to detrimentally affect the game fish in a body of water. The Court concluded that the United States had "trespassed upon and destroyed the property;" "[t]hat the act of the defendant in draining the plaintiff's property of all water, destroying plaintiff's fish and frogs, and leaving the plaintiff's land an arid desert land, constitutes negligence per se and offends the constitutional rights of the plaintiff;" and that "[p]roperty is taken by the Government in the sense of the provision of the Fifth Amendment that private property shall not be taken for public use without just compensation, when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude would have been created."

The Tenth Circuit Court of Appeals vacated the judgment and remanded the case. 300 F. 2d 11 (1962). The Court of Appeals said it was not readily discernible whether the judgment was based upon the court's jurisdiction under the Tort Claims Act (28 U.S.C. 1346(b)) or upon a theory of condemnation under the Tucker Act (28 U.S.C. 1346(a)(2)), or upon a combination of both. The Court decided:

1. The acts of the Bureau fell clearly within the "discretionary function" exception (28 U.S.C. 2680(a)) to the Tort Claims Act, as the renovation of the canals, in its purest sense, was entirely "discretionary" within the meaning of the exception.

2. If the trial court's conclusion that the drainage of the ponds amounted to a constitutionally compensable taking, the procedure for obtaining "just compensation" vouchsafed by the Fifth Amendment is set forth in the Tucker Act, but the jurisdiction of that court under the Tucker Act is confined to claims not exceeding $10,000.

Plaintiff subsequently filed an amended complaint asking $9,900 under the Tucker Act. After the second trial, the Court held that plaintiff could not and did not obtain a right to the seepage water, and that, as a result, there was no taking of the water by the United States. The Court did award $2,000 for obstruction of an easement by the deposit of sand and gravel waste material thereon which had impaired plaintiff's access to the tract.

Staff: Assistant United States Attorney L. D. Harris (D. N.Mex.); Charles G. Luellman (Lands Division).

LANDS DIVISION FIGHTS THE BATTLE OF JOSHUA (TREES).

The Department of the Interior has referred an unusual trespass case to the Lands Division for action. It seems that in San Bernardino County, California, out where the Joshua trees (yucca cactus) grow, one Allen has been charged with the unauthorized cutting and removal of 307 Joshua trees from Government property. Why did he take the trees? "Because it was necessary to keep my business going." His business? The manufacture of surgical splints. It appears that the old Joshua trees whose main utility we thought was ornamentation will have to be protected from the unauthorized surgery of certain surgical splint manufacturers. The Department of the Interior asks the value of the splints as damages.

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CRIMINAL TAX MATTERS
Reminder Notice

Transfer Under Rule 20, Rules of Criminal Procedure

In two recent criminal tax cases, transfers have been effected under Rule 20 of the Federal Rules of Criminal Procedure without the prior approval of the Tax Division. Such approval and clearance is required as set forth in both the United States Attorneys' Manual, Title 4:44:1, and the Tax Division criminal trial manual, "The Trial of Criminal Income Tax Cases," p. 8. The statement of the requirement in the latter manual is as follows:

> 8. Requests for Transfers Under Rule 20, Rules of Criminal Procedure.
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> Rule 20 of the Federal Rules of Criminal Procedure permits a defendant arrested in a district other than that in which the case is pending, with approval of both United States Attorneys involved, to waive trial and enter a plea of guilty or nolo contendere in the district in which he is apprehended. Some defendants have misused this provision as part of a plan to shop around and have their cases transferred to what they believe to be a more lenient court. For this reason it is requested that before consenting to any transfer under Rule 20 in a criminal tax case, United States Attorneys secure express authorization from the Tax Division which may have information as to the reason for the requested transfer that is not available to the United States Attorneys involved.

CIVIL TAX MATTERS
District Court Decisions

Levy On Safe Deposit Box - Plenary Proceeding Necessary to Obtain Relief From Levy. Lottie Engelberg (Gartenlaub) v. Prudential Savings Bank, et al. (E.D. N.Y., May 13, 1963.) (CCH 63-2 USTC ¶9560). Plaintiff, Engelberg, sought in her complaint to vacate a levy which had been filed by the Internal Revenue Service against the contents of her safe deposit box. Engelberg had given her daughter, Dorothy Carroll, a delinquent taxpayer, a permit giving Carroll access to the safe deposit box. Plaintiff, after filing the complaint, moved for an order granting the relief sought in the complaint. The Court rejected the Government's claim that because the taxpayer had access to the box, she could have placed property in it and that the levy which would permit inspection of the box should stand. The Court found that absent proof that the box contained property of taxpayer, the Court had jurisdiction to enjoin the

enforcement of the levy. The proscriptive provisions of Section 7421 are inapplicable to this instance where a non-taxpayer seeks to enjoin the collection of her property. The Court, however, denied plaintiff's motion on the grounds that the Court was without jurisdiction to grant relief in a summary proceeding which seeks to adjudicate interests in property, citing New Hampshire Fire Insurance Company v. Scanlon, 362 U.S. 404. The plaintiff's remedy was through a plenary proceeding.

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorney Lewis L. Douglass (E.D. N.Y.); and Arnold Miller (Tax Division).

Insurance Adjustor Holding Assignment of Fire Insurance Proceeds Does Not Have Choate Lien Until Amount Due From Insurance Company Is Definite and Certain. Great American Insurance Company, et al. v. United States, et al. (N.D. Ill., October 25, 1963.) Plaintiff, a fire insurance company, interpleaded the amount determined to be due to taxpayer on a fire loss.

Taxpayer, prior to the date on which the claim against the insurance company was settled, and prior to the date of the tax assessments, assigned the proceeds of the fire insurance policy to an insurance adjustor and agreed to pay him 10 per cent of any amount recovered. Then a bank perfected its judgment lien against taxpayer, which lien the Government conceded was prior to the tax lien. Next in time, the tax assessment was made, but prior to the time the tax lien was recorded, an attorney served a notice of lien for 25 per cent of the insurance proceeds and another judgment creditor perfected his judgment lien.

The Court determined that the lien of the insurance adjustor was inchoate at the time the tax lien arose because the amount of money due from the insurance company was not ascertained until after the time the tax assessment was made, and therefore the tax lien was superior.

The Attorney's lien was also determined to be inchoate as of the date the tax lien arose, because it too depended on the amount of the insurance proceeds and, therefore, that lien was also inferior to the tax lien.

The Court found that the lien of the second judgment creditor was inferior to the attorney's lien since notice of that lien was filed prior to the time the second judgment lien was perfected, but that the judgment lien was superior to the tax lien as it was perfected prior to the time a notice of tax lien was filed. Thus, with respect to the tax lien, the attorney's lien and the second judgment lien, we have a problem known as circular priority arising from the fact that the tax lien was superior to the attorney's lien; the attorney's lien was superior to the second judgment lien; and the second judgment lien was superior to the United States' lien.

The Court determined that out of the available fund the bank was to be paid first; secondly, an amount was to be set aside to pay the second judgment lien; thirdly, the United States' tax lien was to be paid. The attorney's lien was then to be paid out of the balance after adding thereto the amount set aside to pay the second judgment lien. The fund thus being exhausted, no money was available to pay the second judgment lien.

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

Bankruptcy; Tax Penalties Assessed After Discharge of Bankrupt and Close of Estate Are Not Barred by Section 57(j) of Bankruptcy Act. In the Matter of Louis R. Lynn. (E.D. N.Y., April 15, 1963.) (CCH 63-2 USTC ¶9627). The estate of the bankrupt-taxpayer was closed and the trustee discharged on July 12, 1955. Thereafter, on March 15, 1957, the District Director assessed against the former bankrupt a penalty arising under Section 2707(a), Internal Revenue Code of 1939, which penalty evidently accrued prior to the discharge. The administratrix of the estate obtained an order reopening the estate of the bankrupt " . . . for the purpose of further examination . . ." of a penalty assessment. The administratrix opposed the Government's motion to vacate this order by arguing that the assessment was invalid because a penalty does not survive a discharge in bankruptcy. United States v. Mighell, 273 F. 2d 682 (C.A. 10).

The District Court concluded that it was not bound by United States v. Mighell, supra, but that even if it were, it did not constitute a basis for the administratrix's order reopening the bankruptcy proceeding. The Court reasoned that since penalties are not part of the bankruptcy proceeding and their assertion at this time would not in effect be a penalty against the creditors of the bankrupt as noted in Simonson v. Granquist, 369 U.S. 38 (1962), there is no bar to the assessment of penalties here involved. The Court therefore granted the motion of the United States to vacate the order of the administratrix reopening the estate.

Staff: United States Attorney Joseph P. Hoey (E.D. N.Y.).

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