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BULLETIN

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NEW EXECUTIVE OFFICE HEAD

On December 2, 1963, Mr. William J. Brady, Jr., a native of Philadelphia, Pennsylvania, was appointed as Special Assistant to the Attorney General, and on January 28, 1964, he became head of the Executive Office for United States Attorneys.

Mr. Brady attended the University of Pennsylvania at Philadelphia in 1941 before serving in the Army Air Force from 1942 to 1946. Upon his discharge from the armed forces in 1946, he attended Harvard College, from which he graduated with an A.B. degree in 1948. He attended the University of Missouri Law School at Kansas City from 1949 to 1953 when he graduated with an LL.B. degree.

From 1954 to 1958 Mr. Brady served as an Assistant District Attorney in Philadelphia. Thereafter, he became a senior partner in the firm of Brady and White in Philadelphia. During the last Presidential election campaign, he served as Executive Director of the Citizens for Kennedy for the State of Pennsylvania. In 1962 he was an unsuccessful candidate for election to Congress.

Mr. Brady is married and has three children.

ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

FORM DJ-10
(Request for and Authorization of Official Travel)

Please refer to Memo 365, Supplement No. 1, concerning use of this Form. It is not to be used for travel which is authorized generally, as set forth in the Manual (e.g. travel within the district).

Since travel requiring submission of Form DJ-10 is the exception rather than the rule, orders in excess of 2 pads (50 sets) for each six-month period should include a statement of justification on the requisition.

Form DJ-10 is printed in sets of original and three tissues. The Department requires two tissues for record purposes. Offices desiring to maintain a record of each request pending the return of the original may retain one of the three carbons, which can later be used with the original to support the voucher.

The judicial district should be shown in each instance, preferably in the section headed "Section or Field Office." The signature or initials of the head of the office, indicating approval, should be added in the space "Requested by" in addition to the traveler's signature. The name of the case and D.J. file number should be inserted in the section headed "Purpose of travel." If additional space is required for showing the purpose of travel, the reverse side of the form should be used.

Memos and Orders

The following memoranda applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 4, Vol. 12 dated February 21, 1964:

MEMO	DATED	DISTRIBUTION	SUBJECT
366	2-13-64	U. S. Attorneys	Reducing Backlog of Civil Cases

ORDER	DATED	DISTRIBUTION	SUBJECT
313-64	2-19-64	U. S. Attorneys & Marshals	Amendment of Regulations Re Withdrawal of Appeals and Time of Submission of Records to Board of Immigration Appeals by Immigration & Naturalization Service - Title 8--Aliens and Nationality Chapter I--Immigration & Naturalization Subchapter A--Gen. Provisions Part 3--Board of Immigration Appeals.

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ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

DISTRICT COURT

FILED

Structural Steel Companies Indicted Under Sherman Act. United States v. United States Steel Corporation, et al., (D. Minn.) D.J. File No. 60-138-133. On February 10, 1964, a federal grand jury in Minneapolis returned an indictment against six fabricators of structural steel and one officer from each of these companies. The defendants' names are:

Corporation	Individual	Capacity
United States Steel Corp.	A. Wayne Willard	District Contracting Manager, American Bridge Division
Paper, Calmenson & Co.	Ray C. Edlund	Vice President
St. Paul Foundry & Manufacturing Co.	Joseph B. Klemp	Vice President
St. Paul Structural Steel Co.	Thomas H. Comfort	President
Crown Iron Works Co.	Clifford Anderson	President
The Hustad Company	John D. Hustad, Jr.	Vice President

The indictment alleges that beginning at least as early as 1949 and continuing thereafter to at least 1961 the defendants, all of whom fabricated structural steel, conspired to submit collusive and rigged bids to purchasers of structural steel in the States of Minnesota, North Dakota, South Dakota and Wisconsin in violation of Section 1 of the Sherman Act.

It is further alleged that the defendants met weekly during the conspiracy in Minneapolis and St. Paul and that at such meetings they allocated structural steel jobs among themselves pursuant to an agreed upon formula. The defendants which were not allocated a particular job, thereafter either did not bid such job or submitted bids not calculated to obtain the job. Total sales of the corporate defendants within the geographic area involved were alleged to be in excess of $14,000,000 annually.

Staff: Earl A. Jinkinson, Francis C. Hoyt and Howard L. Fink (Antitrust Division)

TERMINATED

Court Refuses to Modify Judgment Entered on Nolo Pleas. United States v.

Consolidated Laundries Corporation, et al., (S.D. N.Y.) D.J. File No. 60-202-50. On February 11, 1964, Chief Judge Ryan denied a motion by defendants Central Coat, Apron & Linen Service, Inc. and Sam Spatt to modify the criminal judgment entered against each of them on their pleas of nolo contendere on November 30, 1961, by striking from each of the judgments a printed clause reading "It is adjudged that the defendant is guilty as charged and convicted."

The motion was made under Rule 36, F.R. Crim. P., on the ground that the failure to strike out the clause in question was a clerical error and prejudicial surplusage, because it was inconsistent with a prior clause in the judgment reading "It is adjudged that the defendant has been convicted upon his plea of nolo contendere," and distorts the legal consequences which follow from entry of each judgment. It was further contended that it was not proper for a court to adjudge a defendant guilty after its acceptance of a plea of nolo contendere.

On oral argument, it appeared that the reason for the motion was a decision by the Tax Court that legal fees for defending another defendant in the same antitrust prosecution against whom the same form of judgment had been entered were not allowable deductions in computing income taxes (Re Standard Coat, Apron & Linen Service, Inc. ¶40.91 P-H TC No. 91, 1963).

The Government contended that there was no clerical error and no inconsistency and that it was proper to adjudge the defendants guilty after acceptance of their pleas of nolo contendere.

The Court sustained the Government's position as follows:

There is no substance to the claim of clerical error. The judgments were entered on the printed Criminal Form number 101 (which is supplied by the Administrative Office of the United States Courts), which is in conformity with Form 25 of the Appendix of Forms to the Federal Rules of Criminal Procedure. The clerk filled in the printed form according to the instructions appended to Form 25; both the form and instructions have long been used and uniformly applied in all federal district courts.

Rule 36 F.R.Cr.P. is operative only where there has been a clerical error. It affords no grounds for a motion to strike for "prejudicial surplusage". The fact that the defendants were convicted on their pleas of nolo contendere is clearly set forth in the judgment form. There is, and can be, no dispute between the parties that a plea of nolo contendere is an admission of guilt for the purposes of the case in which it is entered. Equally, the defendants contend, and the Government agrees, that the nolo contendere plea has no effect in any case other than one in which it is entered. The judgment is to be read as a whole and not taken apart phrase by phrase so as to distort its meaning. When so read, the two phrases are compatible.

Staff: John J. Galgay, John D. Swartz, Morris F. Klein and Paul D. Sapienza (Antitrust Division)

First Indictments Against Banks Terminated By Nolo Pleas. United States v. Northwestern National Bank of Minneapolis, et al., D.J. File No. 60-111-555; United States v. First National Bank of St. Paul, et al., D.J. File No. 60-111-553; and United States v. Duluth Clearing House Association, et al., D.J. File

No. 60-111-557 (D. Minn.). On February 11, 1964, Judge Edward J. Devitt granted the motions of the defendants in the three criminal Minnesota bank cases to change their pleas of "not guilty" to "nolo contendere." Since these were the first criminal prosecution of banks for violations of Section 1 of the Sherman Act, the Government neither recommended nor opposed the granting of the motions. The Court then imposed the following fines:

Minneapolis Case - No. 4-63 Cr. 6

Northwestern National Bank of Minneapolis	35,000
First National Bank of Minneapolis	35,000
Midland National Bank of Minneapolis	10,000
The Marquette National Bank of Minneapolis	2,500
The First National Bank of Saint Paul	20,000
Northwestern National Bank of St. Paul	5,000
The American National Bank of St. Paul	1,000
Stock Yards National Bank of South St. Paul	7,500
Northern City National Bank of Duluth	5,000
First American National Bank of Duluth	5,000

St. Paul Case - No. 3-63 Cr. 8

The First National Bank of Saint Paul	25,000
First Grand Avenue State Bank of Saint Paul	5,000
First Security State Bank of Saint Paul	5,000
First Merchants State Bank of Saint Paul	5,000
First State Bank of Saint Paul	5,000
First Bank Stock Corporation	5,000
Northwestern National Bank of St. Paul	15,000
Commercial State Bank in St. Paul	5,000

Duluth Case - No. 5-63 Cr. 6

The Duluth Clearing House Association	2,000
First American National Bank of Duluth	25,000
Northern City National Bank of Duluth	15,000
Northwestern Bank of Commerce	5,000
Duluth National Bank	10,000

The fines in the three cases aggregate $253,000.

Thereafter, the criminal case against the one remaining defendant in the Minneapolis case, Midway National Bank, was dismissed with the consent of the Government.

This defendant, however, together with all of the other defendants in the three companion civil cases signed consents to proposed final judgments in these civil suits.

Staff: Samuel Flatow, John M. Toohey and Charles A. Degnan (Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURTS OF APPEALS

AGRICULTURAL ADJUSTMENT ACT

Notices of Allotment, Excess, and Penalty Need Not Be Given in Crop Year to Which They Pertain; Review of Alleged Erroneous Calculation in Determining Acreage Not Open in Suit For Penalty. Gajewski v. United States (C.A. 8, February 5, 1964). This suit was brought by the Government to recover penalties for excess wheat acreage during the years 1954-1959. The district court entered judgment for the Government. On appeal, the farmer claimed that the Act was unconstitutional as to him, the successor in interest of an original patentee under an unrestricted-use patent; that the notices of allotment, excess, and penalty must be given during the relevant crop year, and that there were errors in determining the acreage allotment. The Court, affirming the district court, dealt shortly with the allegation of unconstitutionality, remarking that the established validity of the Act extended to a patentee, who has no greater right than any other land holder to be free of legislation affecting land. Secondly, the Court ruled that there is no requirement in the Act that notices be given during the relevant crop year, but only that they be given prior to referendum vote "insofar as practicable." The Court noted that no notices could have been given prior to 1957 which was the earliest date the County Committee knew that appellant was producing wheat. Lastly, the Court held that appellant could not raise questions of error in the determination of acreage in the penalty proceeding, since the exclusive means of review is provided in another section of the Act.

Staff: United States Attorney John O. Garaas (D. N.Dak.)

CIVIL SERVICE DISMISSAL

Civil Service Discharge For Off-duty Conduct Upheld Despite Court's View That Discharge Was "Too Severe." Wallace v. Day (C.A. D.C., February 6, 1964). Plaintiff, a veterans' preference eligible with 17 years service as a postal clerk and an otherwise unblemished record, was discharged on the basis of charges that (1) while off duty he had committed an act of indecent exposure in a public washroom, (2) at the same time, he had in his possession a concealed weapon - metal knuckles - contrary to law, and (3) at the same time he was arrested for soliciting males, disorderly conduct, loitering, and carrying a concealed weapon, and was convicted of the latter two charges.

Plaintiff's action to upset his discharge was dismissed by the district court on the basis of Dew v. Halaby, 317 F. 2d 572 (C.A. D.C.), certiorari granted, February 17, 1964. The Court of Appeals affirmed, stating that, while in its view "the punishment for appellant's transgression was too severe," it did not feel warranted "in this case" in substituting its judgment for that of the departmental authorities and the Civil Service Commission. The phrase

"in this case" appears to indicate that the Court is ready to impose its judgment in the right case as to proper punishment, a position that we have so far succeeded in repelling.

Staff: Robert V. Zener (Civil Division)

FEDERAL RULES OF CIVIL PROCEDURE - TIME

Appeal Dismissed For Lack of Jurisdiction Where Notice of Appeal Filed on 62nd Day After Entry of Judgment. Gajewski v. Review Committee (C.A. 8, June 10, 1963). Judgment in the district court was entered on February 6, 1963. Notice of appeal was received by the clerk on April 8, 1963 (a Monday), unaccompanied by the proper filing fee, and was not filed until April 9, 1963, when the fee was received. Appellant erroneously understood that the period for appeal could be enlarged by three days' mailing time as provided in Rule 6(e). The Court of Appeals dismissed the appeal for lack of jurisdiction in view of the fact that no motion to extend the time for filing the notice of appeal had been made and the court records revealed a lapse of 62 days before the notice was actually filed. The Court stated that the "absoluteness" of Rule 73(a) (time for taking an appeal runs from the entry of judgment) is not affected by Rule 6(e).

Staff: United States Attorney John O. Garaas (D. N. Dak.)

MEXICAN MIGRANT WORKERS' PROGRAM

Secretary of Labor Has Authority to Condition Employment of Mexican Migrant Workers Upon Payment of Minimum Wage Higher Than Prevailing Wage for Domestic Agricultural Workers in Area in Which Mexicans Are Employed. Limoneira Company, et al. v. Wirtz (C.A. 9, February 12, 1964). Under 7 U.S.C. 1463, which is part of the Act authorizing the importation of Mexican agricultural workers, it is provided that none of these workers shall be available for employment in any area unless the Secretary of Labor has certified, among other things, that "the employment of such workers will not adversely affect the wages and working conditions of domestic agricultural workers similarly employed." For the first several years of administering the Migrant Labor Program, the Secretary followed the practice of conditioning his adverse effect certification on the payment of wages equal to the prevailing wage paid domestic workers in the immediate area in which the Mexicans were employed. In 1955, four years after the original Act was passed, Congress in effect endorsed this practice by adding a provision authorizing the Secretary to obtain certain information regarding domestic agricultural wages. In 1962, the Secretary changed his practice and required that the Mexicans be paid the prevailing domestic rate or a specified hourly rate calculated for each state as a whole, whichever is higher.

This present action was brought by certain growers in California, challenging the Secretary's statutory authority to condition his certification upon payment of any rate other than the prevailing domestic rate. The district

court held for the Secretary, reasoning that the threatened employment of Mexicans would have an adverse effect on the domestic wage rate in the immediate area and that therefore payment of the domestic rate was not necessarily the only criterion on which the certification of no adverse effect could be based. The Court of Appeals affirmed on the basis of the district court's opinion.

Staff: J. William Doolittle and Robert V. Zener (Civil Division)

SOCIAL SECURITY ACT

Secretary Upheld in Three More Cases Reaffirming. Celebrezze v. O'Brient, Celebrezze v. Townsend (C.A. 5, January 29, 1964). In this disability case the administrative evidence showed that, although claimant was disabled from doing heavy construction work, in which the majority of his experience lay, he had had jobs in the past which his injuries (fracture of both ankles with residual traumatic arthritis) would not prevent him from performing. There was, however, no showing that such jobs were presently available in the area where the claimant lived. The district court reversed the administrative denial of benefits, without opinion. The Secretary appealed solely on the ground that substantial evidence supported the administrative decision. The Court of Appeals reversed in a brief per curiam opinion relying on Celebrezze v. O'Brient, 323 F. 2d 989 (C.A. 5, 1963). The panel included two judges who had not sat on the O'Brient panel.

Staff: Robert V. Zener (Civil Division)

Shelton T. Phillips v. Celebrezze (C.A. 5, No. 20618, February 13, 1964). In a per curiam opinion which reiterates the narrow scope of review in disability cases, again citing O'Brient, and this time Hicks v. Flemming, 302 F. 2d 270 (C.A. 5), the Court of Appeals accepted our contention that there was substantial evidence in the administrative record in support of the Secretary's determination that the claimant's impairments (varicose veins, high blood pressure, hypertensive cardiovascular disease and pulmonary emphysema) were not disabling within the meaning of the Social Security Act.

Staff: Edward Berlin (Civil Division)

Witherspoon v. Celebrezze (C.A. 5, February 17, 1964). In still a third case the Fifth Circuit affirmed the Secretary, ruling once again that "a mere showing of inability to do his former work will not entitle a claimant to disability benefits, unless that work was the only work he could perform." Again O'Brient and Hicks were relied upon. This case involved an unemployed coal miner with arthritic knees and back who was unable to bend his knees at all.

Witherspoon constituted the sixth straight victory in the Court of Appeals for the Fifth Circuit in disability cases.

Staff: Patrick C. McKeever (Civil Division)

DISTRICT COURTS

FRAUD - CONTRACT SETTLEMENT ACT OF 1944

Fraud Suits Under Contract Settlement Act of 1944 Not Subject to 5-Year Limitation Period of 28 U.S.C. 2462, $2,000 Forfeitures Recoverable Notwithstanding Absence of Provable Pecuniary Damage. United States v. Dinerstein, (E.D. N.Y., February 10, 1964). The Government in 1960 sued a contractor under Section 19 of the Contract Settlement Act of 1944, 41 U.S.C. 119, alleging that partial and final payments that had been made on certain terminated contracts in 1946 and 1947 resulted from the contractor (1) presenting false invoices and certificates in stating the costs and progress of the work, and (2) concealing the existence of cost records that would have disclosed the true costs.

The Court found that, while the costs had been consciously misstated by the contractor, the Government's payments to the contractor and the damage which it sustained thereby had not been caused by such misstatements but that the amount of the payments had been based on the Government's own estimate of the percentage of contract work completed. The Court held, however, that notwithstanding the absence of proof of damage attributable to the contractor's fraud, the Government was entitled to three forfeitures of $2,000 each as provided by Section 19(3) of the Act; and that these claims were not barred of enforcement by the 5-year statute of limitations applicable generally to suits to recover penalties and forfeitures, 28 U.S.C. 2462.

In declining to hold the action barred by Section 2462, the Court noted earlier decisions to the contrary by the Court of Claims. However, it asserted that the logic therein appeared to be disrupted by Koller v. United States, 358 U.S. 309, affirming on the authority of Rex Trailer Company v. United States, 350 U.S. 148, the decision in United States v. Doman, 255 F. 2d 865. While the Koller and Rex Trailer cases involved claims for the $2,000 forfeitures and double damages under the Surplus Property Act of 1944, the court determined that the Surplus Property Act, the False Claims Act (31 U.S.C. 231), and the Contract Settlement Act were so nearly related in purpose, approach, and terms, that it is not possible to hold that 28 U.S.C. 2462 must apply to the Contract Settlement Act though not to the Surplus Property Act or to the False Claims Act.

The court similarly analogized the fraud sanctions of the Contract Settlement Act to the False Claims Act by holding that, consistent with the numerous judicial decisions to that effect under the False Claims Act, forfeitures (of $2,000 each) are recoverable for fraud under the Contract Settlement Act notwithstanding the absence of provable pecuniary damage to the United States proximately resulting from the fraud.

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

TORT CLAIMS ACT

Third-party Complaint by Government Against Lessor Permitted Even Though Plaintiff's Complaint Alleges Government Was Owner of Premises Where Plaintiff Was Injured. Frieda H. Collins v. United States v. Berlin Securities Corp. (S.D. N.Y., February 13, 1964). The complaint alleged that the Government permitted the handrail of a stairway leading out of a post office to become defective, failed to remedy it after notice, and that plaintiff fell down the stairway and was injured. It also alleged that defendant "is owner in fee simple absolute" of the premises. The Government's amended third-party complaint against the true owner of the premises exhibited the written lease agreement between the parties, and stated a claim in two counts against the lessor, one in tort and one for breach of an implied contract of indemnity. The lessor moved to dismiss on the ground that the third-party complaint did not state a claim wherein the third-party defendant "is or may be liable" to the defendant for "all or part of the plaintiff's claim against defendant.

The issue, therefore, was whether the Government should be deprived of the opportunity provided by Rule 14(a), Federal Rules of Civil Procedure, of determining the entire controversy in one action because of an allegation as to ownership in the original complaint "which in all likelihood is untrue." The Court overruled the motion as to the first count of the Government's third-party complaint, without prejudice to renewal at trial, so that the difficult (under applicable New York law) question of actual "control" of the premises could be determined regardless of the nominal lessor-lessee relationship of the parties. As to the second count, based on federal rather than state law, that there was an implied agreement to indemnify the lessee against liability to third persons caused by failure of the lessor to fulfill its obligation to keep the premises in repair, the court likewise overruled the motion, holding that there was authority for both the contention as to governing law and as to the implied obligation to indemnify. The opinion cited, inter alia, Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124. This is the first reported decision applying the doctrine of the Ryan case in this area.

Staff: United States Attorney Robert H. Morgenthau, Assistant United States Attorney Stephen Charnas (S.D. N.Y.)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Sentencing Under Youth Corrections Act on Guilty Pleas; Compliance With Rule 11, F.R. Crim. P. Recent challenges to sentences imposed under the Youth Corrections Act, some of which have reached the courts of appeal, point up the necessity for careful explanation of the provisions of this Act where the court accepts a guilty plea and proceeds to sentence the defendant under its provisions.

The widely used Section 5010(b) of Title 18 U.S.C. provides for indeterminate sentencing of youths up to 26 years of age (extended from 22 years by 18 U.S.C. 4209) with a maximum of 6 years confinement during which special types of rehabilitative treatments are provided and during which conditional release can be granted at any time when the Youth Division of the Parole Board considers the youth ready for return to society. Sentencing under these provisions has withstood the challenge of unconstitutionality in that the defendant can receive a potentially longer sentence under the Youth Act than he would receive for violation of the substantive statute, Cunningham v. United States, 256 F. 2d 467 (C.A. 5) 1958, because of the special advantages provided for youths under the Act. However in cases where the sentence is imposed on a plea of guilty, it is essential that the defendant understand the sentencing provisions of the Youth Corrections Act if it is to be used, before the plea be accepted. If the defendant has pleaded in ignorance of the potential sentence he should be permitted to withdraw his plea. The Court of Appeals for the Fourth Circuit has held such procedure mandatory under the requirement of Rule 11 F.R. Crim. P. that the judge must satisfy himself that the plea is voluntary. Pilkington v. United States, 315 F. 2d 204 (C.A. 4, 1963); to the same effect see Carter v. United States, 306 F. 2d 283 (C.A. D.C., 1962).

To obviate future collateral attacks upon convictions, United States Attorneys are urged to assist the courts to the fullest extent possible in insuring that the trial court record reflects compliance with Rule 11 in sentencing under all sections of the Youth Corrections Act.

Voting and Elections; Fraud in September 12, 1962, Primary Election, Quitman County, Georgia. United States v. Mrs. Elton S. Friedman, et al. (M.D. Ga.), D.J. File No. 72-19M-109 #12,244. This case, previously reported in the Bulletin, Vol. 11, p. 465, involved the casting and counting in excess of seventy forged, fraudulent and fictitious votes by election officials in the September 1962 primary election in the Georgetown Precinct, Quitman County, Georgia, in which a candidate for United States Senator was nominated. Joseph Jackson Hurst, Georgia State Representative, and four other defendants entered pleas of guilty to the vote fraud charge (Count 2 of the indictment under 18 U.S.C. 242). The Court thereafter imposed fines in amounts from $250 to $1,000 and all were placed on probation for periods

from one to three years. Count 1 of the indictment charging a conspiracy under 18 U.S.C. 241 and the charges against the sixth defendant were dismissed by order of the Court.

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

Voting and Elections: Civil Rights Acts of 1957, 1960. United States v. L. F. Campbell, et al. C.A. #3530 (J)(C)(S.D. Miss.) D.J. File No. 72-41-29 #7549. On March 5, 1964, suit was brought under 42 U.S.C. 1971(a)(e) against the Circuit Court Clerk and Registrar of Madison County, Mississippi, and the State of Mississippi. The complaint alleges that of the 10,366 Negroes and 5,622 white persons of voting age, more than 5,000 of the white persons and approximately 152 Negroes are registered. It is further alleged that different and more stringent procedures and standards are applied to Negro applicants, that qualified Negroes are being rejected and denied an equal opportunity to apply, and that Negro applicants are being delayed and discouraged in their efforts to become registered.

The complaint seeks a preliminary and permanent injunction against the discriminatory acts and practices and a finding by the Court that they have been and are pursuant to a pattern and practice.

Also, on March 5, application was made for a temporary restraining order on the basis of the pleadings and six affidavits submitted therewith. A hearing was held on the application on March 7 and the matter is now under submission to the Court.

Staff: United States Attorney Robert E. Hauberg; John Doar, Robert T. Moore (Civil Rights Division)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

AIRCRAFT PIRACY

Federal Aviation Act; Federal Kidnaping Act; "Aircraft Piracy" Amendment Applies to Private as Well as Commercial Aircraft (49 U.S.C. 1472(i)); Federal Kidnaping Act Does Not Require Pecuniary Profit; Motive or Kidnap for Illegal Purpose (18 U.S.C. 1201); Appeal Filed From Denial of Petition for Rehearing Considered Timely. United States v. David Thomas Healy, et al. (Supreme Court, October Term, 1963 - No. 64, Feb. 17, 1964) D.J. File No. 95-18-136. Defendants were indicted for kidnaping a pilot of a private aircraft and compelling him to fly them from Florida to Cuba. They were charged in Count 1 with a violation of 18 U.S.C. 1201 and, in Count 2, with a violation of the 1961 "Aircraft Piracy" amendment of the Federal Aviation Act of 1958 (49 U.S.C. 1472(i).) The district court dismissed the indictment on September 17, 1962, before trial, holding that a kidnaping is not "for ransom or reward or otherwise", as required by Section 1201(a), unless committed for the pecuniary benefit of defendants and that a private airplane is not "an aircraft in flight in air commerce" (1472 (i)), limiting the latter provision to commercial airliners. The Government petitioned for rehearing on October 17. The petition was denied on November 8 and a notice of appeal to the Supreme Court under 18 U.S.C. 3731 was filed on December 5. The Supreme Court reversed and remanded ordering both counts reinstated.

Mr. Justice Harlan, speaking for a unanimous Court, stated that the statutory language of the "Aircraft Piracy" provision, the definition of air commerce in 49 U.S.C. 1301, and the legislative history of the statute plainly show Congress' intent to include private aircraft within the scope of the provision. In connection with the kidnaping count, he stated that the construction placed on "for ransom or reward or otherwise" in the Federal Kidnaping Act by the Court in Gooch v. United States, 297 U.S. 124 (consistently followed by courts of appeals), made clear that a non-pecuniary motive does not preclude prosecution under the statute. He added that the legislative history indicated that the amendment which added the words "or otherwise" was designed to extend Federal jurisdiction to cases of persons kidnaped and held not only for reward, but for any other reason. Furthermore, the legality or illegality of the ultimate purpose of the kidnaper does not affect the applicability of the statute.

Notice of appeal was filed by the United States within 30 days from the denial of the petition for rehearing, although not within 30 days of the original entry of judgment. (See U. S. Sup. Ct. Rule 11(2)). Defendants contended that the filing of a petition for rehearing by the Government in a criminal case cannot extend the time for appeal. The Court noted that the well established rule in civil cases, whether brought by appeal or certiorari, is that the 30 day period prescribed by Rule 11(2) begins to run from the date of entry of judgment or the denial of the petition for rehearing. The traditional

and virtually unquestioned practice of the Supreme Court, both as to appeals and petitions for certiorari by defendants or the Government, has been to treat criminal judgments as nonfinal for purposes of appeal so long as timely rehearing petitions are pending. The rehearing petition in this case was filed within the permissible time for appeal. (The appropriateness of Government petitions for rehearing in criminal cases was recognized recently in Forman v. United States, 361 U.S. 425-426.) The Court noted that such petitions enable lower courts to correct errors thus relieving the Supreme Court of an added and unnecessary burden of adjudication. The appeal was held to have been filed timely in this case.

Staff: District Court: Former United States Attorney Edith House; Assistant United States Attorney Daniel S. Pearson. (S.D. Fla.); Supreme Court: Stephen Pollak (Solicitor General's Office); Beatrice Rosenberg, Robert Maysack, on the brief (Criminal Division).

FEDERAL HOUSING

Absence of Loss to Federal Housing Administration or Borrower no Defense to Charge That Contractor Submitted False FHA Completion Certificate for FHA Title I Property Improvement Loan in Violation of 18 U.S.C. 1010. United States v. George William McGuire (C.A. 6, February 27, 1964). Dept. File 130-37-4731. Defendant was convicted by a jury of making and uttering a forged and false FHA Completion Certificate for an FHA Title I Property Improvement Loan in violation of 18 U.S.C. 1010 and 2. He argued that his conviction should be reversed because the construction work was ultimately performed to the satisfaction of the borrower and because the FHA had sustained no loss. The Court, in a per curiam opinion affirming the conviction, held that "[t]he fact that no damage was sustained by the FHA or the borrower was no defense to the charge although the court could take that into account in imposing sentence."

FRAUD

Mail Fraud and Securities Violations; Obligations of Attorneys and Accountants. United States v. Benjamin (C.A. 2, February 17, 1964). Dept. File 113-51-123. The Court of Appeals for the Second Circuit has handed down an opinion on the obligations and responsibilities of attorneys and accountants who are involved with persons engaged in schemes to defraud. The defendants, whose convictions were affirmed, were Mende, the principal promoter, Benjamin, his lawyer, and Howard, a certified public accountant.

Mende arranged for the purchase of a corporate shell and immediately started to sell its outstanding stock. Benjamin issued a signed opinion that the shares of stock were exempt from the SEC's requirements for registration, and he actively participated in Mende's negotiations. Howard, the accountant, prepared a pro forma balance sheet showing the ownership of several companies

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and containing other false information as to assets of the corporation. He also prepared other reports in which false information was included with respect to the financial condition of the corporation.

The opinion of the Court of Appeals commences with this sentence: "This appeal concerns another of those sickening financial frauds which so sadly memorialize the repacity of the perpetrators and the gullibility, and perhaps also the cupidity, of the victims." After stating the factual situation, the Court considered Howard's claim that the evidence against him was insufficient to show the state of mind required for a criminal conviction. Howard contended that he was performing an accountant's duties innocently if inefficiently, for a negligible compensation, that he sheltered himself with the label "pro forma," and thought that his reports were to be used solely for management purposes. The Court found that the evidence established that Howard knew that his reports were being used with brokers selling the stock. The Court rejected the argument that the statements in the reports were not false because they were stated to be "pro forma," stating that such a contention "involves a complete misconception of the duties of an accountant in issuing a report thus entitled." The Court continued: "It would be insulting an honorable profession to suppose that a certified public accountant may take the representations of a corporation official as to companies it proposes to acquire, combine their balance sheets without any investigation as to the arrangements for their acquisition or suitable provision reflecting payment of the purchase price, and justify the meaningless result simply by an applique of two Latin words."

The Court found that Howard had actual knowledge of the falsity of his reports and deliberately conspired to defraud investors. "In fact, however, the Government was not required to go that far . . . We think that in the context of §24 of the Securities Act as applied to §17(a), the Government can meet its burden by proving that a defendant deliberately closed his eyes to facts he had a duty to see . . . or recklessly stated as facts things of which he was ignorant."

The Court siad that the above was also relevant to Benjamin, the attorney. He brought Howard into the scheme and furnished him with information for his reports. Benjamin's opinion letter as to the exemption of the securities must have been known to him to be false under the circumstances, he participated in sales, and his role "was far more than that of an attorney."

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

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Stay of Deportation to Hong Kong Denied. Lam Tat Sin v. Esperdy; (S.D.N.Y., March 3, 1964.) D.J. File No. 39-51-2492. Plaintiff, a Chinese alien, brought this declaratory judgment action to restrain the Immigration and Naturalization Service from deporting him to Hong Kong. An admittedly deportable alien, he contended that the Attorney General had declared a moratorium on the deportation of aliens to Hong Kong because of the refugee problem there, and that it was arbitrary and capricious to select him for deportation to Hong Kong during such moratorium.

The Court first determined that it had jurisdiction of this action notwithstanding the provisions of Section 106 of the Immigration and Nationality Act, 8 U.S.C. 1105a, which vests in courts of appeals judicial review of all final orders of deportation. It was the Court's view that plaintiff was not challenging the order or warrant of deportation but rather the act of deportation itself. The Court rejected plaintiff's contention that the Immigration and Naturalization Service, acting on behalf of the Attorney General, was acting illegally in deporting him notwithstanding the moratorium. The Court pointed out that the apparent reason for staying the execution of the bulk of the orders of deportation to Hong Kong was to lessen the refugee pressure in that area, that in furtherance of this goal the Attorney General need not stay all orders but may distinguish between orders on any reasonable basis, and that the degree of good faith an alien exhibits in his dealings with the Government is one such reasonable basis. The Court went on to find that plaintiff had not acted in good faith in that he had asked the Government to deport him to Red China, but when Red China agreed to receive him as a deportee he then claimed that he would suffer physical persecution if deported there. The Court mentioned as a further ground for dismissal the failure of plaintiff, prior to the institution of this action, to exhaust his administrative remedies by requesting a stay of deportation from the defendant District Director. Defendant's motion for summary judgment was granted.

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

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Restrictions on Travel to or in Cuba. Zemel v. Secretary of State (D. Conn.). (D.J. 146-1-14-432). On February 21, 1964, a majority of a three-judge District Court in the District of Connecticut upheld the authority of the Secretary of State to refuse to validate a passport for pleasure travel to Cuba. (See U. S. Attorney's Bull., Vol. 11, No. 4, dated February 22, 1963).

Staff: Benjamin C. Flannagan (Internal Security Division)

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Condemnation: Interest; Declaration of Taking Act; Joinder of Separate Parcels; Perimeter Description. United States v. 355.70 Acres in Rockaway and Jefferson Townships (C.A. 3, No. 14463, February 13, 1964, D.J. File No. 33-31-183-79). The perimeter description filed in 1958 of the entire tract condemned embraced parts of several parcels in different ownerships. Several landowners applied for distribution of unspecified amounts of the unallocated deposit of estimated compensation. No decree as to distribution was entered until after the valuation trial in 1962. In an opinion reported at 211 F. Supp. 475 and 11 U.S. Attys. Bull. 17, the district court denied interest from the date of taking on the amount deposited in the court registry.

The Court of Appeals reversed. While acknowledging the propriety of joining several parcels in a single condemnation action, the Third Circuit stated:

> Such aggregation of takings does not alter the necessity that estimated compensation be explicitly tendered or readily calculable for each parcel individually in order that the deposit may have that characteristic of immediate availability which alone justifies the denial of interest between the taking and the ultimate award.

Noting that acreage valuation of even contiguous parcels can vary and that the Government here failed to provide sufficient information for arithmetical determination of a sum tendered to each owner, it concluded that "this meant that an ultimate determination of just compensation for each parcel was necessary before any owner could effectively claim a specific amount as his share of the deposit" and that in the circumstances the lump-sum deposit "is not an effective tender of any sum for any parcel" under the Declaration of Taking Act, 46 Stat. 1421, 40 U.S.C. 258a.

In distinguishing Second and Fifth Circuit authorities, the Third Circuit expressly agreed that additional interest liability does not accrue where a title dispute delays distribution of a deposit or where the Government does enough to enable each owner to claim a specific sum, citing United States v. 53¼ Acres in Borough of Brooklyn, 176 F. 2d 255 (C.A. 2, 1949), and Atlantic Coast Line R.R. v. United States, 132 F. 2d 959 (C.A. 5, 1943). The decision has not been made as to whether certiorari will be sought.

Staff: Raymond N. Zagone (Lands Division)

Public Lands-Congressional Reference: Effect of Provision in House Resolution Requiring Court of Claims to Make De Novo Determination of Question Previously Litigated Between Parties; Limitations and Doctrine of Collateral Estoppel as Barring Any Legal or Equitable Claim. Estate of Charles O. Fairbank, etc. v. United States, C.Cls. No. 10-56 (January 24, 1964), D.J. File No. 90-1-23-551. This is a congressional reference case in which plaintiff sought to recover $15,000,000, plus interest, as damages allegedly resulting

from a determination of former Secretary of the Interior Ickes in 1935 that a portion of Section 36, T. 30 S., R. 23 E., Kern County, California, was known mineral land on and prior to January 26, 1903, when the official survey of the section was approved. By Act of March 3, 1853, 10 Stat. 244, 246, the Congress granted to California for school purposes sections 16 and 36 of public lands in each township. Title to the school land sections passed to the State on the date the official plat of survey was accepted by the Department of the Interior. Mineral lands, however, were expressly excluded and excepted from the grant if they were known to be mineral on the date of acceptance of survey. Plaintiff's claim of title is derived through mesne conveyances under patents from the State of California which were issued in 1910. Fairbank and his partner leased their interest in Section 36 to the Standard Oil Company of California in May 1919 and a few months later oil and gas were struck and production in large quantities began.

The crucial issue throughout this litigation and other litigations going back a period of at least 50 years is whether the lands claimed by plaintiff were known to be mineral in character in January 1903 when the survey of Section 36 was accepted by the Department of the Interior. In 1914, the Commissioner of the General Land Office directed the institution of proceedings against the State of California and its transferees, including Fairbank, to determine whether Section 36 was known mineral land on January 26, 1903. These adverse proceedings were dismissed in 1921 by Secretary of the Interior Fall, who did not decide the issue of minerality.

In 1924, the Congress directed the Secretary of the Interior to institute proceedings to establish the Government's title to Section 36, and such proceedings were begun the following year. The Standard Oil Company of California, however, attempted to enjoin the Secretary of the Interior from continuing the adverse proceedings and this controversy reached the Supreme Court in 1929, which held that the proceeding to determine the character of the land on January 26, 1903, had been properly brought. West v. Standard Oil Company, 278 U.S. 200. The matter finally reached Secretary Ickes, who decided in January 1935 on the basis of a voluminous record that Section 36 was known to be mineral in character in January 1903, and that title to Section 36 never vested in the State of California or its transferees but remained in the United States. United States v. State of California, et al., 55 I.D. 121, reh. den., 55 I.D. 532.

In 1937, following Secretary Ickes' decision, the United States filed an action against the Standard Oil Company and the mineral claimants, including the legal representatives of plaintiff, to quiet title to Section 36 and for an accounting. The district court reviewed the entire record of the administrative proceeding in the Department of the Interior and held that there was substantial evidence to sustain Secretary Ickes' determination as to the known mineral character of Section 36 in January 1903, and awarded damages of more than $6,000,000 against the Standard Oil Company. United States v. Standard Oil Co., 21 F. Supp. 645 (1937), aff'd, 107 F. 2d 402 (C.A. 9, 1939), cert. den., 309 U.S. 654 (1940).

Sixteen years after the conclusion of this litigation, plaintiff obtained a House Resolution referring the matter to the United States Court of Claims. The resolution contained a provision requiring the Court to make a de novo determination of the question whether Section 36 was known mineral land on January 26, 1903. After the petition in this case was filed, the Court directed that a separate trial be held on the issue of whether the land claimed by plaintiff was known mineral land in January 1903. Such a trial was held and the entire record of the administrative proceeding in the Department of the Interior, consisting of approximately 10,000 typewritten pages covering the testimony of 160 witnesses, 995 exhibits and more than 1,800 pages of briefs, was introduced in evidence. In addition, both sides presented testimony of expert witnesses and exhibits.

In its decision of January 24, 1964, the Court held that the plaintiff had neither a legal nor an equitable claim against the United States on account of Section 36. Briefly stated, the grounds of the Court's decision so far as any legal claim was concerned were (1) any cause of action for just compensation for the alleged taking of the land by the United States was long since barred by the six-year statute of limitations, 28 U.S.C. 2501, and (2) such claim was also barred under the doctrine of collateral estoppel, in view of the fact that the issue of whether Section 36 was known to be mineral land on January 26, 1903, had previously been litigated in the federal courts and determined adversely to plaintiff.

The Court stated that the provision in the House Resolution requiring a de novo determination of the question of the known minerality of Section 36 in January 1903 was merely a suggestion that the Court re-examine the facts, and being a resolution of a single branch of Congress was not a statute and did not seek to change the applicable rules of law or set aside the doctrines of res judicata and collateral estoppel. The Court stated that it had made de novo judicial findings of fact and that under them plaintiff would not be entitled to prevail according to the legal standard adopted by the Ninth Circuit in 1939. That standard was whether the known conditions in January 1903 were such as reasonably to engender the belief that the lands contained oil such quality and in such quantity as would render its extraction profitable and justify expenditures to that end. (107 F. 2d 414-415.) One of the ultimate findings of the Court was that it would have been reasonable in January 1903 to acquire the land for ultimate oil development on a commercial basis. The Court stated that this finding fitted the rule of the Ninth Circuit, which was phrased in terms of reasonable belief. Consequently, the Court determined that plaintiff had no equitable claim with respect to Section 36.

Staff: David D. Hochstein (Lands Division)

Federal Highways-Jurisdiction: Action in Nature of Mandamus Under 28 U.S.C. 1361 to Compel Secretary of Interior and Other Government Officials to Remove Barricades Placed Across Certain Access Roads Along Blue Ridge Parkway to Which United States Claimed Title; Dismissal for Lack of Jurisdiction as Unconsented Suit Against United States. Switzerland Company, et al. v. Stewart L. Udall, et al. (Civil No. 2138, W.D. N. Car., January 20, 1964,

D.J. File No. 90-1-23-1048.) This action was brought pursuant to the provisions of 28 U.S.C. 1361 against the Secretary of the Interior, the Director of the National Park Service, and the Superintendent of the Blue Ridge Parkway, to compel them to remove certain physical obstacles and barricades allegedly placed by them across two access roads along the Blue Ridge Parkway leading to a famous scenic landmark owned by plaintiffs known as Kilmichael Tower.

In 1938, the North Carolina State Highway Commission conveyed to the United States the fee title to a right-of-way across plaintiffs' lands for use as part of the Blue Ridge Parkway, a federal project authorized by Congress. (16 U.S.C. 460a-1, 2 and 3.) Reserved from this conveyance, however, were public roads as shown and designated on a map which had been filed by the Highway Commission in Mitchell and McDowell Counties where the property involved is located. Failing to reach an agreement with the landowner as to the price to be paid for the right-of-way, the State Highway Commission filed condemnation proceedings in the state court pursuant to North Carolina law. The Switzerland Company was awarded $25,000 by a jury for the right-of-way, including the access roads within the parkway. The Company appealed but the judgment was affirmed upon the ground that the access roads were private and not public roads reserved to the state. Switzerland Company v. Highway Commission, 216 N.C. 450.

Following the completion and opening of the Blue Ridge Parkway in 1948 through the lands of the Switzerland Company, the Superintendent of the Blue Ridge Parkway issued a special use permit to the Company to use and maintain two private roads 10 feet wide from the parkway right-of-way to Kilmichael Tower. The permit was for a period of one year beginning January 1, 1949, and was to be automatically renewed each year for a period not exceeding ten years, and by its terms expired December 31, 1958. The Switzerland Company refused to accept another special use permit in 1959, and the two access roads were closed and barricaded at their entrance to the parkway in April 1960 at the direction of the National Park Service.

A short time thereafter, the Switzerland Company attempted to reopen the 1939 condemnation proceedings so as to obtain a judgment that the access roads were public roads, and named the Secretary of the Interior as a party defendant. That action was removed to the federal court and dismissed as to the Secretary. In 1961, the Switzerland Company and Joseph H. Walker, who had purchased part of the company's land near Kilmichael Tower, filed separate actions against the United States under the Federal Tort Claims Act to recover damages of $125,000 arising out of the barricading of the access roads. A motion to dismiss on several jurisdictional grounds was filed in each case, and a short time after the motions were argued the actions were dismissed voluntarily by plaintiffs. This action was then filed.

After a trial on the merits, the District Court filed a memorandum opinion on January 20, 1964, in which it held that since the United States claimed title to the access roads within the Blue Ridge Parkway, the action must be considered as an action against the United States to which consent had not been given, and dismissed the complaint, citing Malone v. Bowdoin, 369 U.S. 643, and Dugan v. Rank, 372 U.S. 609.

The Court further held that the provisions of 28 U.S.C. 1361, invoked by plaintiffs, were intended to give the various United States district courts outside the District of Columbia the same mandamus authority as that of the federal district court for the District of Columbia. The Court stated that the statute invoked related only to a nondiscretionary ministerial duty, and that where the scope of an official's duty depends upon an interpretation of a statute, the duty is not a ministerial one, which is enforceable by a mandatory order "unless the construction or application of the statute is so plain as to be free from doubt." The Court said, "In this case the duty of these officials depended upon the interpretation of the deed and other documents and the Court Proceedings involved in the acquisition of this property by the United States. The interpretation of this material is certainly not so plain as to be free from doubt." Accordingly, the Court found as a matter of law that the provisions of 28 U.S.C. 1361 were not applicable in this case.

Staff: United States Attorney William Medford (W.D. N. Car.)

Public Lands-Reclamation Jurisdiction: Action Against Employee of Bureau of Reclamation for Preliminary and Final Injunctions Restraining Dredging Operations in Colorado River and Deposit of Spoil on Land Claimed by Plaintiff; Adequate Remedy at Law in Court of Claims; Dismissal for lack of Jurisdiction as Unconsented Suit Against United States. George McBride v. Earl H. Clark, et al. (Civil No. 872-Pct., D. Ariz. February 18, 1964, D.J. File No. 90-1-3-1008). This action was brought to restrain an employee of the Bureau of Reclamation from conducting dredging operations in the Colorado River, near Needles, Arizona, and depositing the spoil upon land allegedly owned by plaintiff, and for substantial damages. Upon application of plaintiff, the Court granted a temporary restraining order ex parte. After a hearing on plaintiff's motion for a preliminary injunction, the Court found that defendant was carrying on work which was authorized and directed by his superiors under authority of the Reclamation Act (60 Stat. 338, as amended). The Court further found that defendant's conduct, as well as that of his superiors, was within the scope of his employment, citing United States v. Buffalo Pitts Company, 234 U.S. 228, and Hurley v. Kincaid, 285 U.S. 95.

The Court held that the action was a suit against the United States to which consent had not been given, and that plaintiff had a speedy and adequate remedy at law in the United States Court of Claims, citing Hurley v. Kincaid, supra, and Myers v. United States, 323 F. 2d 580. Accordingly, plaintiff's application for a preliminary injunction was denied and the temporary restraining order previously issued was dissolved.

On February 19, 1964, the day after judgment denying plaintiff's motion for a preliminary injunction and dissolving the temporary restraining order was filed, the parties entered into a stipulation pursuant to which the Court entered an order dismissing the complaint without prejudice.

Staff: Assistant United States Attorney Arthur E. Ross (D. Arizona)

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TAX DIVISION

Louis F. Oberdorfer, Assistant Attorney General

CIVIL TAX MATTERS
District Court Decisions

Enforcement of Internal Revenue Summons; Factual Report Prepared by Attorneys for Bank for Use in Unrelated Civil Suit Is Not Privileged Report Either on Basis of Attorney-client Privilege or the Work Product Rule. In the Matter of Samuel W. Kearney (S.D. N.Y., January 9, 1964). This action involved the enforcement of an Internal Revenue summons which was issued to obtain from the First National City Bank, New York, certain reports prepared for them by their attorneys. These reports were prepared in connection with irregularities in the loan practices of a bank that had recently merged with the First National City Bank. The purpose of the reports was to determine the size and nature of the losses for the purpose of making a claim against the insurance company and to determine the bank's and the insurance company's liability with respect to third parties.

The bank opposed the enforcement of the summons on the grounds that it called for the production of privileged documents. The Court found that these reports did not fall within the attorney-client privilege, by reason of the fact that they were a compilation of factual material and did not involve a confidential communication from the bank to its attorneys nor did they contain any legal advice from the attorneys to the bank. It further found that these reports were not work products within the doctrine set up by Hickman v. Taylor, 329 U.S. 495 (1947), by reason of the fact that while the reports were prepared in anticipation of litigation, they were not prepared with respect to any litigation, either present or potential, between the Internal Revenue Service and the bank; and in fact, there was no controversy between them outside of the present action. Accordingly, the reports were not work products which were protected by this privilege.

The bank also alleged that the reports were very costly, and that the Government was getting their benefit free of charge. The Court concluded that this allegation was true; but, nevertheless, there was nothing in the law making this a basis for denying the information to the Government. Finally, the bank raised the allegation that some of the reports might be construed as being libelous. The Court determined that the privilege which extends to a witness who testifies in a judicial proceeding should also be applicable to a witness who testifies pursuant to an Internal Revenue summons and, accordingly, nothing he states could be the basis of a civil or criminal libel suit.

Staff: United States Attorney Robert M. Morgenthau and Assistant United States Attorney Arthur S. Olick (S.D. N.Y.)

Federal Tax Liens on Life Insurance. United States v. Nathan Galvin, et al. (E.D. N.Y., December 31, 1963). (CCH 64-1 USTC ¶9194). There were income tax liabilities outstanding against Nathan Galvin and also separate income tax liabilities outstanding against his wife Lillian. In this action, the Government sought to recover the cash value of an insurance policy on the life of Nathan.

Prior to assessment of any of the taxes involved, Nathan had designated Lillian as irrevocable beneficiary and his two children as contingent beneficiaries, if Lillian predeceased him. He did not reserve the right to change the beneficiary but did reserve the right to change the contingent beneficiaries. There were no taxes outstanding against the contingent beneficiaries. Under the terms of the policy, both the insured and the irrevocable beneficiary had to join in a request for the cash value, but consent of the contingent beneficiaries was not necessary. The Court held that federal tax liens attached to the right of Nathan and Lillian to demand the cash value, by reason of the tax liabilities against each of them, and ordered payment of the cash value to the Government.

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

Penalty for Willful Failure to Pay Over Withholding and Social Security Taxes. United States v. Rutledge Slattery, (E.D. Pa., October 11, 1963). (CCH 64-1 USTC ¶9150). This was an action to recover a 100 per cent penalty for willful failure to pay over withholding and Social Security tax of the Philadelphia Brewery Company for the Second Quarter of 1948. The quarter ended June 30, 1948, and the tax was due on July 31, 1948. Taxpayer, who was president of the company and held various other offices, testified that the office manager was in charge of payment of the tax and that he did not learn of failure to pay the tax until some time between July 31 and October 8, 1948. On October 18, 1948, the company went into a Chapter X proceeding. The only available evidence as to funds of the corporation showed that it had cash in the amount of $2,975.96 on September 30, 1948, and $5,144.85 on October 18, 1948. The Court held that the taxpayer was not obligated to pay over all of the cash from the time he learned of the delinquency to the date the company went into Chapter X, and that, therefore, his failure to pay over was not willful. The Solicitor General has authorized an appeal.

Staff: United States Attorney Drew J. T. O'Keefe and Assistant United States Attorney Sullivan Cistone (E.D. Pa.) and Robert L. Handros (Tax Division)