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United States
DEPARTMENT OF JUSTICE

Vol. 13 No. 14

UNITED STATES ATTORNEYS
BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 13 July 9, 1965 No. 14

APPOINTMENTS--DEPARTMENT

The nomination of the following appointee has been confirmed by the Senate:

Assistant Attorney General, Antitrust Division-Donald F. Turner

APPOINTMENTS--UNITED STATES ATTORNEYS

In addition to those listed in previous Bulletins, the nominations of the following United States Attorneys to new four-year terms were pending before the Senate as of July 1, 1965:

Georgia, Northern--Charles L. Goodson
Hawaii--Herman T. F. Lum
Idaho--Sylvan A. Jeppesen
Oklahoma, Western--B. Andrew Potter
South Dakota--Harold C. Doyle

The nominations of the following United States Attorneys to new four-year terms have been confirmed by the Senate:

Georgia, Middle--Floyd M. Buford
Illinois, Eastern--Carl W. Feickert
North Dakota--John O. Garaas
Tennessee, Eastern--John H. Reddy
Virginia, Eastern--C. Vernon Spratley, Jr.
Vermont--Joseph F. Radigan

The nomination of the following appointee as United States Attorney has been confirmed by the Senate:

West Virginia, Southern--Milton J. Ferguson

MONTHLY TOTALS

Traditionally, the last two months of the fiscal year show a substantial reduction in the pending caseload, as United States Attorneys close as many cases as possible in order to reduce their fiscal year-end caseload totals. While there was some reduction in the caseload during May-down 613 cases from the previous month - the decrease was far from substantial-0.019 per cent. Unless the figures for June show an unusually high reduction in the pending caseload, fiscal 1965 will be the fifth successive year in which the caseload has risen. As of May 30, 1965, the caseload has increased by 9,184 cases, or 34 per cent, since June 30, 1960. Following is a table giving a comparison of the cases filed, terminated and pending during the first 11 months of fiscal 1964 and 1965.

	First 10 Months Fiscal Year 1964	First 10 Months Fiscal Year 1965	Increase or Decrease Number	%
Filed				
Criminal	30,847	31,007	+ 160	+ .52
Civil	26,216	26,553	+ 337	+ 1.29
Total	57,063	57,560	+ 497	+ .87
Terminated				
Criminal	29,758	29,126	- 632	- 2.12
Civil	24,511	25,257	+ 746	+ 3.04
Total	54,269	54,383	+ 114	+ .21
Pending				
Criminal	10,860	11,813	+ 953	+ 8.78
Civil	24,025	24,330	+ 305	+ 1.27
Total	34,885	36,143	+ 1,258	+ 3.61

During May, terminations exceeded filings by approximately 10 per cent. In the 11 months of fiscal 1965, this is the second time that more cases were terminated than were filed. Approximately two-thirds of the terminations were in criminal cases.

	Filed			Terminated		
	Crim.	Civil	Total	Crim.	Civil	Total
July	2,321	2,460	4,781	2,230	2,391	4,621
Aug.	2,176	2,224	4,400	1,846	1,590	3,436
Sept.	3,284	2,214	5,498	2,054	2,556	4,610
Oct.	3,284	2,464	5,748	3,251	2,131	5,382
Nov.	2,497	2,005	4,502	2,741	2,132	4,873
Dec.	2,574	2,204	4,778	2,612	2,059	4,671
Jan.	2,698	2,593	5,291	2,529	2,566	5,095
Feb.	2,769	2,411	5,180	2,341	2,134	4,475
Mar.	3,337	2,780	6,117	3,281	2,490	5,771
Apr.	3,142	2,912	6,054	3,055	2,608	5,663
May	2,819	2,586	5,405	3,227	2,729	5,956

For the month of May, United States Attorneys reported collections of $3,402,990. This brings the total for the first eleven months of this fiscal year to $56,728,948. Compared with the first eleven months of the previous fiscal year this is an increase of $5,476,989 or 10.69 per cent over the $51,251,959 collected during that period.

During May, 1965, $4,792,451 was saved in 94 suits in which the government as defendant was sued for $5,855,195. 51 of them involving $2,039,401 were closed by compromises amounting to $446,204 and 14 of them involving $1,666,467 were closed by judgments amounting to $616,540. The remaining 29 suits involving $2,149,327 were won by the government. The total saved for the first eleven months of the current fiscal year aggregated $97,998,372 and is a decrease of $4,589,241 or 4.68 per cent over the $102,587,613 saved in the first eleven months of fiscal year 1965.

The cost of operating United States Attorneys' Offices for the first eleven months of fiscal year 1965 amounted to $16,340,992 as compared to $15,837,136 for the first eleven months of fiscal year 1964.

DISTRICTS IN CURRENT STATUS

Set out below are the districts in a current status as of 1965.

CASES

Criminal

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

CASES

Civil

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

MATTERS

Criminal

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

MATTERS

Civil

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

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ADMINISTRATIVE DIVISION

Assistant Attorney General for Administration S. A. Andretta

Allowances to Government Witnesses

Department Memo No. 422, dated June 28, 1965, includes an attachment, Form DJ-109, outlining the allowances to witnesses. Unfortunately, Form DJ-109, paragraph (b) omitted a semicolon, which omission causes confusion. Please make the correction on your supply of the Forms by adding ";" after the words "Mileage Guide" in line 4 of paragraph (b).

MEMOS AND ORDERS

The following Memoranda and Orders applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 13, Vol. 13 dated June 25, 1965:

MEMOS	DATED	DISTRIBUTION	SUBJECT
416	6-15-65	U.S. Marshals	Monthly Statistical Report - Revision of Form No. USM-6
417	6-15-65	U.S. Attorneys	Submitting Views on Report on "Recommended Procedures in Criminal Pretrials"
418	6-21-65	U.S. Attorneys & Marshals	Control & Reporting of Obligations & Disbursements on New Forms USA-63a & b & USM-63a & b, Form No. USM-111, Amended, & Procedural Changes
419	6-21-65	U.S. Attorneys & Marshals	Minority Group Study, June 30, 1965 (Report 16-166.2)
420	6-21-65	U.S. Attorneys & Marshals	Procedural Guide for Incurring Expenses
421	6-22-65	U.S. Attorneys & Marshals	Fed. Telecommunications System
422	6-28-65	U.S. Attorneys & Marshals	Allowances to Government Witnesses

ORDERS	DATED	DISTRIBUTION	SUBJECT
345-65	6-23-65	U.S. Attorneys & Marshals	Designating Donald F. Turner to Act as Assistant Attorney General in Charge of Antitrust Div.

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ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

Hat Company Charged With Violation of Section 7 of Clayton Act. United States v. Hat Corporation of America, et al. (D. Conn.) D.J. File 60-148-82. On June 11, 1965, a civil complaint was filed alleging that the Hat Corporation of America's (HCA) acquisition of the assets of Stylepark Hats, Inc. in May 1963 violated Section 7 of the Clayton Act.

HCA is the largest manufacturer of men's fur felt hats and in 1963 accounted for approximately 31% of the annual sales of such hats. The complaint alleges that "due in large part" to the subject and past acquisitions "HCA became the dominant manufacturer in the United States in the highly concentrated men's fur felt hat industry." Concentration in this industry is such that the four leading manufacturers now control approximately 80% of sales. This concentration has resulted in large part from acquisitions and mergers and from the hat manufacturers gaining control of retail outlets which sell men's fur felt hats.

Prior to its acquisition Stylepark Hats Inc. was eighth largest manufacturer of men's fur felt hats in the United States. It was a non-integrated manufacturer that purchased its hat bodies from independent hat body manufacturers not affiliated with any hat manufacturers. At present there are only two such independent hat body manufacturers. Their aggregate sales of hat bodies in 1963 were approximately $862,522. In its last year of operation Stylepark Hats Inc. purchased approximately $270,000 worth of hat bodies.

With respect to men's fur felt hats, the complaint alleges that through the subject acquisition actual and potential competition in the manufacture and sale of men's fur felt hats may be substantially lessened; competition between HCA and Stylepark Hats, Inc. has been eliminated; HCA's advantage over its competitors may be enhanced to the detriment of actual and potential competition; concentration in the men's fur felt hat industry has been increased; and additional acquisitions and mergers in this industry may be fostered.

With respect to men's fur felt hat bodies, the complaint alleges that through the subject acquisition, independent manufacturers of such bodies have been foreclosed from a market represented by Stylepark Hats, Inc.

Staff: John J. Galgay, John D. Swartz and Howard Breindel (Antitrust Division)

Plan of Merger Cancelled When Government Files Complaint. United States v. Russell Stover Candies, Inc., et al. (W.D. N.Y.) D.J. File 60-0-37-855. On June 28, 1965, a complaint was filed seeking to enjoin the proposed acquisition of Fanny Farmer Candy Shops, Inc. by Russell Stover Candies, Inc. The complaint, which also sought a preliminary injunction pending a trial on the merits, stated that shareholders of Stover and Farmer were to vote on the proposed acquisition on June 29, 1965.

Under the terms of the agreement entered into by the two leading quality candy companies, Stover would have acquired all of the outstanding stock of Farmer in exchange for Stover common stock having a present market value of more than $23,000,000.

The complaint alleged that Stover is the largest manufacturer of high quality boxed or packaged candy in the United States; that it had record high net sales for the fiscal year ending August 31, 1964 of $28,005,289, and earnings after taxes of $2,855,783; and that its products are distributed through 105 retail establishments and approximately 4,250 wholesale and agency accounts located in every State of the United States and the District of Columbia.

The complaint stated that Farmer is the fourth largest manufacturer of high quality boxed or packaged candy in the United States; that it had record high net sales for the fiscal year ending June 27, 1964 of $22,586,927, and earnings after taxes of $1,126,898; and that its products are distributed through 355 retail establishments and approximately 2,641 wholesale and agency accounts located in 28 States and the District of Columbia.

The complaint alleged that Stover and Farmer candy shops and candy departments are operated in competition with each other in 43 cities and towns located in 14 States and the District of Columbia; and that in 1963 Stover manufactured at least 11.3 per cent and Farmer at least 6.6 per cent of all high-quality boxed or packaged candy sold in the United States.

The complaint alleged that the proposed acquisition, if consummated, would eliminate actual and potential competition between Stover and Farmer; might substantially lessen competition generally in high quality boxed or packaged candy industry; would unduly increase concentration in that industry; and would foster the cumulative process of mergers and acquisitions in that industry.

On June 28, 1965, the Government orally moved, ex parte, for a temporary restraining order to block Stover's acquisition of Farmer, the effective date of which was to be on or about June 29, 1965. At that time the Government submitted to the Court a memorandum of law in support of a motion for a temporary restraining order and affidavits in support of the Government's motion for a temporary restraining order. Chief Judge John O. Henderson signed the temporary restraining order that same day enjoining and restraining Stover and Farmer, their officers, directors, agents, employees, and all other persons acting on their behalf, from taking any further action to consummate the acquisition and from making any changes directly or indirectly in the corporate structure, operations and properties of the defendants other than in the regular and ordinary course of business. Judge Henderson's temporary restraining order provided that it should expire on June 30, 1965, on which date the Government's motion for a preliminary injunction was to be heard.

On the afternoon of June 28, 1965, the boards of directors of Stover and Farmer voted to terminate and abandon the acquisition agreement. On this ground Chief Judge Henderson on June 29, 1965, granted the Government's motion to dismiss its complaint without prejudice.

Staff: John E. Sarbaugh, Bertram M. Long, John T. Cusack and Mabel N. Mann (Antitrust Division); U.S. Attorney John T. Curtin (W.D. N.Y.)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURT OF APPEALS

ADMIRALTY

Decree, Holding United States Not Negligent as to Ladder Rung on Its Ship, Reversed Because of Rejection of Evidence Based on Photograph Not Admitted in Evidence. Kleveland v. United States v. Agmarine Contracting Co. (C.A. 2, No. 28442, May 11, 1965) D.J. No. 61-51-3682. Libelant, as a member of a cleaning crew on a United States "mothball" vessel was held by the district court to have failed to sustain his burden to prove the United States negligent with respect to injury to him by reason of a rung in a ladder which broke. Libelant, at the trial, showed his expert a photo of a broken rung and asked for his conclusion regarding the nature of the weld and the cause of the collapse. The trial court sustained the Government's objection to the expert's testimony on the ground that another witness who identified the severed rung in the photo had not been present when the photo was taken.

The Second Circuit held that the exclusion of the photo had been erroneous since a witness had identified the severed rung depicted therein, and it was not required that he should also have been present when the photo was taken.

The Court of Appeals remanded for the introduction of the photo in evidence, the testimony of the expert thereon, and the determination of the consequent issue of sufficiency of inspection.

Staff: Harry L. Hall (Civil Division)

ARMED FORCES

Validity of Separation From Cadet Corps of United States Military Academy Held Issue Within Jurisdiction of District Court; Suspension Sustained as Against Attacks on Procedure and Contentions of Vagueness of Honor Code and That Only President Can Separate From Corps. Dunmar v. Ailes, Secretary of the Army (C.A. D.C., No. 18997, May 20, 1965) D.J. No. 145-4-1404. Appellant contended that the action of the Secretary of the Army separating him from the Corps of Cadets, United States Military Academy, was invalid because based on proceedings which were inconsistent with procedural due process, and which violated regulations of the Army and of the Academy. He also urged that the Honor Code was too vague, and that the power to separate was only in the President. The Court of Appeals held that the district court was in error in dismissing for lack of jurisdiction (the Court here citing, inter alia, Harmon v. Brucker, 355 U.S. 579), but was correct in its alternative grant of summary judgment sustaining the separation.

The Court found that the record in the instant procedure disclosed no lack of conformity with usual practices. Moreover, the protections furnished "went substantially beyond those expressly provided for" in the applicable regulations. Appellant, inter alia, was represented by counsel, was given a continuance for preparation of his case, and was allowed to cross-examine witnesses. However, the Court of Appeals dealt only with the instant circumstances and did not undertake to formulate standards of procedural due process generally applicable.

With respect to the alleged vagueness of the Honor Code, the Court declined to determine what conduct was or was not condemned by the "common law" of the Corps, but considered this question sufficiently resolved by the finding of a violation by the Cadet Honor Committee, then by the board of officers, the reviewing board, the Superintendent of the Academy, and the Secretary of War.

The Court also found that, although all cadets were to be "appointed" by the President, it did not follow that only the President could separate a cadet.

Staff: United States Attorney David C. Acheson; Assistant United States Attorneys Frank Q. Nebeker, Joseph M. Hannon, and Jerome Nelson (D.C.)

COMMODITY EXCHANGE ACT

Regulation Requiring Competitive Execution of Transactions by Open Outcry Held Not Satisfied; Suspension of Broker Upheld. Laiken v. United States Department of Agriculture (C.A. 2, No. 420, May 18, 1965) D.J. No. 56-13. Regulation (17 CFR 1.38) required, inter alia, execution of transactions "openly and competitively as to price by open outcry." Laiken, who had been purchasing potato futures contracts for his own account, received an order from a customer to buy 26 contracts, 18 at market and 8 at $2.57 or better. While the customer was still on the phone Laiken instructed another broker to call out an offer of 26 contracts at $2.54 and immediately accepted this offer. The other broker understood that he was "selling" not for himself but for Laiken's house account. Laiken used the contracts thus "bought" to satisfy the customer's order. The Department's Judicial Officer found that no one else on the floor had opportunity to sell to Laiken to fill the order, and suspended Laiken as a broker for ten days. Laiken's petition for review was denied by the Court of Appeals, which held that the Judicial Officer could find as he did, irrespective of whether "any great harm was done or not."

Staff: Alan S. Rosenthal (Civil Division); Neil Brooks, Earl L. Saunders, and Robert E. Duncan (Department of Agriculture)

SMALL BUSINESS ADMINISTRATION

Injunction Issued by Referee in Bankruptcy to Restrain Small Business Administration From Proceeding With Foreclosure Held Invalid. United States v. Mel's Lockers, Inc. (C.A. 10, No. 7906, June 7, 1965) D.J. No. 105-77-17. The Tenth Circuit here reversed the refusal of the district court to vacate an injunction issued by a referee in bankruptcy in a Chapter XI proceeding which restrained the Small Business Administration from proceeding with a foreclosure action. In this case of first appellate impression, the Court of Appeals declined to follow the only reported cases on the subject, and held that, by virtue of the sovereign immunity doctrine and the specific language of 15 U.S.C. 634(b)(1), the SBA cannot be enjoined. This decision will enable SBA to avoid the loss in value of collateral frequently associated with drawn out Chapter X or XI proceedings.

Staff: Morton Hollander and Robert C. McDiarmid
(Civil Division)

SOCIAL SECURITY ACT -- SURVIVORS' BENEFITS

Second Circuit Continues to Deny Benefits to Widow Whose Remarriage Was Void for Fraud. Shatz v. Celebrezze (C.A. 2, No. 29737, May 27, 1965) D.J. No. 137-52-203. In this case of a widow's remarriage annulled for fraud, in which the Court was urged to depart from Nott v. Flemming, 272 F. 2d 380 (C.A. 2), in view of Yeager v. Flemming, 282 F. 2d 779 (C.A. 5), the district court felt constrained by Nott to affirm the Secretary's order denying benefits, and the Second Circuit affirmed in open court per curiam, adhering to Nott.

Staff: United States Attorney Joseph P. Hoey; Assistant
United States Attorney Barry M. Bloom

SOCIAL SECURITY ACT -- DISABILITY

Denial of Disability Benefits Sustained in Case Involving Prior Subtotal Gastrectomy and Cholecystectomy, Psychoneurosis, and Chronic Alcoholism, Where Record Disclosed Gainful Activity Subsequent to Respective Onsets. Willard Brown v. Celebrezze (C.A. 4, No. 9843, June 11, 1965). D.J. No. 137-84-338. Claimant, age 43 at the time of his application for disability benefits in June 1963, had an ulcer condition as early as 1941, a subtotal gastrectomy in 1955, a cholecystectomy in 1958, and hospitalization in 1960 and 1962 for psychoneurotic and alcoholic disorders. However, he had worked in the coal mines until 1954 and had operated a pool hall and grocery establishment from 1959 to February 1963. The district court sustained the Secretary's denial of benefits and the Fourth Circuit affirmed, stating in its per curiam opinion that, while it might not have reached the same result sitting as a hearing examiner, it could not characterize the record as barren of substantial support for the denial of benefits.

The Court also adverted to the worsening of claimant's condition after the effective date of the application, and stated that the decision was without prejudice to what might appear if claimant filed a later application.

Staff: J. F. Bishop (Civil Division)

TORT CLAIMS ACT

Summary Judgment Dismissal of Plaintiff's Claim for Malpractice Reversed. Rev. Johnstone Beech, et al. v. United States (C.A. 5, No. 21665, May 26, 1965). D.J. No. 157-76-246. This suit was brought in February 1963, alleging that the negligence of Government hospital employees resulted in a fall and injuries in June 1960. The complaint also contained a cause of action based upon the alleged negligence by Government doctors during the period from September 1961 through the Spring of 1962 in misdiagnosing the injured person's condition and in failing to provide her with proper care and treatment and, hence, aggravating her injuries. The district court gave summary judgment to the Government on its defenses that (1) the claim for injuires from the fall was barred by the Tort Claims Act's two-year statute of limitations, (2) any negligence arising from the alleged misdiagnosis was barred by the Tort Claims Act's misrepresentation exception, and (3) the record failed to reveal any genuine issue of fact as to the alleged negligence in treatment.

The Court of Appeals agreed that the claim for the injuries resulting from the fall was barred by the statute of limitations, since the time of the accrual of that cause of action, a matter of federal, not state, law was at the time of the fall, even though the full extent of the ultimate damage then might have been unknown or unpredictable.

The Court held, however, that the claim based upon the alleged improper treatment was not barred by the statute of limitations since, under federal law, such a cause of action does not accrue until a claimant has discovered, or in the exercise of reasonable diligence should have discovered, the existence of the acts of malpractice. The claim was held not barred by the misrepresentation exception because it involved an allegation of the Government's failure both to communicate a correct diagnosis to the injured person and to render her proper care.

With respect to the Government's contention that the record revealed no negligence of treatment the Court noted that, since the issue had been determined by summary judgment, a stringent standard of review would be applied, and the record did not negate the probability that at a trial the plaintiffs might develop some evidence indicating neglect or negligence. The case was remanded for a trial on the malpractice claim.

Staff: Frederick B. Abramson (Civil Division)

Holding, That Plaintiff in Malpractice Suit Failed to Prove Notice of Disease Purported to Have Been Overlooked, or Damage From Delay in Treatment, Affirmed. Willie Bristol Watson v. United States (C.A. 5, No. 21,858, June 1, 1965) D.J. No. 157-18-402. The Fifth Circuit has affirmed a holding of the district court that the United States was not liable for the alleged malpractice of a Public Health Service doctor in the outpatient clinic of the Public Health Service Hospital in Savannah, Georgia. The action had alleged negligent failure of the doctor to diagnose a serious disease and asking recovery of $500,000, asserting that the delay in treatment resulting from the failure to diagnose had caused the loss of claimant's leg. The Court of Appeals noted the severe burden resting upon plaintiff in a malpractice action under Georgia law and held that the district court had had adequate support in the evidence for its conclusion that plaintiff had not complained of symptoms sufficient to put the doctor on notice of his disease and for its conclusion that, in any event, the delay in treatment had not contributed to the loss of the leg.

Staff: Robert C. McDiarmid (Civil Division)

VESSELS

Coast Guard Regulation, Directing That Seaman's Papers Voluntarily Deposited With Coast Guard May Not Be Returned Unless Seaman Furnishes Proof of Physical Fitness, Upheld. Thomas V. Pew v. Commandant, United States Coast Guard (C.A. D.C., No. 19,058, May 28, 1965) D.J. No. 145-3-687. When this seaman was refused employment because of possible physical disability, he voluntarily deposited his engineer's license and merchant mariner's document with the Coast Guard until such time as he might furnish the Coast Guard with a medical certificate of physical fitness. In this suit, he sought to compel the return of his papers without supplying the medical certificate. The Court of Appeals affirmed the district court's summary judgment for the Coast Guard. The case is the first to consider the voluntary deposit procedure, authorized by 46 C.F.R. 137.10-1, which permits seamen to use the voluntary deposit agreement "in order to avoid a charge of incompetence" under R.S. 4450, 46 U.S.C. 239.

Staff: Florence Wagman Roisman (Civil Division)

DISTRICT COURT

ADMIRALTY

Burdened Vessel Held Solely at Fault for Failing to Alter Course to Avoid Collision, and for Attempting to Recross Bow After Passage Had Been Made; Privileged Vessel Free of Fault Where Changes in Course Were Made Too Remote in Time and Distance and After Burdened Vessel Had Crossed Ahead. United States v. M/V BERND LEONHARDT (D. Md., May 13, 1965) D.J. No. 61-18747. The aircraft carrier USS SARATOGA and a German freighter the M/V BERND LEONHARDT collided on May 25, 1960, 35 miles off of the North Carolina coast. The collision occurred

at night on a calm sea with excellent visibility and both vessels were properly lighted. They had sighted one another at a distance of approximately 10 to 12 miles and were actually in visual communication by flashing light shortly after sighting and until briefly before the collision. The BERND LEONHARDT had held the SARATOGA on her starboard hand and was thus the burdened vessel in a crossing situation. The SARATOGA was proceeding roughly south at a speed of 26 knots and the BERND LEONHARDT northeast at a speed of 13 knots with a relative closing speed of approximately 38 knots. The SARATOGA changed her course 20° to the right to make passage with another vessel and resumed her original course when she was still approximately 4 miles away from the BERND LEONHARDT. The German vessel continued on the same course until she had actually crossed the SARATOGA's bow at a distance of perhaps 2 miles and then came right in order to pass down the SARATOGA's port side, which in effect caused her to recross the SARATOGA's bow. When the BERND LEONHARDT was first observed to cross the SARATOGA's bow, the SARATOGA came left 10° and then ordered an additional 10° left to open the passage already made. When the BERND LEONHARDT's re-crossing was observed the SARATOGA came hard right, but the vessels collided along their port sides with the resulting damage of approximately $1 million to the SARATOGA and $500,000 to the BERND LEONHARDT. The Court found the BERND LEONHARDT solely at fault for failure to give way as the burdened vessel in a crossing situation, for failure to observe where she lay with respect to the SARATOGA's bow, and failure to sound whistle signals indicating her course change. The Court exonerated the SARATOGA from liability because her first course changes were made too remote in time and distance and her subsequent course changes to the left were made only after the BERND LEONHARDT had first crossed the SARATOGA's bow and were to open the passage already made.

Staff: Alan Raywid and Bertram E. Snyder
(Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

BAIL JUMPING

Circumstantial Evidence Sufficient Proof of Willfulness Where No Evidence That Defendant's Counsel Told Him to be in Court on Specific Date; Failure of Attorney-client Privilege to Cover Transmission by Defendant's Counsel of Assistant U. S. Attorney's Notification to Appear. United States v. Hall (C.A. 2, June 9, 1965). D.J. File 95-51-257. After being indicted on May 28, 1962, for transporting and conspiring to transport stolen securities in interstate commerce, Hall executed a $15,000 bail bond. On June 27, 1963, the Assistant U. S. Attorney in charge of the prosecution informed Hall's counsel that Hall would thereafter be required to be in court every day his case was on the calendar. Hall appeared on June 27, June 28, and July 1. Hall's counsel did not subsequently see him specifically to inform him that his presence was required on July 8. He failed to appear, and his bond was declared forfeited on July 11. On October 16, 1963, he was arrested by the FBI in Hawaii where he was living under an assumed name.

In affirming Hall's conviction for bail jumping, the Second Circuit said:

> [T]o require explicit proof that notice of the exact date of forfeiture was directly brought home to the bail-jumper would, in most instances, make a mockery of the statute and fly in the face of the applicable precedents, the legislative history of § 3146, and the practical realities of bail-jumping.

Therefore, it held that, despite the lack of direct proof that the defendant knew when his bond was forfeited, cumulated circumstantial evidence could be sufficient to establish the requisite mens rea to support a conviction.

The Court also held that the relaying of the Assistant U. S. Attorney's notification to appear by the defendant's counsel was not a privileged communication, since it was the Assistant U. S. Attorney's responsibility to notify the defendant through his counsel, and the duty of defendant's counsel as an officer of the court to relay this notification to his client. It held the disclosure that the counsel had complied with this duty in no way was inconsistent with his obligation to his client.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorneys Michael F. Armstrong and Bernard W. Nussbaum (S.D. N.Y.).

BANK ROBBERY STATUTE

Not Necessary for Property to Be Owned by Bank to Be Within Meaning of 18 U.S.C. 2113(b) Which Prohibits Taking of Property Belonging to or in Care, Custody or Control of Any Bank. Betty Jane Chapman v. United States (No. 19,660, May 24, 1965, C.A. 9). D.J. File 95-017-12. Chapman was tried and convicted by jury trial for violation of 18 U.S.C. 2113(c), which proscribes

the possession, inter alia, of property knowing said property to have been taken from a bank in violation of 18 U.S.C. 2113(b), and dealing with property or things of value belonging to or in the care, custody, control, management or possession of any bank.

The significant portion of the opinion is the consideration given to what constitutes care, custody and control of the bank within the meaning of section 2113(b). Appellant was a former employee of the bank in the escrow department. A large volume of documents disappeared, including various escrow papers and files and, in addition, reference or form books or specimen forms owned by the new escrow clerk, Miss Beatrice Hall, and left on bank premises. Appellant contended that since the latter documents were never owned by the bank, they could not have been taken from the bank, and if they were considered by the jury in arriving at its specific finding on value, there was error. In affirming the conviction, the Ninth Circuit held that whether the documents belonged to the bank was immaterial and said, "This property, including Miss Hall's personal documents, were, while owned by her and used by her in the performance of her duties at the bank and left there when she left for the day . . . 'within the care, custody or control of the bank,' and thus within the statute here involved."

Staff: United States Attorney Manuel L. Real (S.D. Calif.).

BANKRUPTCY FRAUD
18 U.S.C. 152

Transfer and Concealment of Assets in Contemplation of Bankruptcy. James Robert Burchinal v. United States (C.A. 10, March 23, 1965), 342 F. 2d 982. D.J. File 49-13-229. Appellant was convicted of transferring and concealing the proceeds of a sale of corporate property in contemplation of bankruptcy and with intent to defeat the bankruptcy law, and of making a false oath regarding those assets, in violation of the sixth and second paragraphs of Section 152, Title 18. As president and sole stockholder of the corporation, at a time when it was in serious financial difficulty, appellant sold close to one-third of the corporation's total inventory. When creditors threatened to levy execution on the company's inventory, appellant endorsed the check received from the buyer to his wife, who deposited it in an out-of-town bank under her maiden name. Six weeks later creditors filed an inventory bankruptcy petition against appellant's corporation.

At trial, appellant and his wife testified that the check deposited in her bank account was intended as a "trust account" for the corporate creditors and was used to pay creditors. The Government brought out that the total amount had been withdrawn in cash by appellant's wife, and that the sale of inventory had not been disclosed during bankruptcy hearings or on bankrupt's statement of affairs. Appellant's principal assignment of error was that the evidence was insufficient to sustain the conviction.

In affirming the conviction on both counts, the Court stated: (1) The term "transfers or conceals" is to be applied in the disjunctive, so that

sufficient to sustain a conviction. (2) The term "in contemplation of bankruptcy or with intent to defeat the bankruptcy law" is similarly to be applied in the disjunctive. (3) Concealment is not a necessary element of a prohibited transfer. (4) Concealment does not require a physical secretion of the asset and may be accomplished by action which prevents discovery or withholds knowledge of the asset.

Staff: United States Attorney Lawrence M. Henry; Assistant United States Attorney Robert E. Long (D. Colo.).

ANTI-KICKBACK STATUTE
41 U.S.C. 51-54

Payment or Receipt Punishable Under Statute Need Not Be Connected With Specific Purchase Negotiation. Robert E. Howard v. United States (C.A. 1, May 11, 1965). D.J. File 46-36-330. Appellant Howard and one Barnard J. Champy were indicted for violating 41 U.S.C. 51-54, the Anti-Kickback Statute. Howard was employed as an assistant plant manager by a defense prime contractor of the United States, and Champy was manager of Champy Construction Co., Inc. a sub-contractor as defined in 41 U.S.C. 52. Champy was charged with causing his company to furnish labor and materials to Howard for construction of his home as "a fee, commission, gift, gratuity and compensation" paid on behalf of the company "as an inducement for awards of sub-contracts and orders" and "as an acknowledgment of sub-contracts and awards previously awarded" to Champy Construction. Howard was charged with knowingly receiving the labor and materials from the firm for the prohibited purposes.

Both were found guilty and Howard appealed, contending: 1) an essential element of the crime is the existence of a "connection" between the acceptance of the prohibited payment and the award of certain subcontracts, and 2) the statute requires a showing of specific criminal intent to induce or influence the award of particular sub-contracts.

On the first point the Court, after quoting excerpts from sections 54 and 51 of Title 41, United States Code, said the gist of the crime was receipt of a prohibited payment with knowledge it is made for the purpose of awarding a subcontract, and it is irrelevant whether the recipient actually induces the award of a subcontract. The statute forbids purchase of good will in the contracting process. In the Court's view appellant's interpretation of the statute as requiring a "connection" was too narrow because the vice at which the statute is aimed is not only improper awarding of subcontracts, but also the corruption of the contractor's employees who are participating in the awarding of subcontracts involving use of Government funds. The Court found the statute's purpose to be basically the same as that of 18 U.S.C. 201 and so it should be construed according to the same principles, the crime of bribery being complete upon the acceptance of a bribe regardless of whether or not improper action is thereafter taken (citing cases).

In the Court's view, appellant's second point was also without merit, the trial court having correctly charged:

" . . . the government must satisfy you beyond a reasonable doubt . . . that Howard accepted the work and materials knowing that the work and materials were furnished for his home as an inducement for the award of some subcontract or orders under Contract 4030."

The Court found the essential elements of the crime defined in 41 U.S.C. 54 to be, (1) the parties are within the class covered by the statute; (2) a contract covered by the statute; and (3) an acceptance of a prohibited payment as defined in Section 51 with knowledge of its nature and purpose.

We would alert all United States Attorneys to this particular holding, because it is the first decision under the Anti-Kickback Statute specifically rejecting the contention that a payment or receipt punishable thereunder must be connected with a specific purchase order negotiation.

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT

Immunity; Grant of Immunity Under 29 U.S.C. 521, Which Incorporates Immunity Section of Federal Trade Commission Act, 15 U.S.C. 49, Is Coextensive With Constitutional Privilege Against Self-incrimination. W. Willard Wirtz v. George B. Robb and Erick E. Erickson (C.A. 6, June 11, 1965). D.J. File 156-37-168. Pursuant to the authority of 29 U.S.C. 521, the Secretary of Labor issued two subpoenas requiring the respondents to testify before an authorized representative of the Department of Labor. Respondents refused to testify on the grounds that their answers might incriminate them. The Secretary then successfully petitioned the District Court to compel the testimony, 235 F. Supp. 913 (E.D. Mich. 1964). Still the respondents refused to testify, whereupon they were held in contempt of Court, a ruling from which they appealed. Respondents contended that the applicable immunity statute did not protect them from prosecution in state courts because it does not, on its face, apply to all courts, state and federal; and because it is not as broad in its protections as the Fifth Amendment. The Court of Appeals held that "the grant of immunity set forth in 15 U.S.C. §49, . . . when implemented by an order of the district court as has been done in the present case, is coextensive with the constitutional privilege of appellants not to incriminate themselves, and protects appellants from both state and federal prosecution with respect to the matters concerning which they have been ordered by the district court to testify."

Staff: United States Attorney Lawrence Gubow; Assistant United States Attorney Paul J. Komives (E.D. Mich.).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Alien Seaman Not Entitled to Hearing When Temporary Parole Expires. Lam Hai Cheung v. P.A. Esperdy (C.A. 2, No. 29,276, May 26, 1965.) D.J. File 39-51-2528. This is an appeal from the order of the United States District Court for the Southern District of New York dismissing a writ of habeas corpus sought by the appellant, an alien seaman.

Upon arrival at Norfolk, Virginia, on December 14, 1963, on the T/S Kingsville, appellant was issued a crewsman's conditional landing permit which granted him the privilege of shore leave for the period of time, not exceeding 29 days, that his vessel was in Norfolk or in any other United States port. He proceeded coastwise on the vessel to Jacksonville, Florida, where he was found afflicted with active tuberculosis and in need of medical treatment. Since he could not leave with his vessel, the Immigration and Naturalization Service revoked his landing permit and pursuant to 8 U.S.C. 1182(d)(5) and the applicable regulations, 8 CFR 253.1(b) and 253.1(d), paroled him into the United States for 30 days ending January 26, 1964 to receive treatment at the Norwegian Health Center in New York. After receiving tests at the Health Center appellant absconded and was not located by the Immigration authorities until nine months later. He was then taken into custody, his medical parole revoked and steps taken to deport him.

Appellant first argued that his conditional landing permit was improperly revoked because the Service had no evidence as required by 8 U.S.C. 1282(b) that he was not a bona fide seaman or that he did not intend to depart on the vessel which brought him. As to this issue, the Court held that since petitioner's permit would have shortly expired and upon expiration he would have been paroled for medical treatment, it mattered not that the conditional permit might have been illegally revoked. Appellant's final argument was that he should not be expelled from the United States without a deportation hearing pursuant to 8 U.S.C. 1252(b). To this the Court responded that it had already ruled that a temporary parolee is not entitled to a hearing on the revocation of his parole. The Court went on to say that a person like the appellant whose temporary parole has automatically expired stands in no better position than one whose parole has been revoked. The decision of the lower Court was affirmed.

Staff: United States Attorney Robert M. Morgenthau (S.D. N.Y.) Roy Babbitt and James G. Greilsheimer, of Counsel

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LANDS DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

Indians; Case or Controversy; Authority of Secretary of Interior to Restore Ceded San Carlos Lands Under Sections 3 and 7 of Indian Reorganization Act. James Houston Bowman, et al., Plaintiffs, State of Arizona, Intervenor v. Stewart L. Udall, et al., Defendants, San Carlos Apache Tribe of Indians, Intervenor (Civil No. 105-63, Dist. Col.) D.J. File 90-2-12-371. By order No. 2874 (28 Fed. Reg. 4608) the Under Secretary of the Interior restored to the Indians the subsurface rights only, subject to valid existing rights including patented lands, in an area known as the Mineral Strip which had been ceded by the Indians by agreement entered into in 1896, the Indians to receive the proceeds from the disposition of the lands under the mineral land laws. The order was executed pursuant to Sections 3 and 7 of the Indian Reorganization Act, 25 U.S.C. 463, 467. Plaintiffs are ranchers who claimed patented lands, leases from the State, and Taylor Grazing Act permits and leases on the Mineral Strip. The State of Arizona claimed valid existing rights in the area and intervened. Plaintiffs and the State attempted to have the order of restoration declared illegal as beyond the authority of the Secretary under Sections 3 and 7. The San Carlos Apache Tribe of Indians intervened to uphold the validity of the order of restoration.

Defendants and the Tribe asserted (1) that plaintiffs and the State had no standing to sue because of the protection accorded patented lands and valid existing rights in the order of restoration as well as because their surface rights were not disturbed and (2) that the Secretary's action was authorized by Sections 3 and 7 of the Indian Reorganization Act.

The District Court held that no case or controversy existed between the plaintiffs and the State of Arizona on the one hand and the Secretary on the other hand, since they had failed to show any legally recognizable injury as the result of the order restoring only subsurface rights which did not affect the valid existing rights of plaintiffs or the State in any lands or the surface rights of plaintiffs held under grazing permits and leases. The Court also indicated that plaintiffs' action was premature since the Secretary had made no finding that restoration of the surface rights was in the public interest, a requisite under Section 3 of the Indian Reorganization Act.

The Court then passed upon the claim that Sections 3 and 7 of the Indian Reorganization Act did not apply to the Mineral Strip and concluded that the Secretary had authority to restore to tribal ownership the remaining undisposed of lands. The Court denied the contentions of plaintiffs and the State that Section 3 applied only to surplus lands on an Indian reservation where allotments had been made and that it applied only to lands remaining within an Indian reservation at the time of the restoration. The Court found it sufficient if the lands were a part of an Indian reservation at the time they were ceded for disposal for the benefit of the Indians. The Court appeared to give much weight to the interpretation of Sections 3 and 7 by the Department of the Interior, citing Udall v. Tallman, 380 U.S. 1, 16 (1965).

Staff: Floyd L. France (Lands Division)

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TAX DIVISION

Acting Assistant Attorney General John B. Jones, Jr.

CIVIL TAX MATTERS
District Court Decisions

Levy and Distraint; Payment by Savings and Loan Association of Money in Account to Internal Revenue Service Pursuant to Levy Is Absolute Defense to Any Action Brought Against Association by Holders of Account From Which Payment Was Made. Evelyn S. Sebel, et al. v. Lytton Savings and Loan Association, et al. (S.D. Cal., January 26, 1965). (CCH 65-1 U.S.T.C. ¶9343). The plaintiffs, Evelyn S. Sebel and Richard Sebel, were the owners in joint tenancy of a savings account on deposit at the Lytton Savings and Loan Association, and, on June 21, 1963, the District Director levied upon and seized $8,238.74 on deposit in this account to satisfy the tax liabilities of Evelyn S. Sebel and one W. F. Sebel. Pursuant to the levy, the savings and loan association paid this amount to the District Director, and, subsequently, the plaintiffs, Evelyn S. Sebel and Richard Sebel, brought this action against the savings and loan association to recover the amount paid from their account. The United States was made a cross-defendant.

The Court, after noting that each joint tenant is entitled to the whole of the joint account, held that the receipt or acquittance of one of the joint tenants releases and discharges the savings and loan association for any liability on that account to the other joint tenant. Inasmuch as the savings and loan association was obligated to honor the levy of the District Director, the Court held that payment pursuant to the levy constitutes an absolute defense against any action which might be brought against it by the holders of that account.

Staff: United States Attorney Manuel L. Real; and Assistant United States Attorney James S. Bay (S.D. Cal.).

Federal Tax Liens; Where Taxpayer as Vendee Under Contract of Sale of Realty Defaults in Making Installment Payments, Tax Lien Attaches to Any Cause of Action Taxpayer Would Have Against Vendor for Unjust Enrichment. Roscoe L. Greenup v. United States. (D. Mont., March 18, 1965). (CCH 65-1 U.S.T.C. ¶9362). The owners of certain real property entered into a contract for the sale of the property to the taxpayers on August 6, 1959, and the taxpayers made a down payment and made additional installment payments. However, the taxpayers failed to pay an installment and default was declared. A lien for federal taxes was filed in March, 1960. Later, the vendors conveyed the property to Greenup and the deed was recorded in June, 1960, and, at the same time, a quit claim deed from the taxpayers to the original vendors was also recorded. Greenup then sold the property to Bair by warranty deed, took back a second mortgage, and, when Bair demanded that he remove the cloud on the title created by the tax lien, Greenup instituted this action, naming the United States under 28 U.S.C. 2410.

The District Court determines that when the federal tax lien attached, the taxpayers were the equitable and beneficial owners of the property under state law and that the lien of the vendors as security for the unpaid purchase price primed the tax lien and would have been so recognized in any action to recover possession and enforce the lien. Further, by the terms of the contract of sale, the defaulting purchasers forfeited all sums theretofore paid and all fixtures and improvements placed on the premises, but the Court held that the defaulting purchasers would have, in such circumstances under state law, a potential cause of action against the vendors for unjust enrichment to which the tax lien could attach. Thus, the Court ruled that to the extent the Government could prove that the vendors had been unjustly enriched over and above the amounts they could properly retain, the Government would be entitled to priority. The Court noted that in the absence of a showing of unjust enrichment there would be no property or right to property to which the tax lien could attach. The Court then gave the Government ten days to advise it whether it would attempt to prove that the taxpayers had a cause of action for unjust enrichment to which the tax lien could attach.

Staff: United States Attorney Moody Brickett (D. Mont.).

Priorities; Real Estate Against Which Federal Tax Liens Were Sought to Be Foreclosed Did Not Constitute Taxpayers' Homestead, and, Therefore, Judgment Lien Attached to Real Estate and Was Entitled to Priority Over Subsequently Recorded Tax Liens. United States v. Emzy T. Barker, et al. (W.D.Tex., February 5, 1965). (CCH 65-1 U.S.T.C. ¶9344). This suit was instituted for the purpose of foreclosing federal tax liens against two tracts of real estate owned by the taxpayers, and various judgment creditors and mortgagees of the taxpayers were named defendants. A notice of federal tax lien encumbering the taxpayers' property was filed of record on September 3, 1958, and a judgment lien against the taxpayers was filed of record on September 15, 1958, prior to the time the rest of the federal tax liens sought to be foreclosed were recorded. It was the position of the Government that, inasmuch as the two tracts of land constituted the homestead of the taxpayers, the land was exempt from the judgment lien, and, hence, the subsequent tax liens would enjoy priority over the judgment lien. This contention was based upon the proposition, well accepted under Texas law, that the homestead exemption does not affect the federal tax lien.

The Court found that, under the facts presented, no homestead with respect to the two tracts had been established or could be claimed by the taxpayers. This determination by the Court was apparently based upon the facts that the taxpayers had never improved the two tracts of land, never constructed a dwelling place thereon (although they had started to build a residence thereon and had stopped for lack of financing), nor had they ever extensively cultivated the land or used it for grazing purposes, with only minor exceptions. Inasmuch as no homestead exemption could be established with respect to the two tracts of land involved in the proceeding, the Court determined that the judgment lien was entitled to priority to all of the tax liens, except the one which was recorded prior to the time the judgment lien was recorded.

Staff: United States Attorney Ernest Morgan; and
Assistant United States Attorney Ted Butler (W.D. Tex.).

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