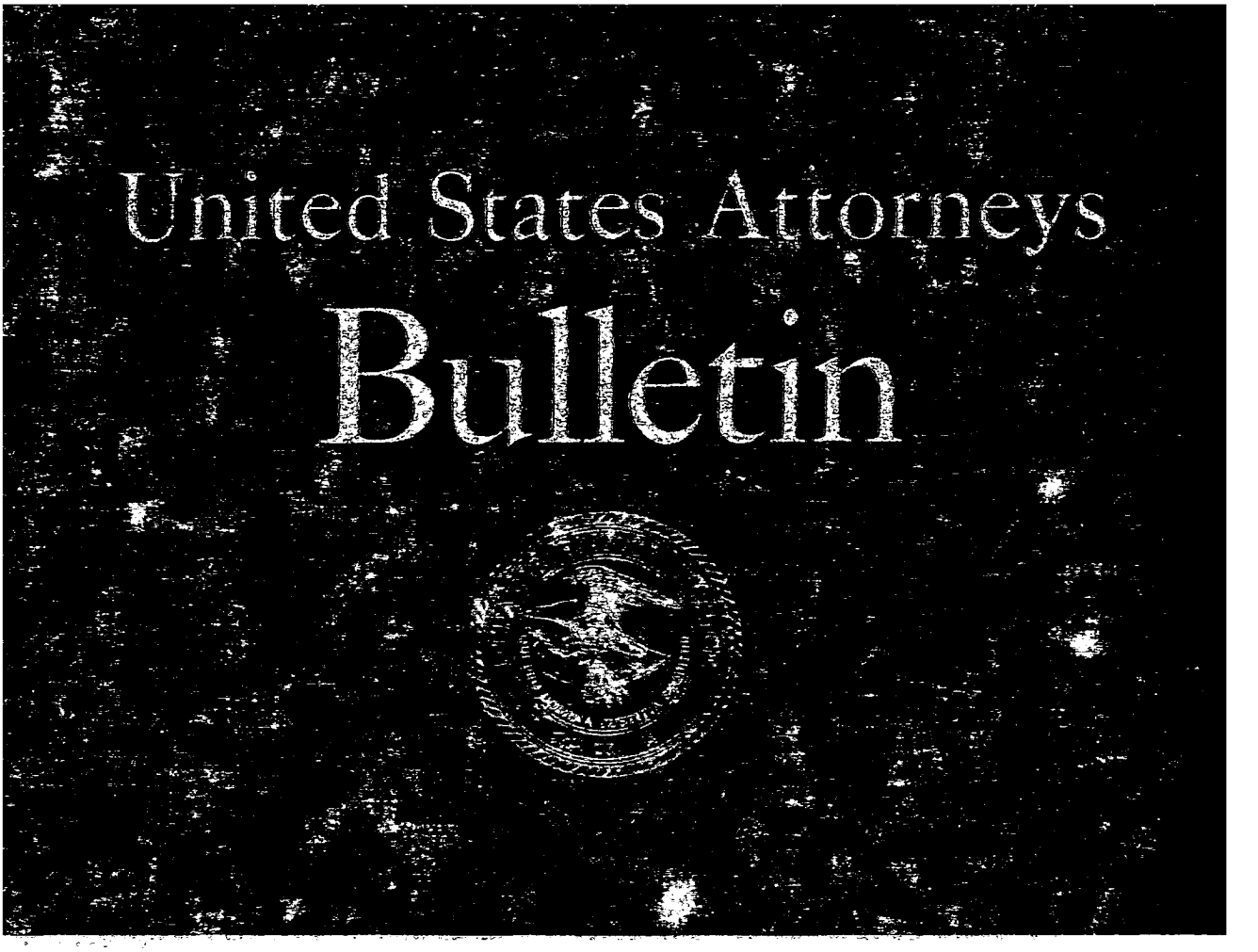

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UNITED STATES DEPARTMENT OF JUSTICE

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Assistant Attorney General Donald F. Turner

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On June 22, 1967, the Court rendered an opinion holding that the December 1965 acquisition of the assets of AMF American Iron, Inc. ("American Iron") by Reed Roller Bit Company ("Reed") was a violation of Section 7 of the Clayton Act. Prior to Reed's acquisition of American Iron, American Iron was a wholly owned subsidiary of American Machine and Foundry Company ("AMF").

After the acquisition was consummated but before Reed had moved the assets into its Houston plant, the Government filed suit on July 21, 1966 alleging that Reed's acquisition of American Iron's assets in two fields, tool joints and drill collars (equipment essential to oil well drilling) violated Section 7 of the Clayton Act, naming Reed, AMF and American Iron as defendants.

Trial commenced on September 21, 1966 and after a recess, was concluded on November 8, 1966. The parties agreed that tool joints and drill collars each constituted a separate line of commerce and that the United States as a whole constituted the relevant geographic market. The Court found that American Iron and Reed had the following market shares in 1965:

	Tool Joints	Drill Collars
Reed	35.2%	19.6%
American Iron	13.0%	10.4%
	48.2%	30.0%

The Court further found that the great bulk of tool joints sold were flash welded to drill pipe, that a new flash welder fully equipped costs between $400,000 and $700,000, that there were only five flash welders in the country, with Reed and American Iron each owning one, that of the four concerns engaged in selling flash welded tool joints, Reed was second largest and

American Iron third largest, and that the combination of Reed and American Iron produced the largest firm in the field.

Regarding drill collars, the Court found that seven significant producers accounted for 96% of the country's sales, that Reed was the second largest and American Iron was the fifth largest producer and seller, and that the combination would be the industry's second largest, and would significantly increase concentration.

Stressing the "controlling" decision in United States v. Philadelphia National Bank, 374 U.S. 321 (1963), with respect to "an undue percentage of the relevant market" and citing United States v. Aluminum Company of America, 377 U.S. 271, 277-278 (1964); and United States v. Von's Grocery Company, 384 U.S. 270, 277 (1966), for the view that where an industry is already concentrated mergers of less than 30% shares of the market may be unlawful, the Court concluded that Reed's acquisition was unlawful.

Reed urged, as an affirmative defense, that American Iron was a failing company, premising its view on the following facts, as found by the Court: (a) There had been a significant decline in the mid-continent drilling activity (the area principally served by American Iron); (b) American Iron's sales had declined from $10,000,000 in 1956 to $6.4 million in 1964; (c) American Iron had experienced losses in 1958 and 1960; (d) From 1962 through 1965, American Iron's return on investment averaged approximately 2.3 percent; and (e) That recent decisions by the major steel companies with regard to the stocking of drill pipe indispensable for welding tool joints placed American Iron at a severe disadvantage.

The Court also found the following facts, raised by the Government, to be true: that American Iron was earning a small profit at the time of the acquisition; that it had experienced a net profit in most years since its acquisition by AMF; that its sales had remained constant during the 1960's and the number of its employees had increased; that AMF had made no effort to sell American Iron to other firms from 1960 until Reed acquired it in late 1965; and that its products, labor force and general manager were well regarded in the trade.

The Court concluded that Reed had failed to meet the burden of establishing the failing company defense. Stressing International Shoe v. Federal Trade Commission, 280 U.S. 291 (1930), and United States v. Diebold Inc., 369 U.S. 654 (1962), the Court found two elements necessary to a failing company defense: (1) That the acquired company be on the brink of insolvency or bankruptcy; and (2) That there be no other bona fide prospective purchaser.

Thus, the Court concluded, "Reed has failed to carry its burden of showing that American Iron came within the strict test of International Shoe."

Quoting from United States v. DuPont de Nemours & Co., 366 U.S. 316 at 323-344 (1961), the Court noted:

> [T]he key to the whole question of an antitrust remedy is of course the discovery of measures effective to restore competition.

The Court further noted that practicability and equitableness of the remedy may be considered and may influence the selection between two or more equally effective remedies.

The Court was faced with the question of whether to order full or partial divestiture, since American Iron made fluid end expendable parts, a line of products which Reed did not manufacture. Judge Eubanks rejected the Government's request for full divestiture, concluding that under the special facts present, partial divestiture of only the competing lines (tool joints and drill collars) would effectively restore the competition the merger had destroyed, and would at the same time retain the pro-competitive effects a merger would have on the other non-competing lines of commerce. The Court further found: that American Iron's tool joint and drill collar facilities were readily separable from the fluid end expendable parts production and marketing; that there was no reason to believe that the products had to be made or sold together; that in any event the tool joint and drill collar facilities had to be moved to Houston, Texas; that Reed would provide more effective competition in the fluid end expendable parts industry than did American Iron; that contentions of possible elimination of competition in the fluid end expendable parts industry were unsupportable or were too speculative; and that it would be easier to sell only tool joint and drill collar facilities than all the facilities.

The Court concluded that:

> The fact that a merger has beneficial effects on competition in some markets is material to the type of relief to be decreed where permitting the acquiring company to keep the assets relating to the market where competition has been increased will at least be as effective in restoring competition in the other markets that have been adversely affected by the merger.

As an alternative remedy, the Government had requested that Reed be required to restore American Iron as a viable company and return it to the seller, AMF. Defendants contended that rescission was not a proper remedy under Section 7 since the statute applies only to the acquiring company; thus AMF was not a proper defendant to the charge, and no precedent existed for such ruling. As the Court found that, under the facts, rescission would not bring about the desired restoration of competition in the relevant product markets, it concluded that a ruling on the legal propriety of rescission was unnecessary.

Facts which the Court believed militated against rescission were: AMF had demonstrated that it was unsuited to operate American Iron, and it would be almost impossible to re-staff American Iron, especially when it is apparent that AMF does not want to keep it.

The Court concluded that Reed should divest itself of the tool joint and drill collar facilities acquired from American Iron.

Staff: John E. Sarbaugh, Raymond P. Hernacki, John T. Cusack, and Paul D. Carrier (Antitrust Division)

* * *

CIVIL DIVISION

Acting Assistant Attorney General Carl Eardley

COURTS OF APPEALS

ADMIRALTY

SUITS IN ADMIRALTY ACT STATUTE OF LIMITATIONS BARS TORT INDEMNITY ACTION AGAINST GOVERNMENT BROUGHT MORE THAN TWO YEARS AFTER GOVERNMENT'S NEGLIGENT ACT

H-10 Water Taxi Co. v. United States (C. A. 9, No. 21,261; June 26, 1967; D.J. File 61-12-228).

H-10 brought suit to recover maintenance and cure payments which it had been required to pay to one of its seamen who had been injured by reason of Governmental negligence. The district court dismissed the action on the ground that, since there was no contract between H-10 and the Government, H-10 was not entitled to indemnity for the amount it expended for maintenance and cure. On H-10's appeal, the Government not only defended on the merits, but also for the first time asserted that H-10's claim was barred by the statute of limitations of the Suits in Admiralty Act (45 U. S. C. 745) since the negligence of the Government had occurred more than two years before the suit was brought. The Court of Appeals affirmed on the limitations ground. Rejecting H-10's claim that its cause of action did not arise until it had actually made the maintenance and cure payments, the Ninth Circuit ruled that limitations began to run on the date of the injury to the seamen since H-10's obligation to pay maintenance and cure stemmed from that injury. See in this regard, United New York Sandy Hook Pilots' Ass'n. v. United States, 355 F. 2d 189 (C. A. 2).

Staff: Alan S. Rosenthal and Howard J. Kashner (Civil Division)

GOVERNMENT EMPLOYEES -- OFFICIAL IMMUNITY

SEVENTH CIRCUIT UPHOLDS IMMUNITY FROM TORT ACTIONS OF OFFICERS ASSIGNED TO PROTECT PRESIDENT

Scherer v. Brennan (C. A. 7, No. 15,961; June 21, 1967; D.J. File 145-3-813).

Plaintiff sought to recover $100,000 damages from two Treasury agents who had been assigned to guard the President of the United States while he was staying at an inn at O'Hare Airport, Chicago. The grounds for the action

were alleged trespass and interference with plaintiff's right of access to his residence. Plaintiff was a lawful dealer in firearms and had a variety of weapons in his home, the rear window of which was less than 300 yards from the inn where the President was staying. Plaintiff admitted to the agents that "it could be an easy rifle shot for any military model firearm." Plaintiff also had a cannon in his garage and had been previously arrested while in possession of a cannon. The Treasury agents, who were directed to keep plaintiff under surveillance, told him that he could enter his home only if they accompanied him. Plaintiff, however, refused them entrance. Thereafter, plaintiff entered it through a window, and the agents did not attempt to enter.

On the agents' motions for summary judgments, affidavits were filed attesting to their assignment to protect the President and to their instructions to keep plaintiff from his guns. No counter-affidavits were filed by plaintiff. The district judge granted summary judgment for the agents on the ground that their actions were within the "outer perimeter" of their official duties and could not, therefore, subject them to tort liability under Barr v. Matteo, 360 U.S. 564.

The Seventh Circuit affirmed on the authority of Barr v. Matteo. In addition, it distinguished the recent decisions of the Supreme Court in Camara v. Municipal Court, 35 L.W. 4517, and See v. Seattle, 35 L.W. 4522, in which convictions for refusal to permit health inspectors without warrants to enter private premises were overturned, on the grounds that neither case involved immunity of Government agents, and plaintiff was not charged with any offense. The Court stated that in a situation involving the safety of the President, measures inappropriate for health inspections might be justified.

Staff: Alan S. Rosenthal and Martin Jacobs (Civil Division)

SWITCHBLADE KNIFE ACT

KNIFE MAY BE FOUND TO BE A SWITCHBLADE KNIFE FOR PURPOSES OF ACT NOTWITHSTANDING ITS FAILURE TO CONFORM LITERALLY TO ACT'S DEFINITION

Precise Imports Corp. v. Kelly, Collector of Customs (C.A. 2, No. 30777; June 15, 1967; D.J. File 95-51-268).

Plaintiffs brought this action for a declaratory judgment that various importations of knives were not barred from entry into the United States by the Switchblade Knife Act, 15 U.S.C. 1241-1244. The Act, which prohibits transportation and distribution of switchblade knives in interstate commerce and their knowing introduction into it, defines a switchblade knife as "any knife having a blade which opens automatically - (1) by hand pressure applied to a button or other device in the handle of the knife, or (2) by operation of

inertia, gravity, or both." The knives involved did not conform to these criteria at the time of importation. However, the knives could be modified slightly to operate as switchblade knives, and were designed for use as daggers. A jury returned a verdict that the knives were switchblade knives. The court dismissed plaintiffs' complaint and entered judgment for the United States on its counterclaim for liquidated damages under entry bonds for plaintiffs' failure to redeliver the knives to customs.

The Second Circuit affirmed. It first determined, on its own motion, that it, rather than the Customs Court, had jurisdiction of the case since the Act was a criminal statute of general application, not a "provision of the customs laws" within the meaning of 15 U. S. C. 1583. In addition, in agreeing with the district court's charge that the knives violated the Act despite the fact that at the time they were imported they did not open automatically, the Court of Appeals relied upon evidence showing that they could be made to open automatically by insignificant alterations. The appellate court observed that:

> The congressional purpose of aiding the enforcement of state laws against switchblade knives and of barring them from interstate commerce could be easily frustrated if knives which can be quickly and easily made into switchblade knives, and one of whose primary uses is as weapons, could be freely shipped in interstate commerce and converted into switchblade knives upon arrival at the state of destination.

Finally, the Court held that plaintiffs were liable under the entry bonds for failure to redeliver the knives released to them upon the collector of customs' demand, regardless of whether the knives were barred by the Act.

Staff: United States Attorney Robert M. Morgenthau and Assistant United States Attorneys Robert E. Kushner, David E. Montgomery and Lawrence W. Schilling (S. D. N. Y.)

DISTRICT COURT

CONTRACTS

GOVERNMENT MAY RECOVER AMOUNT OF ILLEGAL CONTINGENT FEE FROM GOVERNMENT CONTRACTOR EVEN WHEN FEE HAS NOT BEEN PAID

United States v. Webber, et al. (D. Del., Civil No. 2815; June 22, 1967; D.J. File 77-15-121).

The United States, as assignee of one of its prime contractors, sued a subcontractor for breach of its warranty "that he has not employed any person to solicit or secure this contract upon any agreement for a . . . contingent fee." The contract provided further that breach of the warranty entitled the Government "to deduct from the contract price . . . the amount of such . . . contingent fees." See Executive Order 9001, 50 U.S.C. App. 611 (1941). Prior litigation between the subcontractor and one Browne, who claimed, unsuccessfully, a fee after obtaining the subcontract, had established the existence and amount of the contingent fee arrangement. Browne v. R. & R. Engineering Co., 164 F. Supp. 315 (D. Del.), rev'd. in part, 264 F 2d 219 (C. A. 3). The district court judicially noticed the prior proceedings and entered summary judgment for the United States. The Government was awarded the amount of the fee even though it was never paid by the contractor.

This is the first court holding that such recovery is allowable even when the fee has not been paid. See 35 Comp. Gen. 470. This is in accordance with the policy underlying Executive Order 9001, namely, that a contingent fee, whether or not paid, will be reflected in the price which the Government pays for the work done.

Staff: Stephen R. Felson (Civil Division)

* * *

CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

SPECIAL NOTICES

PARDON AND PAROLE INFORMATION

In order to insure that all pertinent information is made available to the Pardon Attorney and the Board of Parole when United States Attorneys contact these offices in connection with individuals who are subject to their jurisdictions, it is requested that such contacts be by letter over the signature of the United States Attorney, with a copy of the letter forwarded to the Criminal Division. This procedure will enable the Criminal Division to check its files and personnel for other pertinent information which should be considered by the Pardon Attorney or the Board of Parole.

WAGERING PROSECUTIONS

The Bulletin for April 15, 1966 (Vol. 14, No. 8) noted that the Supreme Court had granted certiorari in the Costello case and that the constitutionality of the wagering tax statutes would be raised in that case. It was suggested that pending a determination of the case no change be made with regard to processing referrals for prosecution and with scheduling such cases for trial.

The Marchetti (substituted for Costello) case (No. 38, October Term, 1966) and the Grosso case (No. 181, October Term, 1966) were, in fact, argued before the Supreme Court in January, 1967. On the last day of the term the Supreme Court set the cases down for reargument along with the case of Miles Edward Haynes, which challenges the constitutionality of the registration provisions of the National Firearms Act.

In view of the foregoing, we reiterate our view that no change should be made regarding referral of cases and prosecution of cases involving violations of the wagering tax statutes. In the interests of preventing a considerable backlog of wagering tax cases on the district court dockets, trial counsel should be advised that in the event of conviction, application for enlargement on minimum bail pending appeal will not be opposed. Similarly, if the constitutionality of the statute is the only issue involved in the case, counsel may be advised that in such instances only the Government will not oppose entry of pleas of nolo contendere, wherein the right to appeal on such grounds may be preserved.

The Criminal Division would appreciate being advised if any district is encountering difficulty in implementing this policy.

COURT OF APPEALS

COUNTERFEITING CONSPIRACY

SCHEME TO COUNTERFEIT GOODS THAT MIGHT BE EXPECTED TO BE TRANSPORTED IN INTERSTATE COMMERCE HELD BROAD ENOUGH TO VIOLATE 18 U.S.C. 371

United States v. Mattia, et al (C.A. 3, Nos. 15810, 15811, 15812, 15813, 15845; June 29, 1967; D.J. File 122-017-48).

Defendants' conviction of conspiring to transport counterfeit securities in interstate commerce (18 U.S.C. 371) was affirmed.

Defendant Mattia managed a printing firm in Newark, New Jersey, and employed the other defendants in various capacities. In November 1961 they reproduced investment bonds through a lithographic printing process, making three thousand counterfeit securities, with a face value of $1000 each. The bonds, which purported to have been issued by the General Motors Acceptance Corporation, included a provision that they would be paid upon maturity in New York. The defendants were convicted of a conspiracy to violate 18 U.S.C. 2314, 2315 by possessing, receiving, and transporting counterfeit securities in interstate commerce.

The Third Circuit Court of Appeals found that the evidence adduced at the trial clearly showed that the bonds were counterfeit and had been printed at the printing company, by the defendants, who all had full knowledge of the scheme. The defendants argued that there was no proof of an intent to violate the federal statute by causing the securities to be transported in interest commerce. The Court of Appeals ruled, however, that the provision in the bonds about payment in New York reasonably allowed the jury to conclude that the defendants were aware that at some time the bonds would be transported interstate, and thus that they contemplated the transportation in their total scheme.

Staff: United States Attorney David Satz, Jr. and Assistant United States Attorney Dennis B. O'Connor (D. N.J.)

* * *

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

Assistant to the Deputy Attorney General John W. Kern, III

REMARKS OF THE PRESIDENT
TO UNITED STATES ATTORNEYS
THE ROSE GARDEN

June 14, 1967

Attorney General Clark, United States Attorneys:

The offices of Attorney General and United States Attorney command enormous public trust. Yours is a crucial task. It is an exacting one. I hope that the burdens that you carry are lightened somewhat by the satisfactions you earn.

In looking back on his career--which included a multitude of public services--the great Secretary of War during Roosevelt's Administration, Henry L. Stimson, remarked that the Office of United States Attorney had always been his first love. He said,

> "I felt then, and still feel, that there is no other public office ...which makes such a direct and inspiring call upon the conscience and the professional zeal of a high-minded lawyer... or in which courageous effort and steady poise bring such a sense of satisfaction to the occupant."

Few men have brought greater luster to the office than Henry L. Stimson. It was he, as much as any man, who helped to give this position its present stature.

He attracted the ablest young lawyers in America to his office. He made the positions of United States Attorney and Assistant United States Attorney a proud institution of its own---not just a pale imitation of private practice.

The scope of your work has been increasing year by year. It has vastly expanded.

If our system of justice is to match the public's rights and expectations, then we must do something to remove the great backlog of unfinished work that is stacked up in the dusty corners of our Federal Courthouses.

I don't think I have to remind you that justice long delayed is justice denied.

Every United States Attorney should take a personal interest in terminating during the next year more cases than are filed.

I want each of you to take a particularly hard look at the civil and criminal cases which are more than two years old, and cases involving trivia and small claims which clutter your dockets.

One thing I like most about the young man who is our gifted Attorney General is that he demonstrated in the Department of Justice how cluttered backlogs could be brought under control with a "can do" attitude.

So, when you go back home, let's get the job done. I know you can. Go back and get rid of this backlog, this trivia. I want you to take these little cases and clean them out. Sit down and plan with your staff how you will get current.

Let's have it said of these United States Attorneys, of this Department of Justice, of this Attorney General, of this Administration, that it is the most alert, competent, dedicated, "can do" outfit that ever served any Government at any time in its history.

Let us take Henry L. Stimson as our example. To mirror his achievements would be worth all the sacrifices that you and your family make in order to serve your country.

There is not a man here today who could not make more money, play more golf, have more pleasure and give his family more social life if he were out of the office.

But that is not really what counts in this life as you so well know. It is what you are able to do for your fellow man, what you are able to do for your country, what you are able to do for humanity.

You have energy, ability and experience. Use it to clean up our backlogs. Use good judgment. Call them as you see them. Let's look back on our record next year when we meet here and see what we have done.

I want you to be part of the community, too. I want people to know the United States Attorney. I want the United States Attorney to go to some of the drives, some of the projects, go when we open some of the swimming pools, when we plan what to do to relieve tensions, what to do to make the land more beautiful.

I want you and your wives to be a part of your community where you are my representatives.

You are appointed by the President. The image you leave is the image this Administration is going to leave. I hope it won't be a junk yard image. I hope it won't be an old, battered, used car image. I hope it won't be an image that is unconcerned with the social problems. And I hope it won't be just a legalistic bookworm, bookshelf, library image. I hope it will be an image of the Golden Rule.

The Good Lord has made things a little better for you. You have a law license. You have a responsibility. You have a regular paycheck. You have a position of leadership that only 95 other men in this country have.

Are you using it? If so, when, where and how? Engage in a little introspection. Ask yourself, "what did I do, or what did my wife do, last week to make America more productive and more beautiful, more interesting, more exciting, and a better place to live? What did I do to provide a better education for our children, better health for our people, to clean up our air, to clean up our water, to be a nation that the other 120 countries can look to with great pride?"

We have made a lot of progress in the last few years because we have believed it could be done.

I stood here yesterday in this same spot and performed a privilege that I had long looked forward to. I really wasn't sure it would ever come about. I appointed a Negro, the first Negro ever appointed, to the United States Supreme Court. I did it because it was the right thing to do, the right man for the right job, at the right time. That is just one thing that I call to your attention. I wish down in your areas you will be discovering Ramsey Clarks, Thurgood Marshalls.

I need to find young talent from all geographical areas, of all religions, of all colors that are representatives of this beautiful land that we call America. You could be a good scout for me. You can find some talent. You can send them up through your office.

Thank you for coming this morning. Thank you for your loyalty to your country, for the quality of your service, for your loyalty to your chief and your department.

Please know that you are in a little different situation than judges, a little different situation than the Civil Service employees. You are the President's appointee in your state, in your district. You may be the only person who those people ever see whom I appointed. They may never see the Attorney General or the Secretary of Agriculture. They may not see the space administrator or the Chairman of the Joint Chiefs of Staff.

So conduct yourself in a position of leadership in such a manner that will make the office of President proud of you. I am proud of you.

I want to check you next year, though, and see how much better a job you do next year than you did last year.

Thank you very much.

ASSISTANTS APPOINTED

District of Columbia - JAMES PHELPS, ESQ.; University of Cincinnati, LL. B., and formerly a trial attorney with HEW.

District of Columbia - JOHN RUDY, ESQ.; American University, LL. B., and formerly Judge Advocate, USAF, and in private practice.

Delaware - JOHN BRADY, ESQ.; University of Delaware, LL. B., and formerly Register of Wills, New Castle County, Attorney with the Legal Aid Society of Delaware, and in private practice.

Idaho - GERALD SCHROEDER, ESQ.; Harvard University, LL. B., and formerly in private practice.

Michigan, Eastern - GEORGE NEWMAN, ESQ.; University of Michigan, LL. B., and formerly program director for the Institute of Continuing Legal Education.

New Mexico - MICHAEL WATKINS, ESQ.; Washington and Lee University, LL. B., and formerly legal advisor to a Congressman, and in private practice.

New York, Eastern - HERBERT KRAMER, ESQ.; New York University, LL. B., and formerly attorney in private industry.

South Carolina, Eastern - WALTON McLEOD, ESQ.; University of South Carolina, LL. B., and formerly law clerk to U. S. Court of Appeals, and in private practice.

Texas, Southern - GEORGE PAIN, ESQ.; University of Texas, LL. B., and formerly in private practice.

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

COURT OF APPEALS

IMMIGRATION

ALIEN ADMITTED ON FALSE CLAIM OF CITIZENSHIP HAS NOT BEEN INSPECTED UNDER IMMIGRATION LAWS

Goon Mee Heung v. INS (C.A. 1, No. 6828; June 29, 1967; D.J. File 39-36-342).

The above action is a petition to review a deportation order for the petitioner, a Chinese National, who was admitted to the United States upon her presentation of a fraudulent United States passport. After her deportation hearing had been concluded she filed a motion to reopen it to permit her to apply for adjustment of status to that of a permanent resident under the provisions of 8 U.S.C. 1255. The Board of Immigration Appeals denied her motion on the ground that she had not been inspected and admitted as required by the statute.

In these proceedings the petitioner contended that the Board erred in finding that she had not been inspected when she presented her false United States passport to an immigrant inspector and was by the inspector admitted to the United States. Chief Judge Aldrich writing for the majority of the Court, upheld the decision of the Board. After review of prior cases, the legislative history of 8 U.S.C. 1255 and other provisions of the immigration laws he concluded that the word "inspected" in 8 U.S.C. 1255 means inspected as an alien and that where a false claim to citizenship has been made and accepted there has been no inspection under the immigration laws.

Circuit Judge Coffin wrote a dissent in which he found that the petitioner was not barred from seeking the discretionary relief of 8 U.S.C. 1255. He reasoned that a narrower meaning should be given the word "inspected" and that an alien has been "inspected" when he has presented himself to an inspector at a proper place and time, whether or not meaningful inquiry then ensues.

The decision of the Board of Immigration Appeals was affirmed.

Staff: United States Attorney Paul F. Markham and Assistant United States Attorney Albert F. Cullen, Jr. (D. Mass.)

* * *

LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

COURTS OF APPEALS

INDIAN TRIBAL LANDS

CONSTRUCTION OF OIL AND GAS LEASES; CONTENTS OF ADMINISTRATIVE RECORD

Continental Oil Co. v. Udall (C. A. D.C., No. 20,362; Feb. 10, 1967; D.J. File 90-2-18-81).

The Bureau of Indian Affairs advertised the sale of leases for half a million acres of Navajo tribal land in Arizona and Utah. Part of this land was surveyed under the standard federal rectangular system, and part was unsurveyed. In the latter area, each tract was described by metes and bounds which approximated the normal acreage and location of future regular sections as projected from the adjacent surveyed area and stated that when surveyed "will probably be" a specific section. The advertisements provided that the land was offered on a tract not an acreage basis (the computed acreage was to determine rentals prior to survey only), that the lessees would have to have the land surveyed and marked with substantial boundary markers, and that the leases were subject to existing and future regulations of the Secretary. An existing regulation provided that "the area covered by a lease * * * shall conform to the system of public land surveys * * *." Continental successfully bid in two tracts of land in the unsurveyed area.

When the land was later surveyed, a shortage of 7.4 chains was discovered in the north-south line of the previously surveyed sections. This discrepancy was adjusted as to the area involved here by moving the southern boundary of adjacent tracts into Continental's land a distance of 624 feet. After using this survey to get drilling permission, Continental brought in a producing well. It then filed a second plat of the tract in terms of the metes and bounds descriptions and sought permission to drill in the 624-foot strip. This request was denied by the Secretary. He ruled that the regulations required the tracts to conform to the system of public land surveys and that Continental showed its understanding of this by filing its first plat in accordance with the official survey.

The district court (without opinion) concluded that the Secretary's decision was lawful and was supported by substantial evidence in the administrative record. The Court of Appeals affirmed without opinion. Both courts implicitly rejected Continental's contention that it was error to include in the

administrative record various materials in the administrative file which its counsel had not seen. The courts evidently accepted the position that no formal hearing was requested or had, that no material was refused Continental, and that, for intelligent review, it was necessary for the court to have before it the matters which the Secretary considered. Continental has filed a petition for a writ of certiorari.

Staff: S. Billingsley Hill (Land and Natural Resources Division)

OIL SHALE

OIL AND GAS RESERVATION INCLUDES OIL SHALE UNDER 30 U.S.C. 121-123; TIME OF VESTING OF PATENT TITLE

C. W. Brennan v. Udall (C. A. 10, No. 8722; June 22, 1967; D.J. File 90-1-18-654).

Brennan owned 160 acres in Rio Blanco County, Colorado. This land was patented in 1917, reserving to the United States all the nitrate, oil and gas in the lands, as required by 30 U.S.C. 121-123. Brennan petitioned Interior for a ruling that oil shale was not included in the reservation. The Secretary ruled that oil shale was included. The Secretary admitted that oil shale has little value as such, and is not dissolved by oil solvents; but, as its only worth is for oil, it has long been included by the Department within the wording of the statute.

The district court and the Court of Appeals affirmed the Secretary. They held that courts would not reverse a reasonable, consistent position of the Department in effect since 1914. Brennan also argued that as his predecessor entered upon the land (seeking patent) prior to the enactment of the statute setting up the reservations, they would not apply to this land because he is entitled to patent vesting title as of the time of entry. The Court rejected this argument, because Brennan's predecessor freely consented that the patent, when finally issued to him (subsequent to the statute), should contain the reservations in dispute. His time to challenge was then, and the patent cannot be attacked 50 years later by his successor.

Staff: S. Billingsley Hill (Land and Natural Resources Division)

CONDEMNATION

SEPARATE VALUATION OF INTERESTS IN PROPERTY RATIONALE OF COMMISSION DECISION REQUIRED TO JUSTIFY COMPENSATION AWARD

Ozark Real Estate Co. v. United States (C. A. 8, No. 18,484; May 16, 1967; D.J. File 33-4-275-368).

Ozark appealed a district court affirmance of a condemnation commission award for the Government's taking of land and flowage easements for the Dardanelle Lock and Dam Project on the Arkansas River. The Court of Appeals affirmed.

The parties agreed to separately value (1) surface, (2) oil and gas, (3) strippable coal, and (4) deep coal. Ozark appealed only the award for deep coal. Appellant argued that (1) the commission did not adequately reveal the rationale by which it arrived at its final award, and (2) the report was not based on a "before and after" valuation. The Court rejected both arguments. It found that the commission weighed the conflicting evidence, and that it clearly stated which evidence it rejected or accepted. As to the "before and after" test of valuation, the Court recognized its worth as a proper test, but stated that the parties had superseded it by agreeing to value the interests in the property separately. The Court would not allow Ozark to accept the first three awards and then reject the fourth, when all four awards were based on a plan agreed to by Ozark.

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CONDEMNATION

AUTHORITY TO CONDEMN; REQUIREMENT OF STATE CONSENT; APPLICATION OF STATE LAW TO FEDERAL CONDEMNATION PROCEEDING

West, Inc., et al. v. United States (C. A. 5, No. 22819; Mar. 10, 1967; D.J. File 33-25-143-367).

The United States condemned the fee title to three tracts of land in connection with the Yazoo Basin Headwater Project in Mississippi. Compensation was fixed in the district court by stipulation and by jury.

Appellants argued that (1) the Federal Government could not condemn the fee when flowage easements would have accomplished the desired results of the project; (2) Mississippi law governs the proceedings under 33 U.S.C. 591 and Rule 71A(k), F.R.Civ.P.; and (3) the consent of Mississippi was required and it could consent only to condemnation of a flowage easement. The district court rejected all three arguments.

The Court of Appeals affirmed on the grounds that (1) determination of the extent of the taking (given a valid constitutional purpose) is a legislative

function delegated to the Secretary of the Army and is, therefore, not subject to judicial review; (2) 33 U.S.C. 591 only applied to procedure, and its requirement of procedural uniformity was superseded by Rule 71A(h), F.R.Civ.P., as was 40 U.S.C. 258; and (3) the consent of Mississippi was not required, since state law (which would permit Mississippi to condemn a flowage easement) cannot limit federal power of condemnation where there is no impingement of state-protected sovereignty.

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DISTRICT COURTS

CONDEMNATION

VALUATION; RICE ALLOTMENT

United States v. 4,253.25 Acres, etc. (Civ. No. 2849, S.D. Miss.; June 26, 1967; D.J. File 33-25-315-216).

At the trial of a 628.2-acre tract of land in Hancock County, Mississippi, upon which restrictive easements were acquired in the buffer zone surrounding the Mississippi Test Facility of the National Aeronautics and Space Administration, a commission award of $87,764 ($53,515, land; $34,249, improvements) was obtained. The Government offered valuation evidence of $60,818.90 ($35,649.90, land; $25,169, improvements) and the defendant offered testimony of $247,150 ($192,000, land; $55,150, improvements).

The owner had purchased the land in 1952 for $32 per acre and testified he had spent approximately $170 per acre clearing the land and preparing 493.7 acres for rice planting. He grew rice for four years before his rice was stricken by a disease called Hoja Blanca. After the disease struck, his 493.7 acres were put into a Government plan and the Government paid him $4,999 for eight years, such payments to end in 1968. The owner was of the opinion he could not go into rice production again because of the restrictive easements imposed on his land.

The commission found, contrary to the defendant's expert witness, that the rice acreage allotment could be transferred. 7 U.S.C. 1378. The commission stated in part as follows:

> The Government is not putting the Defendant out of his occupation of growing rice. Indeed, it must be recognized that such a legislative regulation could be changed or withdrawn at any time by the Congress without compensation. The United States is not required to pay compensation for the

withdrawal for a benefaction--a bare privilege or benefit which it has itself conferred. United States v. Miller, 317 U.S. 369, 375 (1943). For Defendant to profit twice, by transferring the allotment from the condemned land to other land, and at the same time requiring the Government to pay for the condemned land as enhanced by such allotment, is clearly beyond the legislative intent, and would constitute a windfall beyond the relief which the Congress has already seen fit to grant. Compensation must be just to the public, as well as to the condemnee. Bauman v. Ross, 167 U.S. 549, 574 (1897); Searl v. School District, Lake County, 133 U.S. 553, 562 (1890); Bibb County, Georgia v. United States, 249 Fed. 2d 228, 230-231 (C.A. 5, 1957). The Government pays only for what it takes.

Under 7 U.S.C., Section 1378, the Federal Government did not acquire the allotment. Thus, land without the allotment is all the Government has imposed the easement on, pursuant to the Congressional statute, and is all the Government must pay for under the fifth amendment. United States of America v. 3296.82 acres of land, 22 F. Supp. 173.

Staff: Assistant United States Attorney Edwin R. Holmes, Jr. (S.D. Miss.)

INJUNCTION

SUIT AGAINST OFFICERS; SUIT AGAINST UNITED STATES UNDER TUCKER ACT; EXCESS LAND LIMITATIONS LAW

Washington v. Udall, et al. (E.D. Wash.; July 7, 1967; D.J. File 90-1-2-791).

The State of Washington, as owner of school lands situated within the Columbia Basin Project, brought suit against the United States, the Secretary of the Interior, the Commissioner of Reclamation, the Regional Director, the Project Manager and the South Columbia Basin Irrigation District. The complaint alleged that the defendant officers of the United States had refused to deliver water to irrigable state school lands in excess of 160 acres unless the State would execute a recordable contract in the form prescribed by the

Secretary of the Interior. The State alleged that it was powerless to execute such a contract because of certain provisions of its Constitution and the State Enabling Act. The State alleged that state school lands, including those described in this complaint, are exempt from the excess land provisions of the Federal Reclamation laws and sought a declaratory judgment to that effect, declaring further that the purchaser of such lands shall not be disqualified from executing a recordable contract by reason of the price paid to the State. The State sought a permanent injunction against the defendant officers enjoining them from requiring the execution of a recordable contract with respect to such state school lands and further enjoining them from refusing to execute a recordable contract with the purchaser of such lands by reason of the price paid to the State. The State further sought an order granting relief in the nature of mandamus by compelling the defendant officers of the United States to deliver irrigation water. The State further sought damages from the United States for the failure of delivery of water.

The motion to dismiss the Government officers was granted on the grounds that it was an unconsented suit against the United States (on the authority of Dugan v. Rank, 372 U.S. 609), since the relief sought would require the disposition of Government property. The Court held that neither the Administrative Procedure Act nor the mandamus statute, 28 U.S.C. 1361, waived immunity from suit. Notwithstanding the State's expressed willingness to waive damages in excess of $10,000, the Court dismissed the action under the Tucker Act on the ground it was an impermissible splitting of the State's cause of action, there being other state school lands similarly situated.

Staff: Walter Kiechel, Jr. (Land and Natural Resources Division) and Assistant United States Attorney Ronald R. Hull (E. D. Wash.)

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TAX DIVISION

Assistant Attorney General Mitchell Rogovin

COURTS OF APPEALS -- CRIMINAL CASES

EVIDENCE

EVIDENCE VOLUNTARILY GIVEN TO REVENUE AGENT AT INTERVIEW NOT INADMISSIBLE ALTHOUGH TAXPAYER WAS NOT ADVISED THAT HE COULD HAVE COUNSEL PRESENT

Morgan v. United States (C.A. 1, No. 6877; May 16, 1967; D.J. File 5-36-3206).

Taxpayer came to the office of the Internal Revenue Service to discuss his income tax returns. He was warned of his right to remain silent but nothing was said on the subject of counsel. Evidence thus obtained was introduced at taxpayer's trial for failure to file a tax return. On appeal from taxpayer's conviction, the First Circuit affirmed, holding that this was not a custodial or coercive situation to which Miranda v. Arizona, 384 U.S. 436, was applicable. "There must be reasonable limits to the solicitude required of the government. *** To some extent persons must be prepared to look after themselves". To the same effect, see, e.g., Kohatsu v. United States, 351 F. 2d 898 (C.A. 9), certiorari denied, 384 U.S. 1011. (Also to the same effect, see other decisions included in this issue of the Bulletin.)

Staff: United States Attorney Paul F. Markham and Assistant United States Attorney John Wall (D. Mass.)

REVENUE AGENTS NEED NOT WARN OF RIGHT TO COUNSEL BEFORE OBTAINING EVIDENCE FROM TAXPAYER; FOUR-YEAR DELAY BETWEEN INITIAL INVESTIGATION AND INDICTMENT DID NOT DEPRIVE TAXPAYER OF SPEEDY TRIAL; RECORD OF REVENUE AGENT'S GRAND JURY TESTIMONY IMPROPERLY WITHHELD FOR CROSS-EXAMINATION PURPOSES IF SUCH RECORD EXISTED

Schlinsky v. United States (C.A. 1, No. 6864; June 6, 1967; D.J. File 5-36-3009).

During the initial audit, no warnings of consitutional rights were given. When a Special Agent first interviewed taxpayer, he advised that taxpayer need not answer any questions or produce any records and could leave at any time, but made no mention of the right to counsel. Citing its recent

decision in Morgan v. United States (67-1 U.S.T.C., ¶9449), the First Circuit held that the evidence thus obtained was properly admitted.

The Court rejected the contention that the pre-indictment delay here was such as to deny the right to a speedy trial, without deciding whether such delay might ever amount to such a denial.

The Court refrained from deciding whether it is an improper practice not to record the grand jury testimony of investigating agents, but remanded for a finding as to whether such a record was here made, since if it was, the district court erred in not making it available for cross-examination--a prejudicial error if the "slightest inconsistency" appears.

Held, also, that it was sufficient to instruct the jury that accident or carelessness was not willful intent, without referring also to "gross" carelessness.

Staff: United States Attorney Paul F. Markham and Assistant United States Attorney Herbert N. Goodwin (D. Mass.)

REVENUE AGENTS NEED NOT ADVISE OF RIGHT TO COUNSEL; INVESTIGATORS WHO OBTAIN CO-OPERATION OF TAXPAYER'S ACCOUNTANT DO NOT THEREBY INVADE CONSTITUTIONAL RIGHTS; NET WORTH PROOF SUFFICED ALTHOUGH RESTING IN PART ON SCANTY EVIDENCE OF PARTNERSHIP INTEREST

United States v. Mancuso (C.A. 4, No. 10,822; May 19, 1967; D.J. File 5-35-1061).

The Fourth Circuit affirmed a conviction for attempted tax evasion rejecting the contention that taxpayer was deprived of constitutional rights because the C.P.A. who prepared his return voluntarily brought his file on taxpayer to the United States Attorney's office. The file contained net worth schedules prepared at the request of taxpayer's counsel, but any error was cured by the district court's order suppressing those schedules and ordering the Government to disclose its net worth computations. (Taxpayer sought dismissal of the indictment.) Further, it was not error to refuse to suppress taxpayer's statements to revenue agents, whether or not taxpayer "subjectively" knew of his legal right to resist the investigation (here, taxpayer was accompanied by his counsel at the first interview and was told of his right to refuse to answer questions). After detailed analysis, the Court also held that the Government's assumption, in its net worth computation, that

taxpayer held an equal interest in partnership assets was justified, in spite of "a scarcity of direct evidence".

Staff: Former United States Attorney Thomas J. Kenney, and Assistant United States Attorneys Ronald T. Osborn, Arthur K. Crocker and Clarence E. Goetz (D. Md.)

REVENUE AGENT MAY PROPERLY INTERVIEW TAXPAYER WITHOUT ADVISING AS TO RIGHT TO COUNSEL

United States v. Maius (C. A. 6, No. 16,981; June 15, 1967; D. J. File 5-30-479).

In obtaining statements from taxpayer, revenue agents advised him of his rights under the Fifth Amendment but did not inform him that he could have an attorney present during the interview. The Sixth Circuit held that the admission of evidence so obtained, at taxpayer's subsequent criminal trial, was not error. The Court, while indicating its own feeling that such advice should be given, stated that it could not so hold in the absence of a Supreme Court decision to that effect.

Staff: Donald A. Hansen and Richard B. Buhrman (Tax Division)

IN PROSECUTION FOR SUBSCRIBING TO FALSE RETURNS, HELD NOT ERROR TO EXCLUDE EVIDENCE SHOWING SMALL TAX CONSEQUENCE

Silverstein v. United States (C. A. 1, No. 6830; May 12, 1967; D. J. File 5-47-229).

In a jury trial, taxpayer was found guilty of willfully subscribing to tax returns not believing them to be true and correct as to every material matter, in violation of Section 7206(1) of the 1954 Code. The returns omitted income from dividends, interest and capital gains amounting to a few thousand dollars for each of the two years involved. The defense was that taxpayer kept inadequate records and was unaware that the returns were false. The First Circuit affirmed taxpayer's conviction, rejecting his contention that the trial court erred in excluding evidence of the small tax consequences ($379.64 and $481.55), as bearing upon whether the omissions of income were willful or merely negligent. The Court noted that taxpayer's state of mind was the only disputed issue, and that the amount of tax involved had no bearing upon that subject. The defense was simply that taxpayer did not know that he had more income than he reported, and the truth of that defense could not be

evaluated in terms of tax consequences of which taxpayer was by hypothesis unaware.

Staff: United States Attorney Louis M. Janelle (D. N.H.); John M. Brant (Tax Division)

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