

the *Security Trust* case and for the same reasons.”⁷² The Supreme Court found the cases indistinguishable from *Security Trust* and from each other,⁷³ and ruled that the state’s characterization of its liens was not binding on the federal court; the competing liens were, for federal purposes, inchoate. The Supreme Court, although thus given the opportunity to review and perhaps alter its decision, in no uncertain or vague language, affirmed the *Security Trust* case.

The various writers have differed as to whether or not the federal tax claims should be given absolute priority⁷⁴ and have presented sound arguments in support of both positions. No matter which course is favored, there is a need for congressional clarification in this area. Congress should review the system of priorities in the various statutory provisions and establish precise and uniform standards to control the courts in the determination of the priorities of federal tax claims and competing liens.

EMBEZZLEMENT AND INCOME UNDER THE INTERNAL REVENUE CODE

The federal income tax, primary source of revenue for the National Government, is levied upon “all income from any source whatever.”¹ This broad definition encompasses income from illegal business opera-

72. *United States v. Acri*, 75 Sup. Ct. 239, 241 (1955).

73. *United States v. Liverpool & London & Globe Ins. Co.*, 75 Sup. Ct. 247, 248 (1955).

74. For arguments favoring federal priority see Sarner, *supra* note 34, at 746 (1947). For those opposing federal priority see Kennedy, *supra* note 10; Note, 29 N.C.L. REV. 293, 300 (1951).

1. INT. REV. CODE OF 1954, § 61(a). This section replaces Int. Rev. Code of 1939, § 22(a), 52 STAT. 457, but does not appreciably alter its interpretation. 1 CCH 1955 STAND. FED. TAX REP., ¶ 636.

2. Bootlegging: *United States v. Sullivan*, 274 U.S. 259 (1927); *Maddas v. Commissioner*, 114 F.2d 548 (3rd Cir. 1940); *Steinberg v. United States*, 14 F.2d 564 (2nd Cir. 1926). Black market operations: *United States v. Chapman*, 168 F.2d 997 (7th Cir. 1948), *cert. denied* 335 U.S. 853 (1948); *Wallace H. Petit*, 10 T.C. 1253 (1948). Lotteries: *Droge v. Commissioner*, 35 B.T.A. 829 (1937); *Huntington v. Commissioner*, 35 B.T.A. 835 (1937). Bookmaking: *James P. McKenna*, 1 B.T.A. 326 (1925). Usurious loans: *Barker v. Magruder*, 95 F.2d 122 (D.C. Cir. 1938); *Mitchell M. Frey*, 1 B.T.A. 338 (1925); *Terrell v. Commissioner*, 7 B.T.A. 773 (1927). Unlawful insurance policies: *Patterson v. Anderson*, 20 F. Supp. 799 (D.C. Cir. 1937). Fraudulent land sales: *Briggs v. United States*, 214 F.2d 699 (4th Cir. 1954). Illegal movie transportation: *George L. Rickard*, 15 B.T.A. 316 (1929). Income from abortion: *Mary Luginbuhl*, 8 CCH Tax Ct. Mem. 968 (1949).

tions² and unlawful practices³ as well as from lawful occupations, save for one area of crime. Funds obtained by embezzlement and larceny have not been held taxable income.⁴ To the honest taxpayer it may seem anomalous that this exception exists. While this immunity has limited practical justification, it has little legal validity and prevents the broad, sure criterion of taxability necessary for administrative convenience.

Proceeds from larceny have never been considered subject to taxation as income for a simple, practical reason. If the thief was apprehended, the property was returned to the victim.⁵ If the criminal escaped, the Government did not know on whom to levy the tax. Legally, the argument not to tax stolen money hinges on the concept that title to stolen property remains in the victim. Embezzlement, a more sophisticated form of larceny, has long been disputed in tax law.

Early cases grouped embezzlement with larceny and exempted such illegal gains from taxation.⁶ By 1942, after a Treasury Department ruling that embezzlement funds were taxable,⁷ the circuit courts were split over the matter.⁸ In 1946 the Supreme Court "settled" the dis-

3. Graft: *Chadick v. United States*, 77 F.2d 961 (5th Cir. 1935), *cert. denied*, 296 U.S. 609 (1935). Protection payments: *Johnson v. United States*, 318 U.S. 189 (1943); *Humphreys v. Commissioner*, 125 F.2d 340 (7th Cir. 1942). Kickbacks: *Caldwell v. Commissioner*, 135 F.2d 488 (5th Cir. 1943). Card playing: *Weiner v. Commissioner*, 10 B.T.A. 905 (1928). Commercial Bribes: *United States v. Bruswitz*, 219 F.2d 59 (2d Cir. 1955). Influence selling: *Reichert v. Commissioner*, 214 F.2d 19 (7th Cir. 1954). Extortion: *Rutkin v. United States*, 343 U.S. 130 (1952); *Estate of Joseph Nitto*, 13 T.C. 858 (1949). Swindling (obtaining money by false pretenses): *Rolinger v. United States*, 208 F.2d 109 (8th Cir. 1953); *Akers v. Scofield*, 167 F.2d 718 (5th Cir. 1948). Illegally obtained salaries: *Healy v. Commissioner*, 345 U.S. 278 (1953); *National City Bank of New York v. Helvering*, 98 F.2d 93 (2d Cir. 1938). See *Geller & Rogers, How The Federal Income Tax Applies To Illegal and Unlawful Gains*, 27 TAXES 214 (1949).

4. *Commissioner v. Wilcox*, 327 U.S. 404 (1946); *Steinberg v. United States*, 14 F.2d 564, 566 (2d Cir. 1926) (dictum); *Rau v. United States*, 260 Fed. 131, 136 (2d Cir. 1919) (dictum). See 1 MERTENS, FEDERAL INCOME TAXATION § 4.11 (1942); Note, *Income Tax Consequences of Theft*, 35 VA. L. REV. 759, 767 (1949).

5. *Steinberg v. United States*, 14 F.2d 564 (2d Cir. 1926); *Cf. Bank of United States v. Bank of Washington*, 31 U.S. (6 Pet.) 299, 304-5 (1832).

6. *Steinberg v. United States*, 14 F.2d 564, 566 (2d Cir. 1926); *Rau v. United States*, 260 Fed. 131, 136 (2d Cir. 1919) (both dictum).

7. G.C.M. 16572, XV-1 CUM. BULL. 82 (1936).

8. Embezzled funds were held taxable in *Kurrle v. Helvering*, 126 F.2d 723 (8th Cir. 1942). The *Kurrle* case relied on *National City Bank of New York v. Helvering*, 98 F.2d 93 (2d Cir. 1938), which expressly overruled *Rau v. United States*, 260 Fed. 131 (2d Cir. 1919).

Embezzled funds were held not taxable income in *McKnight v. Commissioner*, 127 F.2d 572 (5th Cir. 1942). This court anticipated the *Wilcox* case by seeking to protect the victim against a preferential tax lien which would interfere with the victim's recovery of the converted funds. *Id.* at 574.

pute in *Commissioner v. Wilcox*.⁹ Speaking through Mr. Justice Murphy, the Court held that embezzled money does not constitute taxable income to the embezzler, although he has used it as his own and although the victim was granted a tax deduction for his loss.¹⁰ The real question was whether or not the taxpayer received income under a "claim of right."¹¹ To qualify as taxable income, funds must be obtained under a bona fide legal or equitable claim and the holder must have no duty to repay the money.¹² Mere possession of the stolen funds was not sufficient to render them taxable as income in the embezzler's hands.¹³ The policy reason behind the Court's decision was the desire to allow the victim to regain possession of his money unfettered by the government's preferential lien.¹⁴

Even under the *Wilcox* rule, however, embezzled funds could become taxable. If the statute of limitations runs through the victim's negligence or condonation, the embezzler is vested with an irrefutable legal claim, and the illegal gain would become taxable income.¹⁵ To

9. *Commissioner v. Wilcox*, 327 U.S. 404 (1946). See Holzman, *Tax Classics*, 29 TAXES 764 (1951); 22 IND. L.J. 99 (1946); 7 ALA. LAW. 332 (1946); 26 B.U.L. REV. 404 (1946); 34 CALIF. L. REV. 449 (1946); 46 COLUM. L. REV. 667 (1946); 14 GEO. WASH. L. REV. 650 (1946); 9 GA. B.J. 107 (1946); 44 MICH. L. REV. 885 (1946); 30 MINN. L. REV. 308 (1946); 20 SO. CAL. L. REV. 113 (1946); 25 TEX. L. REV. 693 (1946); 20 TUL. L. REV. 628 (1946); 1947 WIS. L. REV. 114.

10. 327 U.S. at 409 (1946).

11. *Id.* at 408. The Court admitted, however, that ". . . no single, conclusive criterion has yet been found to determine in all situations what is a sufficient gain to support the imposition of an income tax. No more can be said in general than that all relevant facts and circumstances must be considered." *Id.* at 407.

12. *Id.* at 408.

13. *Ibid.*

14. *Id.* at 410. "Sanctioning a tax under the circumstances before us would serve only to give the United States an unjustified preference as to part of the money which rightfully and completely belongs to the taxpayer's employer." *Ibid.*

As a result of *Wilcox* the embezzler prosecuted for tax evasion was placed in a ludicrous position. After having stolen from his employer he must then argue earnestly that his victim would be harmed should the tax lien attach and drain the assets of the embezzler. Such concern for the rights of the victim seems slightly belated. Furthermore, it requires the embezzler to confess to a more serious crime to defend against the evasion charges. Thus it might be assumed that the number of these cases would remain relatively small.

15. *Ibid.* A related problem would be whether or not the victim, by condoning the embezzlement, would forfeit his right to a deduction, allowed under INT. REV. CODE OF 1954, § 165(e). See Note, 35 VA. L. REV. 759 (1949). It is assumed that no deduction would be allowed in such cases, but as condonation is likely only where relatively small amounts are involved, this would not prove a serious problem. See *Currier v. United States*, 166 F.2d 346, 348 (1st Cir. 1948) where the court ruled that no deduction would be allowed if the victim had a cause of action against the embezzler. The court did not consider that by allowing the embezzler to retain the funds the victim actually is making a gift to him. Gifts are not taxable under INT. REV. CODE OF 1954, § 102(a). See *Helvering v. American Dental Co.*, 318 U.S. 322, 330 (1943). Were this money declared a gift, it would be taxable as such, but not as income. However, the Court ruled this taxable as income. See note 16 *infra*.

delay assessing the tax until these conditions occur makes administration of the tax difficult.

Subsequent cases quickly whittled away the broad *Wilcox* ruling.¹⁶ In 1952 the Supreme Court was given an opportunity to re-appraise *Wilcox* in *Rutkin v. United States*,¹⁷ an evasion prosecution concerning extorted money. There a defense based on the *Wilcox* holding failed, and the Court ruled that extorted funds were taxable. The majority opinion¹⁸ limited *Wilcox* "to its facts."¹⁹ The Court, ignoring the claim of right concept, held any gain, legal or illegal, taxable if the recipient ". . . has such control over it that as a practical matter he derives a readily realizable economic value from it."²⁰ While the case involved only proceeds from extortion, the decision was a victory for the Commissioner because of the expanded income concept that was adopted.²¹

Lower courts circumscribed *Wilcox* still further.²² Attempts to use

16. In 1946 Chief Counsel of the Bureau of Internal Revenue backed down from the former bureau position and grudgingly admitted that "the correct rule appears to be that the mere act of embezzlement does not of itself result in taxable income inasmuch as the owner does not lose title to the property embezzled." G.C.M. 24945, 1946-2 CUM. BULL. 27, 28. He was quick to add that ". . . where the owner condones the taking of the property and forgives the indebtedness, taxable income may result to the embezzler, depending on the facts in the particular case." *Ibid.*

17. *Rutkin v. United States*, 343 U.S. 130 (1952). Estate of Joseph Nitto, 13 T.C. 585 (1949). For an excellent discussion and comparison of the *Rutkin* and *Wilcox* positions see Note, *Taxation of Misappropriated Property: Decline and Incomplete Fall of Wilcox*, 62 YALE L.J. 662 (1953). See also 19 BROOKLYN L. REV. 151 (1953); 20 GEO. WASH. L. REV. 796 (1952); 7 MIAMI L.Q. 256 (1952); 36 MINN. L. REV. 988 (1952); 7 RUTGERS L. REV. 422 (1953); 26 TEMP. L.Q. 211 (1952); 100 U. PA. L. REV. 595 (1952); 38 VA. L. REV. 682 (1952); 28 WASH. L. REV. 67 (1953).

18. Mr. Justice Burton, who wrote the lone dissent in *Wilcox*, drafted the majority opinion. Justices Black, Frankfurter, Reed and Douglas dissented.

19. *Rutkin v. United States*, 343 U.S. 130, 138 (1952).

20. *Id.* at 137.

21. The *Rutkin* equation of taxable income and economic benefit stems from *Burnet v. Wells*, 289 U.S. 670 (1933). There the Court held that tax liability "may rest upon the enjoyment by the taxpayer of privileges and benefits so substantial and important as to make it reasonable and just to deal with him as if he were the owner, and to tax him on that basis." *Id.* at 678. See *Corliss v. Bowers*, 281 U.S. 376, 378 (1930). See also Commissioner v. Tower, 327 U.S. 280 (1946); *Helvering v. Horst*, 311 U.S. 112 (1940). For the most recent judicial view of the *Wilcox* and *Rutkin* definitions see *United States v. Bruswitz*, 219 F.2d 59, 61-62 (2d Cir. 1955).

The *Wilcox* and *Rutkin* cases are distinguishable on facts. In *Rutkin* the statute of limitations had run against the victim; hence he could not be harmed by the government collecting taxes. This distinction was not articulated by the Court. Brief for the United States in Opposition, p. 14, and Brief for Appellee, pp. 35-36, *Rutkin v. United States*, 343 U.S. 130 (1952).

22. Two later tax court cases upheld the *Wilcox* ruling. *George H. Conradson*, 5 CCH Tax Ct. Mem. 112 (1946); *Agnes McCue*, 5 CCH Tax Ct. Mem. 141 (1946). Under the view expressed in *Estate of Joseph Nitto*, 13 T.C. 858 (1949)—"The *Wilcox* case does not stand for the proposition that all funds fraudulently or illegally acquired are non-taxable. . . ."—the courts quickly began to narrow the scope of *Wilcox*. See *Rothwacks, Taxability of Corporate Receipts Diverted by Officer-Stockholder*, 7 N.Y.U. INSTITUTE ON FEDERAL TAXATION 573 (1949); Note, 16 U. PITT. L. REV. 188 (1955).

an embezzlement defense to evasion prosecutions met unanimous defeat.²³ Money "embezzled" by owner-officers of small corporations was held taxable.²⁴ In 1954 the Eighth Circuit, forsaking any hope of reconciling the Supreme Court cases, held taxable the funds stolen by an employee from his employer.²⁵ While the act would seemingly qualify as embezzlement under state law, the court refused to be bound by the state definition and adopted instead a free-wheeling interpretation of embezzlement for federal tax purposes.²⁶ Further cases held the *Wilcox* rationale inapplicable to bribery,²⁷ swindling,²⁸ and other related crimes.²⁹ Thus, the once broad rule that embezzled proceeds are not taxable now appears so limited as to be effectively overruled.³⁰

Appraisal of the soundness of the *Wilcox* ruling necessitates an examination of the validity of the claim of right and tax lien arguments—the bedrock on which the case was erected. The claim of right doctrine was limited by requiring a bona fide claim and the "absence of a definite, unconditional obligation to return that which would otherwise constitute a gain."³¹ This extension indicates that taxability rests on indisputable

23. See Holzman, *supra* note 9. Note, 62 YALE L.J. 662, 668-669 (1953).

24. Kann v. Commissioner, 210 F.2d 247 (3rd Cir. 1953), *cert. denied*, 347 U.S. 967 (1954); Currier v. United States, 166 F.2d 346 (1st Cir. 1948); Alexander Grosshandler, 13 CCH Tax Ct. Mem. 383 (1954); J.J. Dix, Inc., 12 CCH Tax Ct. Mem. 536 (1953). See 29 N.Y.U.L. REV. 1298 (1954); 23 U. CINN. L. REV. 362 (1954).

25. Marienfeld v. United States, 214 F.2d 632, 636, 639 (8th Cir. 1954).

26. *Id.* at 636. "[T]he present question is not whether appellant was guilty of embezzlement under the law of Missouri, but whether the funds he received were his income under the Act of Congress defining taxable income. State law will not be decisive in that determination." *Ibid.* Kann v. Commissioner, 210 F.2d 247, 251 (3rd Cir. 1953), *cert. denied*, 347 U.S. 967 (1954); Daine v. Commissioner, 168 F.2d 449, 451 (2d Cir. 1948). See also Commissioner v. Tower, 327 U.S. 280 (1946).

27. United States v. Bruswitz, 219 F.2d 59 (2d Cir. 1955).

28. Rollinger v. United States, 208 F.2d 109 (8th Cir. 1953); Akers v. Scofield, 167 F.2d 718 (5th Cir. 1948).

29. Briggs v. United States, 214 F.2d 699 (4th Cir. 1954) (fraudulent land sales); United States v. Chapman, 168 F.2d 997 (7th Cir. 1948) and Wallace H. Petit, 10 T.C. 1253 (1948) (black market operations); Greenfeld v. Commissioner, 165 F.2d 318 (4th Cir. 1947) (receipts from sale of stolen bearer bonds).

30. The court in United States v. Bruswitz, 219 F.2d 59 (2d Cir. 1955) summarizes the present judicial view of *Wilcox*. "It is difficult to perceive what, if anything, is left of the *Wilcox* holding after *Rutkin v. United States*. . . . The reconciliation evolved by other circuits seems to be that even temporary dominion over illicit gains is sufficient to render them taxable in the hands of the holder thereof. . . . Although eminently justified by the *Rutkin* holding, this formulation in effect does what the Supreme Court purported not to do; it overrules the *Wilcox* case." *Id.* at 61. It would seem that the only situation where *Wilcox* might still apply would be where the embezzler had first been convicted of the state crime of embezzlement, *i.e.*, the "facts" of the *Wilcox* case.

31. Commissioner v. *Wilcox*, 327 U.S. 404, 408 (1946). The claim of right was introduced into income tax law by Mr. Justice Brandeis in *North American Oil Consolidated v. Burnet*, 286 U.S. 417 (1932). "If a taxpayer receives earnings under a claim of right and without restrictions as to its disposition, he has received income which he is required to return, even though it may still be claimed that he is not entitled

title,³² a far cry from the humble origin of the doctrine in property law.³³ Previously, the claim of right theory served as a general "money in the pocket" test to bring income within the scope of taxation rather than to exclude it.³⁴ Control or possession of money has generally been held sufficient criterion for determining taxability,³⁵ primarily as an outgrowth of the annual accounting income system which necessitates a relatively sure guide for both taxpayer and tax collector. Surely title is of no concern to the embezzler who has the money and can enjoy its economic benefits. It would appear that the stringent standards of *Wilcox* were imposed to provide for the contingency that the embezzler might be caught and forced to repay.³⁶ On this possibility the Supreme Court excluded from income all embezzled proceeds. Yet, nowhere else does the possibility of repayment render broad categories of income immune from taxation.³⁷ The contingency that the embezzler might not repay would seem to serve as an equally compelling argument for adopting the less rigid "economic benefit" test as proposed by *Rutkin*.³⁸ Not

to retain the money, and even though he may still be adjudged liable to restore its equivalent." *Id.* at 424. For the development of this doctrine see *Holzman, Tax Classics*, 30 TAXES 299 (1952); *Webster, The Claim of Right Doctrine: 1954 Version*, 10 TAX. L. REV. 381 (1955); Note, *Taxing Unsettled Income: The "Claim of Right" Test*, 58 YALE L.J. 955 (1949).

32. Note, 62 YALE L.J. 662, 664 (1953). See also Bartlett, *The Impact of State Laws on Federal Income Taxation*, 25 CHI-KENT L. REV. 103, 131 (1947). "[T]axation is not so much concerned with the refinements of title as it is with actual . . . benefit for which the tax is paid." *Corliss v. Bowers*, 281 U.S. 376, 378 (1930); *Burnet v. Wells*, 289 U.S. 670, 678 (1933); *cf. Burnet v. Guggenheim*, 288 U.S. 280, 283 (1932).

33. *Healy v. Commissioner*, 345 U.S. 278, 282 (1953).

34. "There is a claim of right when funds are received and treated by a taxpayer as belonging to him. The fact that subsequently the claim is found to be invalid by a court does not change the fact that the claim did exist." *Id.* at 282. The Commissioner has used the claim of right doctrine generally to compel the payment of the tax. *Ibid.*; *United States v. Lewis*, 340 U.S. 590 (1951); *North American Oil Consolidated v. Burnet*, 286 U.S. 417 (1932). The concept is employed to add certainty to the annual accounting period. *United States v. Lewis*, 340 U.S. 590, 592 (1951). See 2 MERTENS, FEDERAL INCOME TAXATION, § 12.103 (1942).

35. Every related evasion case since *Rutkin*, and some before it, talk in terms of Judge Learned Hand's view in *National City Bank of New York v. Helvering*, 98 F.2d 93 (2d Cir. 1938), *i.e.*, that possession was a sufficient criterion for determining taxability. See notes 24, 25, 27, 28, 29 *supra*.

36. *Commissioner v. Wilcox*, 327 U.S. 404, 410 (1946). See also Mr. Justice Burton's dissent, *id.* at 414.

37. "No rule is better established in tax law than that which requires the taxpayer who derives a profit in a particular year to return it as income in the year when received—even though it may be claimed he is not entitled to retain the money and even though he may be ultimately adjudged liable to restore its equivalent." *Barker v. Magruder*, 95 F.2d 122, 124 (D.C. Cir. 1938). See also *Brown v. Helvering*, 291 U.S. 193, 201 (1934).

38. *Rutkin v. United States*, 343 U.S. 130, 137 (1952). This test has been followed exclusively by the circuits. *Brunswitz v. United States*, 219 F.2d 59, 61-62 (2d Cir. 1955).

only would this be more easily administered under the annual accounting concept, but it would restore certainty to the law by aligning recent cases to the traditional meaning of claim of right.

The tax lien argument on which the *Wilcox* case rests is also questionable. The necessity of protecting the victim is nonexistent where the embezzler is solvent and could pay the victim as well as the Government. In such a situation the embezzler is immunized against taxation by a clearly inappropriate policy. If the proceeds are traceable, the victim may recover them, for the Government's tax lien will attach only to property of the embezzler; and embezzled funds, identifiable in any form, are not his property.³⁹ Furthermore, if the victim has obtained a judgment against the embezzler and levied on his property, the Government lien could attach to only the remaining property.⁴⁰ Only when the funds are not traceable, or when the victim has not acted diligently to obtain a lien against the embezzler, does the tax lien affect the victim. In this case the victim is merely an unsecured creditor. As the sole purpose of the government's tax lien is to assure the collection of revenue before private creditors drain the funds, the lien generally operates to the disadvantage of ordinary, honest creditors.⁴¹ Though the victim may be no more than a creditor the *Wilcox* Court deemed him worthy of special treatment. This seems a debatable basis for excluding embezzlement from taxation.⁴²

39. In *State of Washington v. Byrne*, a larceny situation, it was held that the government did not acquire a lien on money which was not the property of the criminal who obtained it by false pretenses. *State v. Byrne*, 4 CCH 1955 STAND. FED. TAX REP. (54-2 U.S.T.C.) ¶ 5357.032 (Super. Ct. of Washington). The government tax lien attaches "upon all property and rights to property, whether real or personal," belonging to the taxpayer. INT. REV. CODE OF 1954, § 6321. See 1 STAT. 515 (1797), 31 U.S.C. § 191 (1952), which gives the federal government a preference for all debts owing to it, including taxes. *Price v. United States*, 269 U.S. 492 (1926). See also 9 MERTENS, FEDERAL INCOME TAXATION § 54.10-37 (1943). Were the funds traceable it would seem that the tax lien would not apply to such stolen proceeds. 3 COLLIER, BANKRUPTCY § 60.18, 60.24; 4 *id.* 70.25 (14th ed., Moore, ed., 1941). On "property" subject to tax liens see Anderson, *Federal Tax Liens—Their Nature and Priority*, 41 CALIF. L. REV. 241, 245 (1953); Clark, *Federal Tax Liens and Their Enforcement*, 33 VA. L. REV. 13, 14 (1947); Kennedy, *Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien*, 63 YALE L.J. 905, 919 (1954); 9 MERTENS, FEDERAL INCOME TAXATION, § 54.47-50 (1943).

40. The Court appears to have ignored the situation found in *Wilcox* where the victim had ample time to sue, obtain judgment and get a lien against the assets of the embezzler. The tax lien takes subject to the earlier lien of a judgment creditor. INT. REV. CODE OF 1954, § 6323(a).

41. Should the victim and the Internal Revenue Service discover the embezzlement at the same time, a race of diligence might result to perfect liens on the embezzler's property. In such a race the advantage would obviously lie with the victim.

42. Theoretically, protection of the embezzler's victim has merit. The one who suffers the loss is the true owner. The thief has no right to any of the money, and the Government has still less right to levy taxes on it. See 28 WASH. L. REV. 67, 68 (1953). This theory, if expanded, would exclude all illegal profits from taxation. It has been

While the Court was concerned about jeopardizing the victim's recovery of embezzled funds, it was patently unconcerned with protecting the victim's rights to income earned by those funds when it asserted that any income resulting from use of embezzled funds would be taxable.⁴³ Under ordinary constructive trust principles, if the original sum belongs to the owner-victim, so too would any gains derived from that sum.⁴⁴ Any tax lien whether from resulting profits or stolen principal, would have the same effect on the victim's recovery. To be consistent with the *Wilcox* approach, profits gained from use of the stolen funds should be returned to the victim, then taxed.⁴⁵

If the policy of protecting the victim has merit, the whole matter could be resolved by modifying the tax law to give the victim priority over the Government lien. This solution, urged by those in favor of taxing embezzled proceeds,⁴⁶ might boomerang. The likelihood of collecting taxes on embezzled funds under these circumstances may become so unattractive to the government from a revenue standpoint that lax tax enforcement might result. If revenue collection is the chief purpose of the income tax,⁴⁷ and if, as the *Wilcox* Court assumed, embezzlers are usually discovered in a semi-solvent state, the prospects are grim that the trouble and expense necessitated by securing a second grade lien would produce sufficient revenue to make the effort profitable. Furthermore, the advisability of thus protecting the embezzlement victim may

argued that the government should not dignify crime by "cutting itself in" on part of the illegal gain. *Steinberg v. United States*, 14 F.2d 564, 569 (2d Cir. 1926); see also *Smith v. Minister of Finance*, [1925] Can. Sup. Ct. 405, 2 D.L.R. 1137. However, the federal government realistically has recognized the existence of illegal activity and accordingly has levied against this ripe source of revenue.

43. *Commissioner v. Wilcox*, 327 U.S. 404, 409 (1946).

44. "A converter, it is true, is not a constructive trustee of property converted. . . . [but] the owner of converted property is entitled to enforce a constructive trust on the product [of the stolen property]." 3 SCOTT, TRUSTS, § 508.1 (1939). "It is accordingly now well-settled that the owner of stolen property can follow it into its product. He may at his option claim an equitable lien upon the product to secure his claim for the value of the converted property, or claim the product itself as held upon a constructive trust for him." *Ibid.* See also *Vorlander v. Keyes*, 1 F.2d 67 (8th Cir. 1924).

45. This assumes that the victim took his deduction in the year the embezzlement was discovered. If the victim had not taken a deduction and later regained the money, no tax on the amount returned would be levied. Gains made from the principal would be taxable. INT. REV. CODE OF 1954, §§ 165(a), 165(e). If the loss is covered by insurance the victim can claim no deduction. INT. REV. CODE OF 1954, § 165(a). See Geller & Rogers, *Embezzlement Has Its Tax Problems, Too*, 26 TAXES 1097, 1103-04 (1948). The insurance company, upon compensating the victim, normally will be subrogated to his rights against the wrongdoer. VANCE, INSURANCE § 134 (3rd ed. 1951).

46. See Mr. Justice Burton's dissent, *Commissioner v. Wilcox*, 327 U.S. 404, 414 (1946).

47. "The income tax law is strictly a revenue measure enacted for the purpose of raising the necessary revenues for the Federal Government." James P. McKenna, 1 B.T.A. 326, 330 (1925).

be challenged as preferring one private creditor to another.

Assuming that embezzled funds could be made subject to taxation by adoption of the *Rutkin* test, the existing tax law would furnish adequate protection to all parties. First, an embezzler may steal and be apprehended in the same tax year. If he can repay the victim the same year he should be able to claim a deduction as an expense for the production of income⁴⁸ or as a transaction loss.⁴⁹ While this may stretch the concept of deductions slightly, it seems inconsistent to tax the embezzler for property he no longer possesses or controls. Since return of stolen property is legally and socially desirable, there should appear no strong public policy against allowing this deduction.⁵⁰ Clearly a purpose of taxing embezzlers is to levy only on proceeds which they enjoy with no intention of returning. Should the embezzler be unable to repay the victim, the matter becomes more complicated. If the embezzler can not repay, or can only partially repay, the balance that he retains is income under the economic benefit theory and a tax lien attaching to the embezzler's property puts the victim in a secondary position to the government.⁵¹ Because of the deduction, or if the tax lien remains unsatisfied, the government would collect no immediate revenue.

Where the transaction takes place over a period of years, the system of requiring income to be reported for tax purposes on a yearly basis, complicates the situation. If the embezzler has reported his illegal gain

48. INT. REV. CODE OF 1954, § 212 provides a deduction for "all the ordinary and necessary expenses paid or incurred during the taxable year—(1) for the production or collection of income; (2) for the management, conservation, or maintenance of property held for the production of income. . . ." It is conceivable that returned embezzled proceeds would qualify under either of the two categories.

49. INT. REV. CODE OF 1954, § 165(c) (2) provides for deductions for "losses incurred in any transaction entered into for profit, though not connected with a trade or business." Embezzlement is a "transaction" entered into for profit, and repayment would necessarily be a loss resulting. If wagering losses are deductible to the extent of wagering gains, it would seem but a short jump to embezzlement repayments. See *Id.* § 165(d). Embezzled losses should be deductible to the extent of embezzled gains.

50. Legitimate expenses incurred in an illegitimate business are deductible, *Comeaux v. Commissioner*, 171 F.2d 394, 400 (10th Cir. 1949); and repayment of embezzled funds is clearly a legitimate expense, much more so than are gambling losses. The public policy argument is directed against letting a criminal profit from his activity by a tax deduction to the harm of all citizens. *Commissioner v. Longhorn Portland Cement Co.*, 148 F.2d 276, 277 (5th Cir. 1945), *cert. denied*, 326 U.S. 728 (1945). Here the deduction serves only to assist the victim, not to exempt the embezzler from paying a tax on income. The embezzler in this situation has no income on which to levy the tax. If the basis for the tax is punishment, not revenue, then a different argument might be made. See text p. 498, *infra*. In general, see Baker, *The Federal Taxing Power and Organized Crime*, 1953 WASH. U.L.Q. 121, 132-149.

51. In this situation it would be likely that the victim will have gotten a prior lien on the embezzler's property. Thus only where no such lien is obtained would the victim be "injured." If the lien law were modified as suggested by Mr. Justice Burton, it would be applicable here to give the victim priority.

under some fictitious classification, *e.g.*, "investments,"⁵² and then in a later year is discovered and repays his victim, he might claim a deduction under Section 1341 of the 1954 Code.⁵³ Having reported income to which he claimed an "unrestricted right"⁵⁴ and subsequently finding this claim invalid, repayment should entitle the embezzler to a deduction.⁵⁵ Designed to mitigate the harshness of the annual accounting system, Section 1341 allows the taxpayer to deduct for subsequent repayment of amounts upon which income taxes were previously paid.⁵⁶ It would seem feasible to allow Section 1341 to operate in the embezzlement area thereby furthering the concept that one should be taxable only for what is ultimately income.

Even where the embezzler has failed to report his stolen gain and is later discovered and repays, he should still be able to claim a deduction upon repayment under Section 1341. In this situation the Commissioner would, upon discovery of the embezzlement and evasion, assess a tax deficiency against the embezzler.⁵⁷ In effect this makes the unreported embezzled proceeds "included in gross income for a prior taxable year."⁵⁸ The section was, obviously, not adopted with embezzlers in mind and its full meaning remains for future interpretation. Whether the earlier income was included by the taxpayer or subsequently by the Commissioner seems immaterial to the furtherance of the policy underlying the section.

When the embezzler is discovered insolvent in a later year, until he

52. Rare indeed would be the cases where a taxpayer blatantly lists such income as "embezzled funds."

53. This section provides for a deduction if "an item was included in gross income for a prior taxable year (or years) because it appeared that the taxpayer had an unrestricted right to such item" and it later develops that such unrestricted right was non-existent. INT. REV. CODE OF 1954, § 1341(a) (1), (2).

54. The Code fails to define "unrestricted right." Whether it is meant to be interpreted as "claim of right" is left uncertain. For an examination of the new provision see Webster, *supra* note 31 at 381.

55. The section allows the taxpayer a choice of methods for determining his deduction when the amount in question exceeds \$3,000; INT. REV. CODE OF 1954, § 1341(a) (3). See note 56 *infra*.

56. The new law gives the taxpayer his choice of either recomputing the tax for the prior year and excluding the amount repaid on the basis of that year, or merely deducting from present income the funds that were repaid, whichever is most beneficial to the taxpayer. INT. REV. CODE OF 1954, § 1341(a) (4), (5).

57. See Webster, *supra* note 31 at 388.

58. It might be argued in rebuttal that unless the taxpayer reported this uncertain income it would not "appear" that he had an unrestricted right to it. The statute leaves unexplained the question to whom the unrestricted claim is to "appear," the taxpayer, a reasonable man, or the Commissioner. See Webster, *supra* note 31 at 387. If a secondary purpose of the section was to encourage the reporting of all revenue by making repayment-deduction provisions attractive, one who failed to report should not be granted the benefits of the section. This would make the section a weapon to enforce reporting.

repays the victim, he cannot claim a deduction under section 1341 or any other provision and the Government tax lien attaches. Here, neither the Government nor the victim, regardless who has lien priority, may be able to collect.⁵⁹ Since there are no present assets, the value of any lien would be in regard to after-acquired property.⁶⁰ After the victim is repaid, the embezzler, if allowed to claim his deduction under Section 1341, owes no tax. The Government then has gone to a great amount of expense and trouble to assess taxes on income which later ceased to be and stands to benefit only from interest⁶¹ and evasion charges.⁶²

The assumption of the *Wilcox* Court was that the embezzler would always repay the victim, and that no tax could be levied until repayment was no longer legally enforceable. This assumption would be reversed, however, were embezzled funds made taxable income; the Service would view all such proceeds as taxable income until there was repayment. This would assure the victim of being repaid before the embezzler was granted tax relief, and should work no undue hardship on the victim. However, from a practical standpoint, the Service will generally be dealing with embezzlement cases which have come to light through local prosecutions.⁶³ Since forced repayment is there likely, the Code would permit deductions; consequently, there would be little realizable revenue from taxing this source of income. In this respect, even were the law

59. Again, the revenue aspects of this would appear bleak for the government, especially if the victim has obtained a prior lien against the embezzler.

60. The tax lien applies to property owned by the delinquent at any time during the life of the lien. *Glass City Bank of Jeanette, Pa. v. United States*, 326 U.S. 265, 268 (1945); *Citizens National Trust & Savings Bank v. United States*, 135 F.2d 527 (9th Cir. 1943); *Nelson v. United States*, 139 F.2d 162 (9th Cir. 1943). See Anderson, *supra* note 39 at 248.

61. Unfortunately, section 1341 makes no provision for interest. Though designed to aid the taxpayer, the section does not relieve him of interest charges. Interest is charged at the rate of six percent per annum for all taxes unpaid at the time prescribed for payment. INT. REV. CODE OF 1954, § 6601(a). Were this interest to vanish with the tax, the Service would stand to collect still less revenue. See CROCKETT, *THE FEDERAL TAX SYSTEM OF THE UNITED STATES*, 129-137 (1955) for a general discussion of interest and evasion fines.

62. The 1954 Code consolidated all the tax "crimes" with their varying degrees of severity. INT. REV. CODE OF 1954, §§ 7201-7214. Conviction under § 7201 may result in a \$10,000 fine, a five year jail sentence, and prosecution expenses. Whether or not the money in dispute is later repaid to the victim the crime of evasion has still been committed when the embezzler is shown to have willfully attempted to evade the tax. For a discussion of the various penalties see BALTER, *FRAUD UNDER FEDERAL TAX LAW* 323-355 (2d ed. 1953); Gordon, *Income Tax Penalties*, 5 TAX L. REV. 131 (1950).

Granted, if no deduction were allowed, the embezzler would have to pay the tax regardless of whether or not he repaid the victim. But would this be a tax on income? If the embezzler is a one-way conduit handling funds from victim back again to victim, the tax might be an excise tax, perhaps, but not a tax on income. If no deduction were allowed the embezzler, the only justification for allowing the tax would be its use as a sanction against the crime itself.

63. See discussion p. 501 *infra*.

changed, the number of embezzlement evasion cases would probably remain quite small.

Inclusion of embezzled funds in gross income would serve another purpose more important than immediate revenue production from the limited area of embezzlement. If embezzled funds were made taxable, the outer limit of what constitutes gross income for taxation purposes would be clearly delineated and at the same time expanded. The concept of income as funds giving readily recognizable economic benefit would be established in the most extreme of situations. Whenever a question arose whether or not proceeds could be classified as gross income, they could be compared to embezzled funds. Certainty and administrative convenience would result, and this, perhaps, is the Commissioner's chief purpose in seeking to tax embezzlers.

Taxation of embezzlers might prove useful in another manner, that is, as a sanction. If this were found an effective method of policing embezzlers and deterring embezzlement, the argument for taxability might be greatly strengthened. When the government initiates a tax evasion prosecution against a criminal, it seeks directly to punish him for the federal crime of evading taxes. In so doing it indirectly punishes him for committing the illegal act which led to the tax evasion. Thus, while the two crimes are clearly separate, they are interrelated in such a manner that the criminal taxpayer always faces a dilemma. If he reports such gains, even under fictitious classifications, he may render himself liable for state prosecution as tax returns may, under statutory restrictions,⁶⁴ be examined by state officials. If he fails to report the illegal income, he may be prosecuted for evasion, and in the process the illegal source may be revealed, likewise leading to state prosecution. There exists, then, a strong possibility of using the federal tax evasion prosecution as a sanction against this local criminal activity.

Other criminal activities have been taxed successfully,⁶⁵ and the use of evasion prosecutions to enforce the tax law appears to have more

64. Tax returns are considered confidential public records, but may be examined by state officers if the Governor first requests permission and the inspection is for the purpose of administering any state law. INT. REV. CODE OF 1954, § 6103(b). Penalties are applied for unlawful disclosure of such information. INT. REV. CODE OF 1954, § 7213. See Webster, *Inspection and Publicity of Federal Tax Returns*, 22 TENN. L. REV. 451 (1952).

65. See in general, Baker, *supra* note 50; Baker, *Taxation: Potential Destroyer of Crime*, 29 CHI-KENT L. REV. 197 (1951); Geller & Rogers, *supra* note 3; Lyon, *The Crime of Income Tax Fraud: Its Present Status and Function*, 53 COLUM. L. REV. 476 (1953); Schoeneman, *The Commissioner's War on Racketeers*, 29 TAXES 347 (1951). Congress, following the Kefauver Investigations, urged greater use of the Service in prosecuting known racketeers for tax evasion. S. REP. NO. 307, 82d Cong., 1st Sess., 4, 7-10, 190 (1951).

than paid its way.⁶⁶ A special racket squad now exists for the specific purpose of ferreting out gamblers and racketeers for evasion suits.⁶⁷ As over 90,000,000 returns are filed each year,⁶⁸ close scrutiny of each return is impossible.⁶⁹ If, however, an investigation leads to criminal felony prosecution,⁷⁰ conviction is almost assured.⁷¹

Constitutionally, there would seem to be no bar against such a use of the taxing power, as regulatory and destructive taxation has long been allowed,⁷² the 1951 federal wagering tax being the most recent example.⁷³ The question of federalism was broached by Mr. Justice Black

66. Commissioner Schoeneman reported that in the years 1947-1951 the Intelligence Unit of the Service made 1700 tax fraud investigations of racketeers and gamblers and collected nearly \$129,000,000. This was only 10% of the total tax fraud investigations made during that period. Schoeneman, *supra* note 65 at 350. By 1952, however, about half of the criminal evasion prosecutions were in the gambler-racketeer class. CROCKETT, *op. cit. supra* note 61, at 137.

67. Commissioner T. Coleman Andrews reported that in 1953 the racket squad had collected "some \$2,000,000" at a cost of 10% of that amount. Andrews, *The Philosophy of Tax Administration*, PROCEEDINGS OF THE 46TH ANNUAL CONFERENCE, NATIONAL TAX ASSOCIATION, 532 (1953). In its first year of operation the Treasury's racket squad, operating on a \$15,000,000 budget, collected \$95,000,000 in taxes and penalties. See Note, 62 YALE L.J. 662, 672 n. 58 (1953).

68. For the fiscal year ending June 30, 1953, 93,208,277 returns were filed, 67,176,407 reporting income tax. ANNUAL REPORT OF THE COMMISSIONER ON INTERNAL REVENUE, TREAS. DEPT. DOC. NO. 3190, p. 5 (1954).

69. In 1953 3,486,977 returns were selected for examination. From these 440 full-scale investigations of racketeer cases were initiated. ANNUAL REPORT, *op. cit. supra* note 68, at 7, 11. Methods of selecting returns for examination are described by Schwedtfeger, *Federal Prosecution of Income Tax Cases*, 40 KY. L.J. 400 (1952); Spencer, *Tax Practice and Procedure in the Collector's Office*, 30 TAXES 120 (1952). A tax fraud case may be uncovered by a variety of methods. Routine audit, newspaper and court reports, reports of business transactions and government agencies and tips for revenge or reward are all possible sources of information utilized by the Service. BALZER, *op. cit. supra* note 62, at 12-14; Baradel, *How A Practitioner Should Prepare for a Fraud Examination*, 12 N.Y.U. INSTITUTE ON FEDERAL TAXATION 57-73 (1954); Murphy, *Criminal Income Tax Evasion*, 48 NW. U. L. REV. 317, 320, 323-326 (1953); Spencer, *supra* at 122. In the 1953 fiscal year 2,691 claims for rewards were filed by informers under what is now INT. REV. CODE OF 1954, § 7623. ANNUAL REPORT, *op. cit. supra* note 68, at 43.

70. See note 62 *supra*. There is a wide range of discretion in any investigation or prosecution. *Hearings Before a Subcommittee of the House Committee on Ways and Means, Internal Revenue Investigation*, 82d Cong., 1st Sess., 1008 (1951); Lyon, *supra* note 65 at 484.

71. An estimated 98.2% of such prosecutions resulted in convictions in 1952, according to the former Assistant Attorney General. *Hearings, supra* note 70 at 1003.

72. "[A] tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activity taxed." *United States v. Sanchez*, 340 U.S. 42, 44 (1950). *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937). This is true even if the revenue purpose of the tax is secondary. See DOWLING & EDWARDS, AMERICAN CONSTITUTIONAL LAW 159-162 (1954); Note, 29 IND. L.J. 377 (1954).

73. 65 STAT. 529 (1951), 26 U.S.C. §§ 3285-3298 (1952). This statute was upheld in *United States v. Kahrigier*, 345 U.S. 22 (1953); *United States v. Smith*, 106 F. Supp. 9 (S.D. Cal. 1952); *United States v. Nadler*, 105 F. Supp. 918 (N.D. Cal. 1952); *Combs v. Snyder*, 101 F. Supp. 531 (D.C. 1951). See Note, 41 KY. L.J. 346 (1953).

in a vigorous dissent in the *Rutkin* case.⁷⁴ Whether taxing of embezzled funds would be a federal encroachment into local duties depends primarily on the methods and quantity of evasion prosecutions, the latter seemingly destined to remain quite small.⁷⁵

While taxing embezzled returns is possible from a revenue and a constitutional basis, the question remains whether it would prove an effective criminal sanction against embezzlement. The embezzler presents a different target than the gambler or racketeer. He is generally unknown as a criminal. Most embezzlers are trusted and respected businessmen whose first "borrowing" is made with an intent to repay.⁷⁶ Loot acquired from embezzlement is usually sporadic, and the embezzler, the smartest of all criminals,⁷⁷ may escape discovery for years. Furthermore, the public views the embezzler with a sympathetic eye. "From the modern viewpoint is the crime of being caught after you borrow and before you pay it back."⁷⁸ While embezzlement losses are estimated at close to \$4,000,000 annually,⁷⁹ prosecutions are few, convictions are fewer, and full sentences rarely imposed.⁸⁰

Evasion prosecution would offer two deterring factors. First, it would strike the embezzler where he is most fearful—through discovery and its resultant publicity. Wide publicity of evasion convictions of embezzlers who had escaped local prosecution might serve to deter other less-hardy embezzlers, or at least tend to make them more cautious in filing tax returns, both commendable accomplishments. Secondly, it would subject the previously unprosecuted criminal to a possible state prosecution, and would place additional penalties on those embezzlers who had already been convicted of that crime.⁸¹

Even so, the possibility of using tax evasion prosecutions as an all

74. *Rutkin v. United States*, 343 U.S. 130, 140 (1952). Black charged that taxing extortioners was a waste of federal time and money and was only a scheme to ". . . give Washington [D.C.] more and more power to punish purely local crimes. . . ." *Id.* at 141. However, he would allow gamblers and racketeers to be taxed as they are in a "regular business." *Ibid.*

75. For the Fifth Amendment self-incrimination aspect of reporting income see Murphy, *supra* note 69 at 333-340; Doyle, *Fraud Cases: Review of Law and Bureau Policy*, 12 N.Y.U. INSTITUTE OF FEDERAL TAXATION 1-14 (1954); Redlich, *Searches, Seizures and Self-Incrimination in Tax Cases*, 10 TAX L. REV. 191 (1955); Note, 68 HARV. L. REV. 340 (1955).

76. HALL, THEFT, LAW AND SOCIETY 289-298 (2d ed. 1952).

77. MURCHISON, CRIMINAL INTELLIGENCE 58-62 (1926).

78. Jones, *Put It This Way*, Saturday Evening Post, March 12, 1955, p. 62.

79. Peterson, *Why Honest People Steal*, 38 J. CRIM. L., C. & P.S. 94 (1947).

80. Surety companies estimated that less than 1% of all embezzlers are prosecuted by their employers. HALL, *op. cit. supra* note 76, at 305, 319-325.

81. As the penalties imposed on the embezzler are often quite light, or non-existent, the addition of a full evasion penalty might have real meaning. Yet, evasion prosecutions seldom result in the imposition of a full sentence. See Lyon, *supra* note 65, at 479.

out weapon to discover and punish every embezzler seems without merit. The cost of searching out all embezzlers would be prohibitive, as it would necessitate considerably more investigation than is now needed for known criminals.⁸² It is submitted that the only feasible means of using the evasion prosecution as a sanction against embezzlers would be to prosecute only those cases uncovered in the normal routine of audit and investigation. The remote likelihood of discovery and prosecution under this procedure renders this a doubtful sanction and would not warrant a change in the existing law.⁸³

Revision of the Revenue Code to include embezzled proceeds would seem to be ineffective as a sanction. Whether or not sufficient revenue would be produced to warrant the revision would depend on the number of embezzlers taxed by the Commissioner who ultimately did not repay their victims so that no deductions could be claimed. The really significant impact of labelling embezzled funds as income would be the underlying policy decision making readily recognizable economic benefit as the test of taxable income. The limits of gross income would be clearly extended. Since the *Rutkin* case has accepted this position and subsequent court decisions have followed this interpretation, it seems that the Commissioner has achieved his goal regardless of the *Wilcox* case and without the aid of legislation.

82. Furthermore, existing revenue practices, especially prosecuting only "sure" cases and not prosecuting evaders already convicted of more serious crimes, would stand in the way of using the tax as an all-out sanction. By prosecuting only "sure" cases the Service evinces a belief that a smaller number of convictions, well-publicized, is a more effective deterrent to evasion than numerous unsuccessful prosecutions. *Hearings*, *supra* note 70 at 1002; *BALTER, op. cit. supra* note 62, at 91; *CROCKETT, op. cit. supra* note 61, at 136; *Lyons, supra* note 65 at 488. The practice of not prosecuting an evader already convicted hinges on the belief that the imposition of the lighter sentence (which may not apply to embezzlement situations) might create a feeling that tax fraud carries innocuous penalties. *Lyons, supra* note 65 at 488-89. Crowded dockets also argue for prosecuting other cases more rapidly. *Ibid.*

83. A former Commissioner of the Service has admitted that evasion prosecution is probably overrated as a sanction against local crimes. "True, we can harass gamblers with tax charges and make their 'take' less attractive to them, but I doubt seriously whether a tax prosecution will ever be the effective weapon it is so popularly thought to be in this area. The record would seem to indicate that many gamblers are just as willing to gamble on the possibility of being picked up on a tax charge as they are on anything else." *Schoeneman, supra* note 65 at 352. But see S. REP. No. 307, 82d Cong., 1st Sess., 190 (1951).