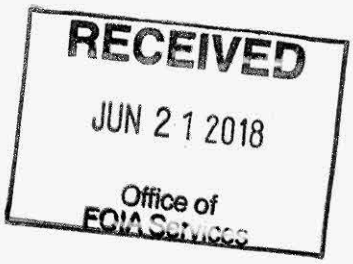
18-02281-FOIA

foiapa

From: Request@ip-10-170-21-217.ec2.internal
Sent: Thursday, June 21, 2018 1:24 PM
To: foiapa
Subject: Request for Document from Blackwood, Thomas



Mr. Thomas Blackwood
1333 H Street NW, Suite 500 West
Washington, District of Columbia 20005
United States

2023777928
thomas.blackwood@thomsonreuters.com
Thomson Reuters

Request:
COMP_NAME: Benjamin Levy Securities, Inc.
DOC_DATE: 1978
CTRL_NUM: 46 S.E.C. 1145
TYPE: Other (fully describe)
COMMENTS: I am looking for some type of document that we have seen in footnotes in other SEC documents. It is always referred to as:

See, e.g., Benjamin Levy Securities, Inc., 46 S.E.C. 1145 (1978);

I am assuming that the 46 S.E.C. 1145 is a citation that was created by the Commission back in 1978.
FEE_AUTHORIZED: Willing to Pay $61
FEE_WAIVER_REQUESTED: No
EXPEDITED_SERVICE_REQUESTED: No

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
STATION PLACE
100 F STREET, NE
WASHINGTON, DC 20549-2465

Office of FOIA Services

July 19, 2018

Mr. Thomas J. Blackwood
Thomson Reuters
1333 H St, NW, Suite 700
Washington, DC 20005

RE: Freedom of Information Act (FOIA), 5 U.S.C. § 552
Request No. 18-02281-FOIA

Dear Mr. Blackwood:

This letter is in response to your request, dated and received in this office on June 21, 2018, for access to some type of document that you have seen in footnotes in other SEC documents regarding Benjamin Levy Securities, Inc. Your request also referenced "*Benjamin Levy Securities, Inc., 46 S.E.C. 1145 (1978).*"

The search for responsive records has resulted in the retrieval of three pages of records regarding 46 S.E.C. 1145 and also 15 pages of records pertaining to SEC File No. 3-5090 that was referenced in the first set of records that may pertain to your request. They are being provided to you in their entirety with this letter. For your information, SEC File No. 3-5090 is publicly available at the following link: https://www.sec.gov/litigation/aljdec/1977/id19770414web.pdf

If you have any questions, please contact me at neilsonc@sec.gov or (202) 551-3149. You may also contact me at foiapa@sec.gov or (202) 551-7900. You also have the right to seek assistance from Dave Henshall as a FOIA Public Liaison or contact the Office of Government Information Services (OGIS) for dispute resolution services. OGIS can be reached at 1-877-684-6448 or Archives.gov or via e-mail at ogis@nara.gov.

Sincerely,

Curtis Neilson
FOIA Research Specialist

Enclosures

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cipating.

IN THE MATTER OF

BENJAMIN LEVY SECURITIES, INC.
A.M.V. CAPITAL CONSULTANTS, LTD.
MICHAEL A. ALPERT

File No. 3-5090. Promulgated January 12, 1978

Securities Exchange Act of 1934—Section 15

OPINION OF THE COMMISSION

BROKER—DEALER AND INVESTMENT ADVISER PROCEEDINGS

Grounds for Remedial Action

Criminal Conviction

Where president and sole shareholder of both applicant for broker-dealer registration and registered investment adviser pled guilty to charges that he made false statements in connection with an application for a loan guaranteed by the Small Business Administration, *held*, in public interest to deny application for broker-dealer registration, revoke investment adviser's registration, and bar president from association with any broker-dealer or investment adviser.

APPEARANCES:

William J. Davis and *Donald A. Derfner*, of Schulman & Scheichet, P.C., for respondents.

Edwin H. Nordlinger and *Larry E. Bergmann*, of the New York Regional Office of the Commission, for the Division of Enforcement.

I.

Benjamin Levy Securities, Inc., which has applied for registration as a broker and dealer, A.M.V. Capital Consultants, Ltd., a registered investment adviser, and Michael A. Alpert, the president and sole shareholder of both firms, appeal from an administrative law judge's adverse initial decision. The law judge concluded that Levy's application should be denied, that A.M.V.'s registration should be revoked, and that Alpert should be barred from association with any broker-dealer or investment adviser.

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II.

On November 10, 1975, a two-count criminal information was filed against Alpert, a certified public accountant, charging him with false statements in connection with an application by his client, Flower Lane Cosmetics, Ltd., for a $150,000 loan guaranteed by the Small Business Administration ("SBA").[1] Alpert was charged with deceiving both the SBA and the lending bank, Citibank (Mid-Hudson) N.A., concerning the amount of accounting and legal fees that Flower would pay in connection with its loan application. On December 18, 1975, on the basis of his guilty pleas to both counts of the information, Alpert was placed on probation for two years and fined $2,500.

Alpert's conviction provides the statutory basis for remedial action against respondents,[2] if we find that such action is in the public interest. We therefore turn to the only issue in this case, the question of what sanctions, if any, should be imposed.

III.

The administrative law judge's findings of fact with respect to the circumstances that led to Alpert's conviction are not challenged on review. They may be summarized as follows.

In late 1973, Alpert agreed with Flower's attorney that $11,250 was a reasonable total for the fees they would charge in connection with Flower's loan application. However, the attorney "hinted" to Alpert that this amount might be considered excessive and should not be disclosed to the SBA or to the bank.

On April 11, 1974, Alpert attended the loan closing at the bank in place of Flower's attorney who was otherwise engaged. At the closing, a bank official asked Alpert the amount of his fee and, after being informed by Alpert that it was $2,200, gave Alpert a check for that amount. At that time, Alpert admittedly anticipated that his fee would actually be around $5,600.

After the closing, Alpert arranged for Flower to make payments for legal and accounting fees in excess of the $2,200 he had already received at the closing. Flower disguised one payment of $5,800 by drawing a check payable to a supplier on the account of a Flower affiliate. The supplier then cashed the check and turned the proceeds over to Alpert's firm. The final amount collected by that firm for its services totaled $7,100, with $5,600 going to Alpert as his personal share. The attorney collected a total of $4,825.

When Flower's bookkeeper asked Alpert in April 1974 how to classify Flower's payments, Alpert instructed him to leave the

[1] *United States* v. *Alpert*, 75 Crim. 1078 (S.D.N.Y.).

[2] Sections 15(b)(1), 15(b)(4)(B) and 15(b)(6) of the Securities Exchange Act, and Sections 203(e) and 203(f) of the Investment Advisers Act.

entries blank, with the result that the checks Flower had drawn were posted as unlabelled entries in Flower's cash disbursement ledger. Several months later, Alpert arranged for Flower's books to reflect these items as "loans receivable." Beginning in January or February 1975, Alpert repaid his $5,600 fee to Flower in installments. He testified that, "on reflection," he was disturbed at the way he had handled the matter, and felt that the fees charged Flower had been excessive.

IV.

Respondents argue that the sanctions imposed by the administrative law judge are too severe. They assert, among other things, that Alpert was inexperienced in SBA matters, that Flower's lawyer was the prime culprit, that Alpert's involvement was "tangential at best," that Alpert was merely an "observer" at the loan closing, and that Alpert's actions were mitigated by the repayment of his fee to Flower and his cooperation with those handling his prosecution.

We are unable to take such a sanguine view of Alpert's misconduct. Respondents' assertions cannot disguise the fact that Alpert, a certified public accountant, played a key role in a deliberate fraud practiced on the SBA and the bank. The fact that Alpert subsequently repaid part of the money received by his firm does little to alleviate our doubts about his fitness for the securities business.

As we recently had occasion to point out:

> "An investment adviser is a fiduciary in whom clients must be able to put their trust. As one court has stated, it is 'an occupation which can cause havoc unless engaged in by those with appropriate background and standards.' "[3] (Footnotes omitted).

We are not persuaded that Alpert meets the standards we consider requisite for an investment adviser. Nor do we consider it appropriate to permit Alpert to engage in the brokerage business, a field where opportunities for dishonesty recur constantly.[4] In light of the serious misconduct in which Alpert engaged, we think that the public interest requires us to deny Levy's application for broker-dealer registration to affirm the sanctions imposed by the administrative law judge on A.M.V. and Alpert.

An appropriate order will issue.

By the Commission (Chairman WILLIAMS and Commissioners LOOMIS, EVANS, POLLACK and KARMEL).

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[3] *Joseph P. D'Angelo*, 46 S.E.C. 736, 737 (1976), *aff'd without option*, C.A. 2 (May 5, 1977), quoting from *Marketlines, Inc.* v. *S.E.C.*, 384 F.2d 264, 267 (C.A. 2, 1967), *cert. denied*, 390 U.S. 947 (1968).

[4] See *Archer* v. *S.E.C.*, 133 F.2d 795, 803 (C.A. 8, 1943), *cert. denied*, 319 U.S. 767; *Hughes* v. *S.E.C.*, 174 F.2d 969, 975 (C.A.D.C., 1949).

ADMINISTRATIVE PROCEEDING
FILE NO. 3-5090

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of :

BENJAMIN LEVY SECURITIES, INC. :

(8-20948) :

A.M.V. CAPITAL CONSULTANTS, LTD. :
MICHAEL A. ALPERT :

INITIAL DECISION

Washington, D.C.
April 14, 1977

Warren E. Blair
Chief Administrative Law Judge

ADMINISTRATIVE PROCEEDING
FILE NO. 3-5090

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:	
BENJAMIN LEVY SECURITIES, INC.	:	
(8-20948)	:	INITIAL DECISION
A.M.V. CAPITAL CONSULTANTS, LTD. MICHAEL A. ALPERT	:	
	:	

APPEARANCES: Edwin H. Nordlinger and Larry E. Bergmann, of the New York Regional Office of the Commission, for the Division of Enforcement.

Robert D.Schulman and William J. Davis, of Schulman & Scheichet, for Benjamin Levy Securities, Inc., A.M.V. Capital Consultants, Ltd., and Michael A. Alpert.

Before: Warren E. Blair, Chief Administrative Law Judge

These public proceedings were instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203 of the Investment Advisers Act of 1940 ("Advisers Act") by order of the Commission dated September 24, 1976 ("Order"). The Order directed that a determination be made whether respondent Michael A. Alpert ("Alpert"), the president and sole shareholder of both Benjamin Levy Securities, Inc., and A.M.V. Capital Consultants, Ltd., was convicted in the United States District Court for the Southern District of New York of certain crimes, as alleged by the Division of Enforcement ("Division"), whether the application of Benjamin Levy Securities, Inc. ("Applicant") for registration as a broker-dealer should be denied, and what, if any, remedial action is appropriate in the public interest pursuant to the Exchange Act and Advisers Act. Additionally, because of the statutory time limitation imposed by Section 15(b)(1)(B),[1/] the Order specified the time schedule requiring completion of the hearing and post-hearing procedures with the Commission's final decision to be entered on or before December 10, 1976. At the outset of the scheduled hearing on October 13, 1976, with the consent of Applicant through its counsel, the time for conclusion

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1/ Section 15(b)(1)(B) provides that denial proceedings shall be concluded within 120 days of the date of the filing of the application for registration but allows an extension of that time "for such longer period as to which the applicant consents."

of the proceedings was extended "to such time as the Commission has determined finally whether to deny the registration of the applicant." [2/]

When the hearing was resumed on January 25, 1977, after several postponements granted upon requests of respondents,[3/] counsel for respondents appeared and participated until conclusion of the hearing on January 26, 1977. As part of the post-hearing procedures, simultaneous filings of proposed findings, conclusions, and supporting briefs were specified. Timely filings thereof were made by the parties.

The findings and conclusions herein are based upon the preponderance of the evidence as determined from the record and upon observation of Alpert as he testified at the call of respondents.

Respondents

Benjamin Levy Securities, Inc., a New York corporation located in Suffern, New York, filed an application for registration as a broker-dealer pursuant to Section 15(b) of the Exchange Act on August 13, 1976. The application has not become effective.

2/ Tr. 6 (Oct. 13, 1976).

3/ Unless otherwise indicated, the term "respondents" includes Benjamin Levy Securities, Inc.

A.M.V. Capital Consultants, Ltd. ("A.M.V."), a New York corporation located in Spring Valley, New York has been registered as an investment adviser pursuant to Section 203(c) of the Advisers Act since April 14, 1974.

Michael Alpert, president of Applicant and A.M.V. and sole stockholder in each of those corporations, is also a certified public accountant who has engaged in the practice of accountancy for 14 years, 10 years as a CPA. At the time of the offenses for which he was convicted, Alpert was a partner in the accounting firm of Antleman, Assante & Alpert.

Criminal Convictions

A criminal information having two counts was filed November 10, 1975 against Alpert in the United States District Court for the Southern District of New York.[4/] Each count was predicated upon a false statement submitted by Alpert in connection with an application by a corporate client for a $150,000 loan to be guaranteed by the United States Small Business Administration ("SBA"). The first count alleged that Alpert unlawfully filed the false application with the SBA for the purpose of obtaining a loan by Flower Lane Cosmetics, Ltd. ("Flower Lane") and influencing the action of

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4/ United States v. Michael Alpert, 75 Crim. 1078 (S.D.N.Y. Dec. 1975).

SBA,[5/] and the second that he unlawfully made a false statement and report for the purpose of influencing the actions of Citibank (Mid-Hudson) N.A., whose deposits were insured by the Federal Deposit Insurance Corporation, upon an application and loan of $150,000.[6/] Upon pleas of guilty made December 18, 1975, Alpert was adjudged guilty and convicted on both counts. Imposition of sentence was suspended and Alpert placed on probation for two years and fined $2,500.

Underlying the criminal charges against Alpert was his complicity in a fraudulent scheme to withold information and deceive the SBA and Citibank concerning the amount of fees paid and to be paid to an attorney or accountant or other agent of Flower Lane in connection with the preparation or presentation of Flower Lane's loan application. As part of the scheme, Alpert concealed the fact that the actual aggregate amount of fees to be paid in connection with the loan was $11,500 and falsely represented that $2,200 was his estimate of the amount of those fees.

Alpert, the only witness at the hearing, testified that his client, Flower Lane, had engaged Bernard Chodosh, a

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5/ An offense laid under Title 15, United States Code, §645(a) and Title 18, United States Code, §2.

6/ An offense laid under Title 18, United States Code, §1014 and §2.

lawyer, to prepare papers in connection with the SBA loan application in question, and that his own participation was limited to preparation of the financial statements attached as exhibits to that application. According to Alpert, he agreed with Chodosh in late 1973 that $11,250 seemed reasonable as the total of the accountant and attorney fees to be charged in connection with the application and that figure was then relayed by Chodosh to Richard Gottesfeld, president of Flower Lane. Sometime prior to the loan closing, and possibly as early as December, 1973, Chodosh also "hinted" to Alpert that $11,250 in fees might be considered excessive and that disclosure of that amount should not be made to the bank or the SBA.

On April 11, 1974, Alpert attended the loan closing at Citibank's branch in Coram, New York in place of and at the request of Chodosh, who was otherwise engaged. Also in attendance were an officer of Citibank, his secretary, an attorney representing a creditor of Flower Lane, and Gottesfeld.[7/]

During the course of the closing the bank official asked Alpert the amount of his fee and, after being informed by Alpert that it was $2,200, drew and handed Alpert a check

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7/ An SBA representative did not attend the closing.

for that amount. At the time that Alpert stated his fee was $2,200, by his own admission and testimony, he knew and did not inform the bank official then or later that $2,200 was inaccurate and that he anticipated the actual fee to be an amount in the area of $5,600.

Within a few days after the closing, Alpert instructed Gottesfeld to draw a check payable to Chodosh for $3,250 and another payable to Alpert's firm for $1,575.[8/] Gottesfeld paid those amounts and in addition arranged for Alpert's firm to receive $5,800 in cash.[9/] Alpert then gave Chodosh a check for $675 as a fee for his advice in connection with the preparation of the financial statements for the loan application and gave him a further $900 in cash. Alpert's personal share in the payments received from Flower Lane was $5,600.

When the bookkeeper for Flower Lane asked Alpert in April, 1974 how the payments from Flower Lane should be classified, Alpert instructed him to leave the entries blank, with the result that the series of checks that Flower Lane had drawn were posted as unlabeled entries in the general

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8/ Alpert testified that $900 in back fees were included in the $1,575.

9/ The $5,800 represented proceeds of a check in that amount drawn against the bank account of a Flower Lane affiliate and made payable to a supplier who cashed the check and turned the cash over to Alpert's firm.

column of Flower Lane's cash disbursement ledger. Several months later, but prior to January, 1975, Alpert caused Flower Lane's books to reflect the fees as loans receivable. Beginning January or February, 1975 and in installments continuing over several months, Alpert made repayment of his $5,600 fee to Flower Lane, testifying that he did so because he was disturbed by his earlier actions and felt that the fees paid were excessive.

At no time did Alpert undertake to correct the intentional false statement concerning his fees he had made to the bank representative at the loan closing, nor make any attempt to furnish the bank or the SBA with the actual fee information. Letters addressed to Alpert's firm in June and July, 1975 by the SBA and Citibank asking for detailed information concerning services rendered in connection with the Flower Lane loan went unanswered because Alpert had come under investigation by the Federal Bureau of Investigation.

Public Interest

The Division contends that Alpert cannot be trusted to conduct himself or direct the operations of a broker-dealer or investment adviser, pointing to his two felony convictions and his testimony at the hearing as amply supporting its request that the application of Benjamin Levy Securities for

registration as a broker-dealer be denied, and that the registration of A.M.V. as an investment adviser be revoked, and that Alpert be barred from association with a broker-dealer or investment adviser. On the other hand, respondents deny that the public interest requires imposition of sanctions against Alpert or A.M.V. or denial of the broker-dealer application for registration. Respondents insist that Alpert has learned his lesson and that he does not present "a hazard for the investing public," especially since registration is being sought "in a business overlayed [sic] with some of the most pervasive and effective regulatory framework of any business." 10/ Upon careful consideration of the record, including the nature of the felony convictions, the explanations offered by Alpert, and the arguments advanced by the parties, it is concluded that the Division's position should be adopted and respondents' arguments to the contrary rejected.

There can be no argument with respondents' premise that the two felony convictions standing alone are insufficient in and of themselves under either the Exchange Act or the Advisers Act to warrant denial of registration or remedial

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10/ Respondents' Memorandum in Support of Their Proposed Findings of Fact and Conclusions of Law, March 21, 1977, at 7.

action against respondents. Each statute specifically requires in addition a finding that the imposition of sanctions is in the public interest.[11/] But respondents' position cannot prevail against a record clearly evidencing a propensity in Alpert to accommodate persons who need his cooperation in carrying out illegal activities. That weakness in Alpert's character, the turpitude inhering in Alpert's offenses, and the absence of satisfactory evidence that the investing public would not be endangered by allowing him to associate with a broker-dealer or investment adviser or control firms doing business in those areas, require a finding that it is in the public interest to impose the sanctions recommended by the Division.

Respondents' suggest, despite Alpert's guilty pleas, that the record here establishes that neither Alpert nor his firm filed false reports. But respondents rely on too little to establish too much. The guilty pleas cannot be so easily brushed aside by Alpert's self-serving testimony and documents relied upon by respondents. The portion of the transcript of the proceedings before Judge Weinfeld in the United States District Court for the Southern District of New York when

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11/ 15 U.S.C. §78o(b); 15 U.S.C. §80b-3; cf. Kimball Securities, Inc., 39 S.E.C. 921, 923 (1960).

Alpert's guilty pleas were accepted reflect Alpert's awareness of the charges against him and of his guilt.[12/] That he did not physically prepare the loan application nor respond with false information to the letters from the SBA and Citibank asking for detailed information regarding his firm's services does not lessen his involvement in the fraudulent scheme. In no wise has the role Alpert played at the loan closing been explained away or mitigated by his later actions.

The only apparent concern displayed by Alpert following his deception was how to protect his own interests. To his further discredit, in order to further that objective he resorted to additional deception by directing the entries of postings in Flower Lane's books of account which falsely reflected fees paid in connection with the loan application as loans receivable. It does not appear, as respondents suggest, that Alpert chose to repay the fee because he was "conscience-stricken." Had he been interested in doing more than covering his earlier tracks by a further imposture he could have readily and at any time after the loan closing made a full and complete disclosure of the fraud to the lending bank, the SBA, or other Federal authorities. This he did not undertake.

12/ Div. Ex. 5.

Further, during his testimony at the hearing, the candor to be expected of one "conscience-stricken" by guilty actions was notably lacking. Rather his demeanor while on the witness stand and his testimony compel the conclusion that if intensive cross-examination had not been undertaken by the Division, much less information concerning the true dimensions of his participation in Chodosh's scheme would be found in the record.

Nor can Alpert be considered, as respondents depict him, an imposed-upon victim of Chodosh's evil ways. Accepting respondents' assertions that it was Chodosh who established the fee level to be paid by Flower Lane, that it was Chodosh who prepared the loan application, and that it was Chodosh, not Alpert, who apparently escaped criminal sanction for the "Flower Lane SBA matter," the fact remains that Alpert, a CPA versed in accounting and holding himself out as knowledgeable in financial analysis and pension matters, one who could have reasonably been expected to abide not only by the morals of the market place but by the higher fiduciary standards demanded of an investment adviser[13/] and financial consultant, needed no more than a "hint" from Chodosh to assure his cooperation

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13/ Joseph P. D'Angelo, Investment Advisers Act Release No. 562 (1976).

as an accomplice in a fraud upon a bank and a Federal agency. A man of such caliber cannot be looked upon as likely to meet the standards required for association with an investment adviser or broker-dealer. Until there is a showing, not present in this record, of Alpert's conduct prior to and subsequent to his criminal offenses which indicates that he is worthy of trust and confidence in the financial community, it must be concluded that he should neither be permitted to remain associated with nor to establish association with any broker-dealer or investment adviser. It is further concluded that by reason of Alpert's control of Applicant and A.M.V., Applicant should not be allowed to become registered as a broker-dealer and A.M.V. not permitted to continue as a registered investment adviser.[14/]

Accordingly, IT IS ORDERED that the application of Benjamin Levy Securities, Inc. for registration as a broker and dealer be, and hereby is, denied;

FURTHER ORDERED that the registration of A.M.V. Capital Consultants, Ltd. as an investment adviser be, and hereby is, revoked; and

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14/ All proposed findings and conclusions submitted by the parties have been considered, as have their contentions. To the extent such proposals and contentions are consistent with this initial decision, they are accepted.

FURTHER ORDERED that Michael A. Alpert be, and hereby is, barred from association with a broker or dealer or an investment adviser.

This order shall become effective in accordance with and subject to the provisions of Rule 17(f) of the Rules of Practice.

Pursuant to Rule 17(f) of the Rules of Practice, this initial decision shall become the final decision of the Commission as to each party who has not, within fifteen days after service of this initial decision upon him, filed a petition for review of this initial decision pursuant to Rule 17(b), unless the Commission, pursuant to Rule 17(c) determines on its own initiative to review this initial decision as to him. If a party timely files a petition for review, or the Commission takes action to review as to a party, the initial decision shall not become final with respect to that party.

Warren E. Blair
Chief Administrative Law Judge

Washington, D.C.
April 14, 1977