**Published by Executive Office for United States Attorneys,
Department of Justice, Washington, D. C.**

January 29, 1960

United States

DEPARTMENT OF JUSTICE

Vol. 8 No. 3

UNITED STATES ATTORNEYS

BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 8 January 29, 1960 No. 3

ERRATA

On page 18 of the last issue of the Bulletin, the fifth sentence of the second paragraph should show that savings in suits against the Government for the first five months of the fiscal year were $6,894,734 less than for the similar period of fiscal 1959.

Page 38.9, Title 8, United States Attorneys Manual should be dated December 1, 1959.

* * *

JOB WELL DONE

The Postal Inspector in Charge of the Chattanooga office has commended United States Attorney Hartwell Davis and Assistant United States Attorney Paul Millirons, Middle District of Alabama, for the great amount of time and effort they devoted to developing the strategy and in defending the Government in a recent tort case.

Assistant United States Attorney Charles H. Hoens and members of the Civil Division, District of New Jersey, have been commended by the District Director, Immigration and Naturalization Service, for their splendid cooperation and the courteous and efficient attention they have given immigration cases, which has resulted in favorable court decisions in every case during the past year.

The District Postal Inspector in Charge has commended Assistant United States Attorney William M. Byrne, Jr., Southern District of California, for the able and competent way in which he handled a recent case involving the mailing of obscene matter. The Inspector stated that had it not been for Mr. Byrne's outstanding efforts in this case, convictions might not have been obtained.

Assistant United States Attorney F. E. Steinmeyer, III, Northern District of Florida, received congratulations from many sources as well as the commendation of the presiding judge for his able presentation of a recent case in which, after a 3-day trial, the jury took only 30 minutes to find seven defendants guilty of participation in a bootlegging ring.

The Acting Assistant General Counsel, Department of Agriculture, has expressed appreciation for the prompt and efficient manner in which Assistant United States Attorney Charles H. Hoens, Jr., District of New Jersey, handled a recent civil case. The letter stated that the personnel of the General Counsel's office who have worked with Mr. Hoens are extremely enthusiastic about his fine cooperation and the excellent results he has obtained in the cases he has and is now handling for them.

The Chief Postal Inspector has expressed his appreciation of the fine work done by United States Attorney Robert Tieken and Assistant R. F. Monaghan, Northern District of Illinois, in a recent mail fraud case in which the sentences imposed were the longest imposed to date on any defendants engaged in selling knitting machines for work-at-home purposes. The Inspector stated that the convictions and long prison sentences imposed will greatly strengthen the drive against swindlers.

Assistant United States Attorney Lawrence L. Fuller, Western District of Texas, has been commended by the District Engineer, Corps of Engineers, for his excellent handling of a recent case involving the Anti-Kickback Act.

The Regional Director, Railroad Retirement Board, has commended Assistant United States Attorney Floyd M. Buford, Middle District of Georgia, for the interested and effective assistance he rendered in a recent case which he brought to a successful conclusion, and for the cooperative manner in which he has worked over an extended period of time in the prosecution of cases alleging fraud under the Railroad Unemployment Insurance Act.

Assistant United States Attorney John H. Mohrfeld, III, District of New Jersey, has been commended by the Assistant Regional Commissioner, Alcohol and Tobacco Tax Division, Internal Revenue Service, for his successful prosecution of a recent complex case in which difficulties were presented by a battery of distinguished defense attorneys.

The special agent in charge of a private surety firm has commended Assistant United States Attorneys Robert F. Monaghan and John J. Quan, Northern District of Illinois, for their zeal, ability and the long hours spent in the preparation and trial of a recent mail fraud case.

* * *

ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

EMPLOYMENT OF RETIRED GOVERNMENT EMPLOYEES AS EXPERT WITNESSES

To avoid conflict with Section 212 of the Economy Act limiting to $3,000 per annum the combined rate of retired pay and civilian compensation, when using retired Government employees as expert witnesses, it is essential that you contract with them for a flat fee rather than employ them at a daily rate. See 28 Comp. Gen. 381. It should be understood that an adjustment will be made in the amount if circumstances, such as settlement of the case, cause cessation of the work. After negotiating with the prospective expert witness, the following terminology is suggested for the Form 25-B:

> "Employment of John Doe as an expert witness at a flat fee of $_____. In justification for this amount it is estimated that the work will require approximately __ days. It is understood that if circumstances require cessation of the work, the fee will be adjusted accordingly."

Vouchers on Form 5-1/2 DC for these expert witnesses should show the total fee being paid for service from the beginning date to the conclusion of employment. Specific dates of employment are not required.

DISPOSITION OF OBSOLETE LAW BOOKS

Heretofore, it has been necessary for United States Attorneys to request permission to dispose of obsolete law books and other publications. In the future, however, upon receipt of new books (replacement volumes), the obsolete books should be turned over to the building custodian to be disposed of as scrap. When there is any doubt as to the propriety of such a disposition, instructions should be requested from the department.

* * *

ANTITRUST DIVISION

Acting Assistant Attorney General Robert A. Bicks

SHERMAN ACT - CLAYTON ACT

Supreme Court Denies Certiorari from Interlocutory Ruling Denying Motion to Dismiss. Firstamerica Corp. v. United States (No. 143 Misc.). In this case the Supreme Court on January 11, 1960, denied Firstamerica's petition for leave to file a common law writ of certiorari from the interlocutory ruling of District Judge Wollenberg dening its motion to dismiss. The motion had been made on grounds that the approval of Firstamerica's acquisition of 80% of the stock of the California Bank by the Federal Reserve Board under Section 3(a) of the Bank Holding Company Act barred the Government from attacking the acquisition under Section 7 of the Clayton Act and Section 1 of the Sherman Act, particularly in view of the Board's statement in its decision that it did not believe the acquisition violated Section 7 of the Clayton Act. The Government, citing United States v. R.C.A., 358 U.S. 334, opposed on grounds that nothing in the Bank Holding Company Act gives the Board authority to exempt acquisitions from the antitrust laws and, while the Board does have concurrent jurisdiction with the Department to enforce Section 7 of the Clayton Act (but not Section 1 of the Sherman Act) it had not purported to follow the statutory procedure for a Board determination of Clayton Act offenses, and in fact the Clayton Act had never been placed into issue in the Board proceedings.

In opposing the petition for an extraordinary writ, the United States not only reargued its position as to the jurisdiction of the district court, but contended that the petitioner had not shown any compelling need for an immediate determination of the jurisdictional issue which would warrant exercise of the "drastic and extraordinary" remedy of granting review to an interlocutory order. The Supreme Court's denial of petitioner's request for leave to file was without opinion, and, of course, does not constitute a ruling on the merits of any of the questions involved. The district court's jurisdiction thus could be raised again in any appeal from the district court's final order in the case.

Staff: Richard A. Solomon (Antitrust Division)

SHERMAN ACT

Price Fixing - Gasoline; Retailers Found Guilty. United States v. Gasoline Retailers Association, et al., (N.D. Indiana). On January 5, 1960 District Judge Luther M. Swygert handed down an opinion from the bench, after trial, holding that Gasoline Retailers Association, Inc., (an association of service station operators in Lake County, Indiana

and Calumet City, Illinois), General Drivers, Warehousemen and Helpers Union No. 142 (a teamsters' local union), and Michael Sawochka (business agent of the union) had conspired in violation of the Sherman Act to stabilize retail gasoline prices in the area. The Court further found that the conspiracy was achieved by prohibiting price advertising of gasoline at the service stations, and prohibiting the station operators from giving premiums in connection with retail sales.

The Court held that the ban against the posting of price signs and the giving of premiums was a price fixing device, because it tended to keep gasoline prices uniform and constant. The court stated that the conspiracy affected the flow of gasoline in commerce coming from outside Indiana to the Calumet area in Indiana, because the picketing and threat of picketing at bulk stations and at service stations by the union kept, or were designed to keep tank wagons from entering the stations of non-conforming operators, which is a direct burden on commerce.

The Court also held that the Clayton Act provided no exemption for these union activities, because no labor dispute was involved and the union's activities were directed at enforcing restrictive trade practices of a business group. Thus, the Court held that this was a combination between a union and a non-labor group to restrain price competition to the detriment of the consumers.

The Court found two other individual defendants (Harry Gold, Secretary of the Association, and Russell Bassett, another union business agent) not guilty because they were not prime movers in the conspiracy and because they were no more active than other members of the union or the association. While they were implicated in the conspiracy, the Court felt that their participation was not of such character that the stigma of guilt should be placed on them.

After hearing counsel with respect to the sentences to be imposed, the Court fined the Association and the union $5,000 each with costs to be assessed equally between them. The defendant Sawochka was fined $3,000 and given a suspended jail sentence of six months. Execution of the fines was suspended pending determination of any motions to be filed by defendants by January 20, 1960.

Staff: Earl Jinkinson, Joseph Prindaville and Harold E. Baily (Antitrust Division)

Restraint of Trade - Electrical Equipment; Indictment Filed Under Sections 1 and 2. United States v. Southeast Texas Chapter, National Electrical Contractors Association, et al., (S.D. Texas). An indictment was returned on January 11 in Houston, Texas charging a trade association of electrical contractors, seven corporations and three individuals with conspiring to restrain trade in the sale and installation of electrical equipment in the Houston area in violation of the Sherman Act. These defendants were also charged with a conspiracy to monopolize, and an attempt to monopolize, this trade in violation of the Sherman Act.

The indictment charges that the value of electrical equipment sold in 1956 by electrical contractors in the Houston area was in excess of $6,000,000, and that the major portion of such electrical equipment sold and installed on commercial and industrial jobs was sold and installed by members of the Association.

Defendants are charged with having engaged in a conspiracy, under the terms of which the defendant and co-conspirator electrical contractors would allocate jobs among themselves, and the conspiring electrical contractors other than the one selected to be low bidder on a job would submit higher bids or would refrain from submitting bids. The indictment also charges that the Union (Local No. 716, International Brotherhood of Electrical Workers), named as a co-conspirator, would refuse to supply union labor for, or supply only inferior or incompetent labor on, any job obtained by a contractor not a member of the conspiracy.

The indictment further charges that the Association members agreed to limit the amounts of work obtained through competitive bidding in accordance with a quota established by the Association, and to use identical overhead percentages in computing their bids.

Staff: United States Attorney William B. Butler (S.D. Tex.)
Marshall Gardner (Antitrust Division)

Restraint of Trade - Drafting Furniture; Indictment Filed Under Section 1. United States v. Hamilton Manufacturing Company, et al., (E.D. Wisc.). On January 18, 1960 the federal grand jury sitting in Milwaukee, Wisconsin returned an indictment against the Hamilton Manufacturing Company, Two Rivers, Wisconsin, and its eight national distributors of drafting furniture.

Hamilton, a large manufacturer of a variety of products, is a leading manufacturer of drafting furniture. During the period of the conspiracy, the resale value of the products sold by Hamilton and its distributors was well in excess of $38 million dollars.

The indictment states that beginning on or before January 1, 1954, defendants engaged in a combination and conspiracy to restrain interstate trade and commerce in the distribution and sale of drafting furniture in violation of Section 1 of the Sherman Act. Pursuant to said combination and conspiracy, it was charged, the defendants agreed:

(a) to fix, maintain and stabilize the selling price of Hamilton drafting furniture at all levels of distribution, including the selling prices to ultimate consumers;

(b) to prevent the distributor defendants and another class of resellers from handling competitive products;

(c) to boycott dealers failing to adhere to the practices mentioned above, and

(d) to maintain a system requiring the mutual approval by all defendants in the selection of each defendant's dealers.

Staff: Philip L. Roache, Jr., Joseph J. O'Malley and Allan J. Reniche (Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General George Cochran Doub

COURTS OF APPEAL

ADMIRALTY

Government Recovers for Damages Sustained by Cable Cutting; Government Record Admissible Under 28 U.S.C. 1732, 1733 as Exception to Hearsay Rule; Best Evidence Rule; Cross-Appeal Unnecessary in Ninth Circuit for Appellee To Attack Judgment; Statistical Study of Average Cost Insufficient Evidence of Damage Where Trial Conducted on Theory of Actual Cost. Canadian Pac. Ry. v. United States (C.A. 9, December 7, 1959). In this action in admiralty to recover damages alleged to have been caused by the negligent operation of the railroad's ship PRINCESS LOUISE which resulted in the cutting of a submarine cable, the district court found for the United States and awarded $6,954.23 damages. The railroad appealed, asserting that the district court's findings as to negligence were clearly erroneous and that the court erred in allowing a government witness to testify as to damages from a cost ledger which he had not prepared. The United States, without taking a cross-appeal, asserted that the judgment should have been for $8,937.50.

The Court of Appeals reviewed the evidence as to negligence and held that the district court's findings were not clearly erroneous. The Court also held that the district court erred in sustaining the railroad's objection to the admission of the cost ledger itself, finding the ledger admissible both as a record made in the regular course of business, 28 U.S.C. 1732, and as a record of a Government agency, 28 U.S.C. 1733. The court, rejecting the railroad's contention that testimony from this ledger by a witness who had not prepared it was hearsay, held that, as the ledger was admissible, so was the testimony based thereon. The Court also rejected the railroad's contention that the testimony was not the best evidence, pointing out that the admission of secondary evidence was due to the railroad's objection to the best evidence, i.e., the ledger itself.

The Court rejected the railroad's assertion that, as the United States had not cross-appealed, it could not attack the judgment. It noted that traditionally cross-appeals have not been held necessary in admiralty because an appeal was conceived of as a trial de novo. The court recognized that the concept of a trial de novo has been substantially restricted, but felt that the change in procedure requiring a cross-appeal should be accomplished by rule of court and not by court decision. It thus distinguished International Milling Co. v. Brown Steamship Co., 264 F. 2d 803 (C.A. 2), for the Second Circuit had changed its rules to require a cross-appeal.

The Government contended that the district court erred in rejecting its claim for additional damages incurred in the operation of the repair

ship for such items as overhead and preparation of the ship for this particular job of repair. The Government's proof of these items was a study of the average operational expense of the repair ship over a period of several years. It claimed for these additional items the difference between the damages allowed by the district court and the average daily expense shown by the study. The Court of Appeals agreed with the district court's rejection of this claim, holding that, as the trial was based on the actual cost or repair, the statistical study was inadequate proof of the additional damages claimed.

Staff: United States Attorney Charles P. Moriarty;
Assistant United States Attorneys Jacob A. Mikkelborg,
Richard F. Broz (W.D. Wash.)
Keith R. Ferguson (Civil Division)

FALSE CLAIMS ACT

District Court Without Authority to Impose Forfeiture Other Than That Prescribed by False Claims Act; Rule 60(b) Confers No Power Upon District Court to Disregard Statutory Measure of Government's Recovery; District Court's Alteration Of Judgment Previously Affirmed on Appeal Held to be Unauthorized Deviation from Appellate Mandate. United States v. Cato Bros. Inc., (C.A. 4, December 14, 1959). Purporting to act under rule 60(b), Fed. Rules Civ. Proc., the district court vacated a $60,000 judgment in favor of the United States on condition that defendants pay to the United States $20,000. The $60,000 judgment was based on the imposition of a $2,000 forfeiture for each of 30 violations of the False Claims Act, 31 U.S.C. 231. The original judgment was appealed by the defendants (see, 247 F. 2d 359, rev'd., 356 U.S. 595) and ultimately affirmed (263 F. 2d 595). The reduction of the judgment from $60,000 to $20,000 occurred following the receipt of the appellate mandate. On the Government's appeal, the Court of Appeals reversed, holding that the district court had no authority to depart from the forfeiture terms of the False Claims Act once a violation of the Act is established and "it would be contrary to reason to hold that after a lawful judgment had been entered in accordance with the statute the judge is then endowed by rule /60(b)/ with the extraordinary power, which he did not previously possess, to disregard the will of Congress." The post-judgment action of the district court was accordingly held to be a deviation from the prior mandate of the Court of Appeals and a violation of the principle that a district court can not reopen questions which the mandate lays to rest.

Staff: John G. Laughlin (Civil Division)

Evidence Held Insufficient for Jury to Find That Office Manager Partner Knew Vouchers Submitted by Partnership Were False. United States v. Priola (C.A. 5, December 8, 1959). Defendant, Virginia Priola, was a partner with two others in Miller G. Williams and Associates (called Associates hereafter), a firm formed to obtain and

perform an Air Force cost-plus contract for the repair of marine engines. The contract specified that the reimbursement to be paid to Associates for costs was not to include any profit to it or its partners, and that the parts used by Associates in carrying out the contract should be obtained at the most advantageous price available. Associates obtained parts needed for completion of the contract from Superior Parts Co., another partnership, which included relatives of the Associates partners. Superior made a net profit of $29,000 on a $4,000 capital investment in less than a year selling parts to Associates, which in turn claimed, in ten vouchers, reimbursement from the Government for the full amount it had paid Superior.

The Government sued defendant under the False Claims Act, R.S. 3490, 5438, 31 U.S.C. 231, claiming she had violated the Act on each voucher by making or causing to be made a claim against the Government which she knew to be false, or by knowingly entering an agreement or conspiracy to do so. The $2,000 statutory remedy was asked with respect to each of the ten vouchers, a total of $20,000. The Government contended that the vouchers presented to it by Associates were false because the Associates partners participated in Superior's profits, and because the price paid to Superior was not the most advantageous which Associates could have obtained. The jury returned a verdict for $20,000 against defendant, but the district court awarded her judgment n.o.v., ruling that the evidence was insufficient to show that she knew the vouchers were false. The district court was of the view that the appellee, who served as office manager of Associates, had no personal knowledge of Associates' dealings with Superior.

On appeal, the Fifth Circuit affirmed. The Court agreed that the defendant, "essentially in a clerical position, . . . was not shown to have had the requisite evil knowledge." The Court's disposition of the case made it unnecessary to consider defendant's argument that a determination by the Air Force Board of Contract Appeals that Associates was not in violation of its contract precluded an action under the False Claims Act based on a false representation that the contract was complied with.

Staff: Lionel Kestenbaum, Peter H. Schiff (Civil Division).

FEDERAL RULES OF CIVIL PROCEDURE

Court of Appeals Affirms Denial of F.R. Civ. P. 60(b) Relief Sought Solely to Permit Party to Appeal. United States v. Padgett (C.A. 5, December 14, 1959). The Government, through the Commodity Credit Corporation, sold dried milk to defendant and subsequently obtained a judgment against him, based on a directed verdict, for violation of contract restrictions on the use of the milk. Defendant made a timely motion for judgment n.o.v. or for a new trial but, before a hearing could be held, his attorney wrote the district court that defendant intended to abandon the motion, and the court, on the basis of the attorney's letter, denied the motion. Appellant then retained a new attorney, who learned of the denial of the motion two days after the time for appeal had expired.

Defendant, however, did not apply for an extension of the time for filing a notice of appeal under F.R. Civ. P. 73(a), which permits an extension of up to thirty days "upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment." Instead, he sought to have the order denying his motion reopened under F.R. Civ. P. 60(b). He claimed that (1) he was entitled to have the order reopened, and a new order entered so that he might take an appeal, and (2) he had not authorized the letter from his former attorney advising the court that he intended to abandon the motion. The district court held that rule 60(b) relief could not be granted for the sole reason that appellant had allowed his time to appeal or to obtain an extension of the time. The court also found that defendant had in fact authorized his former attorney to write the letter which resulted in the dismissal of his motion.

On appeal, the Fifth Circuit affirmed. The Court held that, under the facts as found by the district court, rule 60(b) relief was not justified.

Staff: William E. Mullin (Civil Division)

FEDERAL TORT CLAIMS ACT

Government Liable for Violation of State Statute Requiring Each Property Owner to Inspect Scaffolding on His Property and See That Violations of High Standard of Care Set by Act Are Corrected. Vincent Schmid v. United States v. Loren "Mike" Krause Const. Co., (C.A. 7, decided December 21, 1959). Plaintiff, a carpenter employed by a construction company engaged to repair an Air Force installation, was injured when the scaffold on which he was working collapsed. He sued the United States under the Tort Claims Act and the Government joined the contractor as a third party defendant under an indemnity agreement. The basis of the workman's complaint was that, under the Illinois Scaffold Act, the Government as an "owner . . . having charge of construction," had a duty to erect and maintain scaffolds in "a safe, suitable and proper manner." The district court held that, under the Illinois Act the Government was absolutely liable for any injury caused by violation of the standards set forth in that Act.

On appeal, the Government argued that absolute liability cannot be imposed on the United States under the Federal Tort Claims Act, nor can the Government be held liable under that Act for the negligence of an independent contractor. The Court of Appeals affirmed, holding that the Government's liability was not predicated on absolute liability or any negligence of the independent contractor but on a breach of a duty imposed by the Scaffold Act on every property owner to inspect scaffolding on his property and to remedy any condition which violates the Act. This duty exists apart from any duty of the independent contractor. Applying this interpretation to the instant case, the Court of Appeals held that the Government was negligent in failing to detect and remedy the defective scaffold which gave rise to the plaintiff's injury.

Staff: Robert Wang (Civil Division)

INTERSTATE COMMERCE ACT

Former Two-Year Limitation in Section 16(3)(c) Does Not Apply to Claims for Overcharges by United States. United States v. DeQueen & E.R. Co., (C.A. 8, November 12, 1959). The United States sued the railroad to recover overcharges collected by it on certain shipments for the Commodity Credit Corporation. The carrier contended that the actions were barred by the two-year limitation contained in section 16(3) of the Interstate Commerce Act, 49 U.S.C. 16(3)(c). The district court ruled that the limitation provisions not only barred the remedy, but extinguished the right. It held inapplicable the rule that statutes of limitations not naming the United States do not bind it.

On appeal by the United States, the Court of Appeals reversed. Noting that no limitation applied when the United States recovered overcharges by set-off under section 322 of the Transportation Act of 1940, 49 U.S.C. 66, the Court concluded that Congress could not, by silence, have intended a limitation to apply in the purely fortuitous situation where set-off was not possible because the carrier was not indebted to the United States.

The Court held that there is nothing in the Transportation Act to take this case out of the usual rule that statutes of limitation do not apply to the United States unless Congress clearly manifests an intention to this effect. This rule applies to claims of the Commodity Credit Corporation, which is an instrumentality of the United States, just as to any other claim as to which the United States is the real party in interest.

This decision will not affect claims arising out of transportation performed after August 14, 1958, because the limitation provisions of the Interstate Commerce Act were amended, effective at that date, to include expressly the United States. See P.L. 85-762, 72 Stat. 859.

Staff: Howard E. Shapiro (Civil Division)

JURISDICTION

Exhaustion of Administrative Remedies; District Court Has No Jurisdiction to Entertain Challenge of Court-martial Jurisdiction Where Court-martial Appellate Review Is Still in Process and Defendant Is Not Confined or Placed Under Restraint. Hooper v. Hartman (C.A. 9, December 4, 1959). Hooper, a retired Navy Admiral, challenged the right of the Navy to try him before a Navy court-martial for moral offenses. Hooper was not confined or placed under restraint. The district court dismissed the complaint. The Court of Appeals affirmed, holding that, until Hooper exhausted his administrative remedies, the federal courts had no jurisdiction to consider the jurisdictional basis for the court-martial.

Staff: United States Attorney Laughlin E. Waters;
Assistant United States Attorneys Richard A. Levine and Jordan A. Dreifus (S.D. California)

SURPLUS PROPERTY ACT

Statutory Damages; Defendants' Earlier Pleas of Guilty to Criminal Conspiracy Indictment Did Not Estop Them in Subsequent Civil Action from Denying Their Guilt for Overt Acts Set Forth in Indictment. United States v. Joseph Guzzone and Nicholas Guzzone (C.A. 2, December 15, 1959). The Government brought this suit to recover damages for defendants' alleged violation of the Surplus Property Act of 1944. The complaint charged that defendants had caused fifteen named veterans to purchase surplus trucks from the War Assets Administration on the representation that the trucks were to be used in the veterans' business when, in fact, the trucks were purchased for and on behalf of defendants. At trial the Government stated that its proof would be confined to nine of the fifteen transactions referred to in the civil complaint which had also been set forth as overt acts in an earlier single count criminal conspiracy indictment to which defendants had pleaded guilty. There was also an admission by one of the defendants at trial that he was guilty of one of the nine overt acts set forth in the indictment. The district court held that defendants' pleas of guilty conclusively established their liability for each of the nine overt acts set forth in the indictment, and, accordingly, awarded the Government $18,000, representing the statutory recovery of $2,000 for each of the nine violations of the Act.

The Court of Appeals modified the judgment by reducing the Government's recovery to $2,000. The Court held that the trial court erred in ruling that the Government's proof established defendants' liability for every overt act set forth in the indictment. The earlier pleas of guilty conclusively established defendants' participation in the conspiracy, said the Court, but did not determine which of the particular means charged in the indictment were used to effectuate the conspiracy. Accordingly, the proof at trial justified recovery only for a single violation of the Surplus Property Act.

Staff: Seymour Farber (Civil Division)

DISTRICT COURTS

ADMIRALTY

Cargo Loss; Government Bill of Lading Provisions Supersede Commercial Bill of Lading Provisions and One-year Limitation Period of Carriage of Goods by Sea Act. United States v. Naviera Dominicana, C. por A. (D. Puerto Rico, December 3, 1959). Government cargo shipped aboard respondent's vessel was lost in May 1942 when the vessel was torpedoed by enemy action. However, the Government bill of lading was completed by the consignee through inadvertence, and presented by respondent together with a public voucher under which the freight charges were paid. In this action by the United States to recover the freight, respondent pleaded that it was entitled thereto by reason of the conditions of its commercial bill of lading. This defense was disallowed, the Court holding that the conditions

of the Government bill of lading were paramount and prohibited any prepayment of freight. Respondent likewise defended on the ground of time bar, arguing that the one-year limitations period of the Carriage of Goods by Sea Act governed. This defense was likewise disallowed, the Court ruling that shipment was governed by a Government bill of lading provision prohibiting such limitation. The Court awarded the Government the full amount of the freight plus interest of 6% from October 12, 1942.

Staff: United States Attorney Francisco A. Gil (D. Puerto Rico); Robert D. Klages (Civil Division)

FEDERAL TORT CLAIMS ACT

United States Not Liable for Flood Damage Due to Escape of Flood Waters from Floodway System. Villarreal v. United States (S.D. Texas, November 3, 1959). Plaintiff's farm and home located in Willacy County, Texas, 65 miles southeast of the Falcon Dam on the Rio Grande were damaged by flood waters escaping from the Rio Grande Floodway, which flood waters had been intentionally diverted into the American portion of the floodway by officers of the International Boundary and Water Commission. The damage occurred on or about October 20, 1958, and a number of other adjacent landowners also suffered like flooding at this time. The Court sustained the Government's motion for summary judgment, holding that, by virtue of 33 U.S.C. 702(c), the United States was not subject to suit for damages caused by flooding and that the Tort Claims Act had not repealed this statute. The Court, in following National Mfg. Co. v. United States, 210 F. 2d 263, cert. den., 347 U.S. 967, held it reasonable to conclude that the protection of 33 U.S.C. 702(c) should extend to floodway diversion of excess waters in aid of flood control as well as the use of levees, and that the distance of plaintiff's land from the site of the flood control structures was of no consequence.

Staff: United States Attorney William B. Butler;
Assistant United States Attorney Arthur L. Moller (S.D. Texas);
Irvin M. Gottlieb (Civil Division)

VETERANS REEMPLOYMENT RIGHTS

Reemployment Ordered of Veteran Who Initially Received Undesirable Discharge But Later Was Given Retroactive General Discharge. Robertson v. Richmond, F. & P.R. (E.D. Va., November 25, 1959). Although he originally received an undesirable discharge which disqualified him for reemployment rights under the Universal Military Training and Service Act of 1948, plaintiff nevertheless promptly applied for his old job after his Army service. Reemployment was denied. Plaintiff was thereafter successful in having his discharge changed administratively to a (qualifying) general discharge, made retroactive to the date of his separation from the service. He then reapplied for the job. The employer again denied

reemployment, asserting that plaintiff had not produced proof of satisfactory completion of service within 90 days after separation as required by 50 U.S.C. App. 459. Suit was filed on plaintiff's behalf by the United States Attorney. The Court held that the retroactive discharge entitled plaintiff to reemployment even though plaintiff did not possess (or produce) a qualifying discharge during the statutory 90-day application period. The Court pointed out that the statute requires application for reemployment within ninety days, but does not expressly require that the veteran's military discharge be either received or produced during that period.

This is believed to be the first decision involving this precise point. For a somewhat analogous case, see Travis v. Schwartz Manufacturing Co., 216 F. 2d 448 (C.A. 7).

Staff: United States Attorney Joseph S. Bambacus;
Assistant United States Attorney A. Andrew Giangreco (E.D. Va.);
David V. Seaman (Civil Division)

* * *

CIVIL RIGHTS DIVISION

Acting Assistant Attorney General Joseph M. F. Ryan, Jr.

Police Brutality. United States v. Everett Vernon Lowery. (E.D. Va.) On December 8, 1959, the Federal Grand Jury in Alexandria, Virginia, returned an indictment charging Everett Vernon Lowery, police private at the Washington National Airport, with a violation of Title 18, United States Code, Section 113(d).

An investigation revealed that Private Lowery became involved in an altercation with one Charles Francis Killelea, an industrial engineer, concerning parking while discharging passengers and luggage, and assaulted Killelea while effecting his arrest. The victim was charged with simple assault and was acquitted by a jury.

The assault statute /18 U.S.C. 113(d)/ was used in lieu of the Civil Rights Statute (18 U.S.C. 242), because the violation took place at the Washington National Airport which is federally-owned property.

Staff: United States Attorney Joseph S. Bambacus; Assistant United States Attorney A. Andrew Giangreco (E.D. Va.)

* * *

CRIMINAL DIVISION

Assistant Attorney General Malcolm R. Wilkey

NATIONAL MOTOR VEHICLE THEFT ACT

Confidential Serial Number; Refusal of Court to Require FBI Agent to Reveal Exact Location on Automobile. Charles Oliver Williamson v. United States (C.A. 5, December 4, 1959). Defendant was convicted in the Northern District of Georgia of conspiracy to violate and substantive violations of 18 U.S.C. 2312 and 2313, with respect to nine automobiles. He was sentenced to a total of 8 years, 4 years upon the conspiracy count and 4 years upon each of 18 substantive counts to run concurrently after the sentence on the conspiracy count.

As one of the grounds for reversal on appeal, defendant alleged that the trial court erred in refusing to require a witness, an FBI agent, to reveal the exact place on a particular stolen automobile where he found the confidential serial number. Defendant contended that this refusal deprived him of his right of cross-examination and that the Government should have elected to disclose the place of the confidential serial number or to dismiss the indictment.

The trial court did require the witness to "give in general terms where he found the confidential number". The witness then testified that the confidential number "was on the frame of the automobile" and that "there is a book that gives the location of these numbers". The defense counsel made no further objections and proceeded with the cross-examination with very few questions addressed to the subject of the location of the confidential number.

The Fifth Circuit noted that at no time did defendant dispute the fact that the car in question was a car alleged to have been stolen by him. Further, there was nothing to indicate that the location of the serial number would have been material or that by inspection and discovery of the number or the location the testimony of the witness might have been impeached. Accordingly, the Court found that upon the instant facts defendant was not prejudiced by the trial court's action in this regard, citing United States v. McCurry (D.C. Pa., 1956), 146 F. Supp. 109, at 111, affirmed 248 F. 2d 116, and United States v. Wheeler (C.A. 7, 1955), 219 F. 2d 773, at 775, cert. den. 349 U.S. 944.

Staff: United States Attorney Charles D. Read, Jr.; Assistant United States Attorney J. Robert Sparks (N.D. Ga.).

FEDERAL FOOD, DRUG, AND COSMETIC ACT

Misbranding of Weight Reducing "Drug"; Failure to Comply With "New Drug" Provisions of Act. United States v. Trim Reducing-Aid Cigarettes (two cases: N. J. and S. D. Calif.). The Government filed libels in four jurisdictions praying seizure and condemnation of quantities of a product called "Trim Reducing-Aid Cigarettes," which had been shipped in interstate commerce. This product was intended to be smoked by human beings for the purpose of achieving reduction in body weight of the users. The manufacturer-distributor filed claims and contested the actions in New Jersey and the Southern District of California. In December 1959 the District Court for the District of New Jersey (Judge Wortendyke) issued an opinion holding that the Government's motion for summary judgment should be granted. On December 21, 1959, an order granting judgment was filed.

In its opinion, the Court held, among other things, that the representations, exhortations, suggestions, and directions accompanying the product established without question that it is a drug, since as an article intended to reduce the consumer's appetite for food and thereby achieve a reduction in weight, it "intended to affect the structure or function of the body of man" (21 U.S.C. 321(g)). The Court further found from the pleadings and the evidence that the articles were misbranded because the claims made in the labeling were "misleading, if not actually false and fraudulent." Additionally, the Court found that the product was a new drug within 21 U.S.C. 321(p)(1), a cigarette containing an ingredient (tartaric acid) designed or represented to reduce the user's appetite in a manner not generally recognized as safe for use under the stated conditions. It was held that the affidavits submitted by the parties disclosed "a direct contrariety of medical and scientific opinion" on the question; and that the existence of such a conflict establishes as a matter of law that there is no general recognition among medical experts that the drug is safe for use as intended. The product being misbranded as noted above and no new drug application having been filed in connection therewith, the seizure was proper and justified under the Act. The articles under seizure were ordered condemned and destroyed.

On January 11, 1960, in the parallel case in the Southern District of California, which case was based upon substantially similar grounds and also vigorously contested, the Court granted summary judgment to the Government as prayed for. The articles under seizure in this jurisdiction also were ordered destroyed.

Staff: United States Attorney Chester A. Weidenburner;
Assistant United States Attorney Charles H. Hoens, Jr.
(D. N.J.)

United States Attorney Laughlin E. Waters;
Assistant United States Attorney Richard A. Lavine
(S.D. Calif.)

MAIL FRAUD

False Statements. United States v. Charles I. Hershman (D. Conn.). An indictment in five counts was returned against Charles I. Hershman on July 21, 1959, charging violation of the mail fraud statute (Section 1341, Title 18 U.S.C.) in four counts and the making of a false statement to a postal inspector in a fifth count (Section 1001, Title 18 U.S.C.). The indictment grew out of direct mail advertising to prospective investors offering as much as a 15% return on investments of as little as $100, said money to be invested in mortgages. Upon accumulation of sufficient funds Hershman loaned such funds on several mortgages. Payment on the mortgages were to be made to Hershman who in turn was to make pro rata returns to investors. Investigation of complaints indicated failure to make such payments to investors although the mortgagors made regular payments to Hershman. The investigation further disclosed that the investors had been advised that their money had been invested in certain mortgages which in fact did not exist and that Hershman had converted the mortgage payments to his own use.

Hershman pleaded nolo contendere to the first count of the indictment charging violation of Section 1341, Title 18 U.S.C. and on December 20, 1959, was sentenced to imprisonment for one year. The remaining four counts were nolle prossed.

Staff: United States Attorney Harry W. Hultgren, Jr. (D. Conn.).

Advance-Fee Loans Racket; Convictions. United States v. Financial Service Corporation (S.D. Fla.). In a trial without a jury all five operators of Financial Service Corporation were convicted at Miami, Florida, on all counts of a mail fraud indictment which charged them with obtaining advance fees from businessmen on the strength of fraudulent representations that loans would be obtained for their enterprises through the services of this corporation.

This was the first case featuring the "loan racket" variation of the advance fee swindle to reach trial, and it follows outstanding convictions and sentences in trials involving the original "sell your business" type of advance fee racket which were achieved in the Districts of North Dakota and the Northern District of Iowa. Asserting that he had never seen a "more culpable" fraud the trial judge lauded the investigation and presentation of the case. He sentenced William John Madone to five years' imprisonment, James D. Allen to thirty months, and John J. Bonita to eighteen months. Lawrence H. James and Thomas J. Torpy were each sentenced to three years' imprisonment and fined $2,000 each, with the prison terms suspended on three years' probation.

Staff: United States Attorney E. Coleman Madsen; Assistant United States Attorney Lloyd Bates (S.D. Fla.).

Knit-at-Home Mail Fraud Scheme; Convictions. United States v. Melvin Barron and Edward McLane (N.D. Ill.). Another signal success in the program aimed at extermination of large-scale consumer frauds which utilize advertising media has been won in the Northern District of Illinois where both defendants entered pleas of guilty to an indictment charging them with mail fraud in an operation styled American Knitting Center of West Chicago, Inc. It is expected that the sentences of five years' imprisonment which were imposed as to each defendant on his plea will have a substantial deterrent effect on similar operations still widespread throughout the United States.

The case followed the typical "work-at-home" scheme. Shut-ins and housewives were sold knitting machines at exorbitant prices on the representation that these machines were capable of marketable production which defendants promised to purchase. Allegedly $400,000 worth of machines were sold to the victims and the American Knitting Center purchased only $19,000 worth of garments, of which only $5,000 worth were resold, the majority of the products being returned to the victims as "below company standards".

Staff: United States Attorney Robert Tieken;
Assistant United States Attorney Robert F. Monaghan (N.D. Ill.).

Vending Machine Mail Fraud Scheme. United States v. Sol Cutler, et al. (E.D. Mo.). The two principal operators of Midwest Electronics Corporation entered pleas of guilty to an indictment charging them with mail fraud in a scheme whereby victims were induced to purchase TV tube testing machines at exorbitant prices in the belief that they were establishing themselves in a profitable part time business. Purchasers of the machines reportedly paid approximately $3,000 for five machines worth $150 each at wholesale on representations by defendants that locations for the machines would be secured by Midwest Electronics whose personnel would install them, that exclusive territories would be granted and that profits as large as $650 per month could be earned on the route of five machines. All of these representations, in the pattern of the typical vending machine swindle, were charged to have been false.

Sentencing of the defendants who have reportedly been engaged in vending machine operations for some time has been set for March 11, 1960.

Staff: United States Attorney William H. Webster;
Assistant United States Attorney William C. Martin (E.D. Mo.).

COUNTERFEITING

Sufficiency of Indictment. Benjamin Franklin Neville v. United States (C.A. 5, November 3, 1959, rehearing denied November 28, 1959). Defendant was charged in one indictment with possessing counterfeit

$5 bills and with attempting to pass the counterfeit bills in the Northern Division of the Middle District of Alabama. In a second indictment he was charged with possessing counterfeit $5 bills in the Eastern Division of the same district.

After conviction on all counts of both indictments, defendant on appeal claimed error in the denial by the district court of his motion to dismiss the several counts because the alleged counterfeited instruments were not set forth nor sufficiently described. The Court of Appeals stated that Wininger v. United States, Eighth Circuit, 1935, 77 F. 2d 678, 680, which was cited by appellant, states the rule now prevailing, i.e., that it is not necessary that the instrument be set out in the indictment; that all that is necessary is that the instrument be so described as to advise the defendant of the nature of the charge and the description be such that, with the record, it would save the defendant from a second prosecution for the same offense.

In the instant case the Court pointed out that setting out the counterfeit bills or describing them by their fictitious serial numbers or otherwise would not afford any real protection against a second prosecution for the same offense because a limitless number of identical facsimiles might possibly be printed. The Court stated that defendant should have moved for a bill of particulars under Rule 7(f), Federal Rules of Criminal Procedure, if he needed any more particular identification of the counterfeited bills.

Staff: United States Attorney Hartwell Davis (M.D. Ala.).

SECURITIES ACT OF 1933

Sale of Assignments of Oil and Gas Leases. United States v. D. H. Roe, et al (N.D. Texas). After an 8-day trial, during which 54 Government witnesses were subpoenaed, Dana Hamilton (Shad) Roe was convicted on five counts of violating the Securities Act of 1933 and was sentenced to imprisonment for five years and fined $5,000. The Stratoray Oil Corporation, Inc., Fort Worth, Texas, of which Roe is president, was also fined $5,000 on five counts charging violations of the Securities Act. The scheme involved the sale of "investment contracts" relating to oil and gas leases covering acreage located in Utah and Texas, coupled with collateral agreements and undertakings that wells would be and were being drilled in the vicinity of the leases to test the area for oil. Thousands of letters were mailed to prospective investors throughout the United States and the lease sales substantially exceeded $200,000. The advertising literature contained greatly exaggerated, deceptive, misleading and unfounded statements relative to the oil potential in the areas, and also deliberately misleading and false statements as to Roe's background, which allegedly qualified him to locate oil and gas reserves through the use of scintillation equipment with almost 100% accuracy.

Staff: United States Attorney William B. West, III (N.D. Texas).

Registration Provisions; Conspiracy. United States v. Philip H. Meade, et al. (S.D. Ind.). As a result of extensive investigation conducted by the Securities and Exchange Commission an eight count indictment was returned in March 1959 against Meade, President of an Indiana Insurance Company, and three other defendants, including a former vice president and a salesman of that company, charging violations of 15 U.S.C. 77(e)(a)(1) and (2) and conspiracy to violate said statutes.

The facts of the case did not on their face disclose fraud, the prosecution being predicated upon the registration provisions of the Securities Act requiring full disclosure through the use of a prospectus approved by the SEC if securities are to be offered, sold or delivered interstate. Representatives of the SEC indicate this case is one of the first of its kind to be tried before a jury. While defendant Nation, the company salesman, was acquitted by the Court at the close of the government's case, the other defendants were convicted on all counts in which they were named.

Preparation for and presentation of the case was made difficult since it lacked color, there being no evidence of fraud on the part of the company and the convicted defendants were professional businessmen who claimed to have relied upon the advice of one of the outstanding securities lawyers in the State of Indiana. Additionally the Government was without the benefit of a key witness, thoroughly familiar with the business operations involved, who could not testify due to a serious heart condition.

Staff: United States Attorney Don A. Tabbert;
Assistant United States Attorneys John C. Vandivier, Jr. and Philip R. Melangton, Jr. (S.D. Ind.).

FALSE STATEMENTS

False Claim for Replacement of Series E Government Bonds. United States v. Mary Toomey (N.D. N.Y.). On November 18, 1959, defendant was found guilty on a two count indictment charging violations of Sections 1001 and 287, Title 18, United States Code. Defendant filed a claim for replacement of two $1,000 United States Government, Series E bonds allegedly stolen in a burglary. However, the Government proved through the testimony of a handwriting expert that the bonds had been cashed by the defendant herself prior to the burglary and on each occasion defendant had opened a bank account in her own name. Sentence has been deferred pending a pre-sentence investigation.

Staff: Assistant United States Attorney Francis J. Robinson (N.D. N.Y.).

DENATURALIZATION

Illegal Procurement; Membership in Proscribed Organization. United States v. Al Richmond (N.D. Calif., November 19, 1959). Defendant in this

denaturalization suit was born in England in 1913 and admitted to the United States in 1922. In 1940, in his registration form filed pursuant to the Alien Registration Act of 1940, he stated he had been a member of the Communist Party within the preceding five years. In 1942, in his "Alien's Personal History and Statement" filed with his local draft board, he stated he had been a member of the Communist Party and the Young Communist League within the preceding ten years. In 1943 he was inducted into the United States Army and was honorably discharged three years later.

While in the Army, on June 8, 1943 he petitioned for naturalization under the expedited procedure made available to members of our armed forces by Section 701 of the Nationality Act of 1940. The naturalization examiner who conducted the examination did not have before him the Alien Registration or draft board forms and did not inquire about possible Communist Party membership. Without objection by the examiner, the court granted the naturalization petition on June 11, 1943.

On October 30, 1952, this denaturalization complaint was filed under Section 338(a) of the Nationality Act of 1940, charging that the naturalization had been illegally and fraudulently procured. The Government relied primarily on the charge of illegal procurement. It contended that since Section 305 of the 1940 Act barred the naturalization of any person who within ten years had been a member of any organization which advocated the violent overthrow of our Government, and since the Communist Party was such an organization, defendant was statutorily ineligible for naturalization and his naturalization was therefore illegally procured. This had been the holding in United States v. Chomiak, 108 F. Supp. 527, affirmed 211 F. 2d 118 (C.A. 6, 1954), cert. den. 348 U.S. 817.

In an opinion dated November 19, 1959, Judge Goodman rejected the Chomiak thesis. He pointed out that in 1943, when the defendant was naturalized, membership in the Communist Party was not, per se, a statutory ground for denial of citizenship. The Court found that no fraud or wrongful act of the defendant had induced or brought about his naturalization. It refused to extend the concept of illegal procurement to cover a naturalization where there was neither a misstatement of fact by the applicant or his witnesses nor an unlawful grant of citizenship by the naturalization court in the face of a record showing ineligibility.

Staff: United States Attorney Lynn J. Gillard;
Assistant United States Attorney William B. Spohn
(N.D. Calif.).

MOTION TO VACATE
(28 U.S.C. 2255)

Independent Civil Suit; Docket Fee. George F. Martin v. United States (C.A. 10). On a plea of guilty to use of the mails to defraud, Martin was sentenced to consecutive 5 year terms. An appeal from the judgment of conviction was dismissed as filed out of time. Subsequently, Martin attempted

to file a motion for relief under 28 U.S.C. 2255 and submitted an application for leave to proceed in forma pauperis, which was denied. A notice of appeal to the Tenth Circuit was then made and an application for leave to proceed in forma pauperis was granted. Counsel for Martin contended that an application for relief under Section 2255 should be treated as a motion filed in the original criminal case to which it related and not a new civil action and that if a docket fee was required it should be in the amount of $5 as in habeas corpus. The Tenth Circuit reaffirmed its holding in Hixon v. United States, 268 F. 2d 667, 668, that a Section 2255 application was an independent civil suit, noting that it found support in other circuits. The Court also held that the clerk of a district court must collect a docket fee or permission to proceed in forma pauperis in such matters and that the proper fee in Section 2255 proceedings is $15, as in any other civil suit.

It is believed that this is the only case in which a court has ruled concerning a fee in suits under 28 U.S.C. 2255.

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

CITIZENSHIP

Fraud; Resulting Damages to United States. United States v. Chin Sing et al. (N.D. Calif., September 11, 1959).

An unusual and successful action was taken by the United States Attorney through a suit for damages growing out of a fraud perpetrated on the United States by three Chinese who had conspired with others in an attempt falsely and fraudulently to obtain the admission of two other Chinese as citizens.

Chin Bock, by his next friend Chin Hong, filed suit seeking to establish that Chin Bock was Chin Hong's foreign born blood son and hence a citizen of the United States. The case was consolidated for trial with the prior pending cases of Chin Ming and Chin Yick v. Brownell in the same Court. Chin Ming and Chin Yick likewise claimed to be foreign born blood sons of Chin Sing and hence citizens of the United States. A result of the further investigation requested by the Court and conducted by Immigration and Naturalization officers was that the five parties involved confessed that neither the alleged father nor the plaintiffs in the Chin Ming and Chin Yick cases were citizens of the United States. This resulted in a dismissal of the Chin Ming and Chin Yick cases, with prejudice, by stipulation. Chin Bock and his claimed father Chin Hong entered pleas of guilty to criminal charges of perjury and conspiracy to commit perjury and make false statements.

The Government filed civil suit for damages against Chin Sing, Chin Ming and Chin Yick. The complaint set forth the conspiracy of the three defendants among themselves and with Chin Bock and Chin Hong to falsely and fraudulently gain the entry into the United States of Chin Yick and Chin Ming; recited the overt acts in pursuance of the conspiracy which were done with intent that plaintiff should act in reliance thereon; and alleged that by reason of these false and fraudulent representations of defendants and others in the conspiracy with defendants, the United States was required to expend sums of money investigating and disproving the claims and statements of defendants and their co-conspirators. The sums so expended were stated to amount to at least $1250. Judgment was demanded against defendants for that amount and such other relief as the court deemed just.

Defendants stipulated judgment in the amount of $1250 with interest of 7% per annum, and judgment in the principal sum was entered September 11, 1959.

Staff: Assistant United States Attorney John Kaplan (N.D. Calif.)
United States Attorney Lynn J. Gillard

DEPORTATION

Eligibility to Citizenship; Effect of Exemption from Military Service as Neutral if Country Later Becomes Co-belligerent. Kahook v. Johnson (C.A. 5, January 11, 1960).

This appeal from a summary judgment denying appellant's petition to review and set aside a final order of deportation presented two questions: whether the order of deportation was supported by substantial evidence on the record as a whole; and whether appellant's request for and relief from military service as a native of a neutral country deprived him of his right to become a citizen when, in fact, the country of his citizenship was later declared to be a co-belligerent.

Appellant claimed that as he was unable to obtain certain documents in the hands of the Immigration Service, which would have disclosed that at the time he executed his application for relief from military service, he could not read, write or speak the English language, he had been denied the opportunity to show that he could not intelligently elect between service in the Armed Forces and denial of the privilege to acquire citizenship. The Court considered this a complete nonsequitor; footnoted the observation that appellant had previously registered for the draft in accordance with law and had corresponded with his draft board; and said it was immaterial whether he fully apprehended the legal result flowing from such request for relief. The document which he sought to have produced in the deportation hearing would not have thrown any light on the issue whether he understood the effect and purpose of his request for relief from military service. No other proof was offered by him that he was in fact not able intelligently to make the request.

The Court decided the second question on the basis of its earlier decision in Jubran v. United States, (C.A. 5) 225 F. 2d 81. Appellant relied upon Petition of Ajlouny, 77 F. Supp. 327 for the proposition that a request for relief from military service as a neutral citizen was ineffective to debar applicant from citizenship when the country, than a neutral, is later held by the Executive Department to be a co-belligerent. In the Jubran case the court had declined to follow the Ajlouny decision. In this case it reiterated its conclusion that the holding of Ajlouny was not warranted. Appellant, said the Court, had applied for and obtained a deferred status on the basis of his being a citizen of "what he thought was, and, for all we know, actually was until the later determination, a neutral country." The Court said that upon his request for, and the granting of deferment the statute "inexorably attached the disqualification" and that this bar which is imposed by statute cannot be raised by the courts.

The judgment below upholding the order of deportation was affirmed.

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

False Statement; National Labor Relations Board; Affidavit of Non-Communist Union Officer. United States v. John Joseph Killian (C.A. 7, January 11, 1960). The Court of Appeals has affirmed the conviction, following a retrial, of John Joseph Killian on both counts of an indictment charging him with having falsely denied membership in and affiliation with the Communist Party in an Affidavit of Non-Communist Union Officer filed with the National Labor Relations Board on December 11, 1952. Killian had been originally convicted of this offense on November 29, 1956 (see Bulletin, Vol. 4, No. 25, p. 777) but on appeal the conviction was reversed on rehearing (246 F. 2d 82) because the trial judge had failed to require the Government to produce for defendant's inspection the pre-trial statements of certain Government witnesses (see Bulletin, Vol. 6, No. 11, p. 304). On this second appeal Killian again challenged the trial judge's rulings with respect to the production of pre-trial statements of Government witnesses. The trial judge had ruled, in accordance with 18 U.S.C. 3500 (the Jencks statute) that defendant's right to production was limited to statements which related to the subject matter of the witnesses' direct testimony. The Court of Appeals held that these rulings "were proper and the only rulings permitted by the statute." It further noted that the procedure adopted by the trial judge "could hardly be more faithful to that required by" the decision of the Supreme Court in Palermo v. United States, 360 U.S. 367, (which had been rendered following the trial of the instant case) "had the trial judge, through prescience and psychic perception, been able to for foresee the result of that decision." Killian also contended that the trial judge had erred in refusing his requests for direct production of the grand jury testimony of Government witnesses. At the trial his counsel had taken the position that the defense had an absolute right to production without the necessity of laying any foundation for such production. The Court of Appeals observed that "[t]he request for production was based upon a claimed right which does not exist" and, relying on the decision of the Supreme Court in Pittsburg Plate Glass Co. v. United States, 360 U.S. 395, held that defendant was required to show a "particularized need" for production before being entitled to inspect the grand jury transcript.

Staff: United States Attorney Robert Teiken (N.D. Ill.); Jerome L. Avedon (Internal Security Division)

Government Employee Discharge. Evans v. Leedom, et al. (Supreme Court, January 11, 1960) The Supreme Court has denied the petition for a writ of certiorari to review the disposition of this case by the Court of Appeals for the District of Columbia (265 F. 2d 125). Plaintiff, a Veterans' Preference eligible, was discharged on security grounds as a field examiner with the NLRB in April 1954. He instituted suit for reinstatement on the basis of Cole v. Young, 351 U.S. 536 (1956), which

restricted the Government's security program to holders of sensitive positions only. The Court of Appeals held that plaintiff was barred by laches since suit for reinstatement was not begun until June 1958, some 38 months later. Plaintiff's contention that his failure to bring timely suit was due to his awaiting the outcome of the Cole case was not borne out by the record.

Staff: Anthony A. Ambrosio, Benjamin C. Flannagan (Internal Security Division)

* * *

TAX DIVISION

Assistant Attorney General Charles K. Rice

CIVIL TAX MATTERS

Complaints in Lien Cases

It has been called to our attention that in many instances the United States Attorneys are not forwarding to the Regional Counsels' offices copies of complaints filed pursuant to 28 U.S.C. 2410. In order for the Internal Revenue Service to properly advise the United States Attorneys' offices regarding the 2410 cases, it is imperative that copies of the complaints be furnished to the Internal Revenue Service. It is recognized that in some exceptional cases the exhibits attached to the complaint are too bulky to reproduce. When this occurs, it is suggested that you write to the Internal Revenue Service forwarding a copy of the complaint only, advise the Service that the exhibits are too bulky and suggest that arrangements can be made to examine the pleading on file in the court.

Appellate Decision

Waiver of Restrictions on Assessment and Collection of Tax Executed Before Mailing of Deficiency Notice Held Valid Under Internal Revenue Code of 1939. United States v. Sydelle Price (S. Ct., January 18, 1960.) This was an action brought by the United States for the collection of a deficiency in taxes, plus statutory interest thereon. Taxpayer defended on the ground that the action could not be maintained because the Commissioner had never issued to taxpayer a notice of deficiency (commonly known as a "90-day letter") for the amount in question. The Government relied on the admitted fact that taxpayer had executed a Treasury Department form waiving the restrictions on assessment and collection of the deficiency sued for, pursuant to the provisions of Section 272(d) of the Internal Revenue Code of 1939 which accords to a taxpayer the right "at any time", by a signed notice in writing, to waive the restrictions provided in Section 272(a) of the Code on the assessment and collection of the whole or any part of a deficiency. The basic restriction imposed by Section 272(a) prohibits the Commissioner from assessing and collecting a tax deficiency until expiration of the period following the mailing of a deficiency notice. Sustaining the Government's position, the Supreme Court, relying on the plain language of Section 272(d) as well as its legislative history, held (two dissents) that a waiver given pursuant to that section, or its predecessors, although executed prior to the issuance of a notice of deficiency, was a fully effective instrument.

In so holding, the Court rejected taxpayer's argument that a "deficiency" was not "determined" within the meaning of Section 272(a) until a 90-day letter had been mailed, saying that the plain sense of this provision contemplates first, a determination, and then the sending

of a notice. In general, the Court observed that the relation between Sections 272(a) and (d) of the 1939 Code, and their predecessors, was clear: (1) a waiver is provided for in Section 272(d) in order to permit a taxpayer to pay the tax and stop the running of interest; (2) the Commissioner is thereupon permitted to assess and collect the tax free of the restrictions contained in Section 272(a); (3) the taxpayer is protected against the continued running of interest due to delay in assessment; by the 30-day cut-off provided for by Code Section 292.

The decision overrules long-standing decisions of the Ninth Circuit in Mutual Lumber Co. v. Poe, 66 F. 2d 904, certiorari denied, 290 U.S. 706, and McCarthy Co. v. Commissioner, 80 F. 2d 618, certiorari denied, 298 U.S. 655, but approves the decision of the First Circuit in Associated Mutuals v. Delaney, 176 F. 2d 179.

It is to be noted that under Section 6213(d) of the Internal Revenue Code of 1954, waivers of the restrictions on the assessment and collection of a deficiency in tax executed prior to the issuance of a 90-day letter are expressly declared to be valid.

Staff: First Assistant Howard A. Heffron
George F. Lynch (Tax Division)

District Court Decision

Bankruptcy; Priority of Wage Claim on Assignment of Wages Earned Within Three Months of Filing of Petition in Bankruptcy. In the Matter of Vogue Bag Company, Inc., Bankrupt, (E.D. N.Y.). Wage and tax claims were allowed, but the assets were insufficient to pay administration expenses, wage claims and tax claims in full. The Government sought a priority status superior to the tax claim priority fixed by Section 64(a) of the Bankruptcy Act by asserting that $3,153.71 of its tax claim represented an "Assignment" of wages from workmen for wages earned within 3 months of the bankruptcy, and requested that this be allowed as an administration expense under Section 64(a)(1) of the Bankruptcy Act. The Court held that the withholding taxes involved could not be classified as claims for wages entitled to priority fixed by Section 64(a)(2) of the Bankruptcy Act, but were tax claims arising under the Internal Revenue Code entitled to the priority status fixed under Section 64(a)(4) of the Bankruptcy Act. Any enlargement of the term "wages" under Section 64(a)(2), so as to include taxes withheld should be left to Congressional action through an amendment to the Act. (Local 140 Security Fund v. Hack, 242 F 2d 376 (C.A. 2) cert. denied, 355 U.S. 833.)

Staff: United States Attorney Cornelius W. Wickersham, Jr. and Assistant United States Attorney Irving L. Innerfield (E.D. N.Y.)

CRIMINAL TAX MATTERS
Appellate Decision

Production of Treasury Agents' Reports for Cross-Examination of Agents Under Jencks Rule. United States v. Raymond A. O'Connor (C. A. 2 December 21, 1959.) Appellant was convicted on four counts of attempted evasion of income taxes. After two Treasury agents had summarized the evidence at the trial as to appellant's net worth and expenditures, and had given some testimony as to the results of their investigation, defense counsel demanded production of their investigative reports--on both the civil and criminal aspects of the case--for use on cross-examination. The Government, in accordance with the law as it was then thought to be, successfully resisted the demand. On the day appellant was found guilty, the Supreme Court decided Jencks v. United States, 353 U. S. 657. The Court of Appeals, on the authority of the Jencks case, reversed appellant's conviction, stating:

> In this setting, it is quite plain that the agents' reports relating to O'Connor's asset, income and expenditure position during the entire tax period in question, whether prepared for criminal or civil tax purposes, were necessary to defendant's preparation and conduct of his defense in two respects, to determine whether any statements of fact therein were inconsistent with or contradictory to testimony on the stand of the makers of the reports, and to test their expertness in preparation of the charts and computations used by them respectively on the stand. * * *
>
> * * * Where such agents have testified, it would seem clear that their reports relating to the same investigation may be obtained by the defendant. * * *

The Government will not file a petition for certiorari. Serious consideration was given to the filing of a petition for rehearing in the Court of Appeals, seeking a modification of the broad language used in the opinion. The final decision was against such a filing, because it was felt that it would have virtually no chance of accomplishing its purpose, and that the opinion as written--though it contains some unfortunate language--probably will not give rise to serious difficulties.

The ambiguities arise from a confusion between the Jencks case and the Jencks statute, 71 Stat. 595; 18 U.S.C. 3500. On its face, the opinion seems to require the Government to turn over to a defendant all criminal and civil reports of the agent relating to the case in which the agent is testifying as a Government witness. Under the Jencks case that procedure may be proper (see 353 U.S. at 668-669), and it seems fairly clear that the Court of Appeals is disposing of the issue in terms of that decision rather than the statute--presumably on the theory that the former defines the law as it has always been and the latter was not effective until after the trial. In other words, the Court seems to be placing itself in the shoes of the trial judge as of the time of

the trial, and expounding on what should have been done then. Thus the instant case is easily distinguishable from any case tried after September 2, 1957, the effective date of the Jencks statute.

Certainly the Court cannot mean that even under the statute the agents' reports--both civil and criminal--must be turned over to the defendant in toto as soon as the agent completes his direct testimony. The statute carefully circumscribes the kind of statements and portions thereof that must be delivered to a defendant, and sets up a procedure for the excision of all portions "which do not relate to the subject matter of the testimony of the witness" (18 U.S.C. 3500(c)). The Supreme Court has said, in Palermo v. United States, 360 U. S. 343, 349, that the "detailed particularity with which Congress has spoken has narrowed the scope for needful judicial interpretation to an unusual degree", and that if a statement of a Government witness "cannot be produced under the terms of 18 U.S.C. 3500 /it/ cannot be produced at all." (360 U.S. at 351). Plainly, the defendant is not entitled to examine in their entirety all reports of an agent-witness, whether to "test /his/ expertness in preparation of the charts and computations" or for any other purpose. He is entitled to have that which the statute gives him and no more. The best antidotes, then, to any specious arguments based on the unduly broad language of the instant opinion are the clear language of the statute, and the construction placed upon it by the Supreme Court in the Palermo case, and in Rosenberg v. United States, 360 U.S. 367, 369-370.

The Court's reference to "test/ing/ /the agents'/ expertness in preparation of the charts and computations" must be read in the light of the record, which contains extensive direct testimony by the agents relating to the theory and nature of the net worth method, and its application to the instant case, as well as testimony authenticating summaries made of certain books and records by the agents, and introduced at the trial as secondary evidence.

Staff: Former United States Attorney John O. Henderson, Acting United States Attorney Neil R. Farmelo (W.D. N.Y.).

* * *

I N D E X