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UNITED STATES ATTORNEYS
BULLETIN

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JOB WELL DONE

The General Counsel, Securities and Exchange Commission, has expressed congratulations to United States Attorney Kenneth C. Raub, Northern District of Indiana, for the successful prosecution of a recent case, and for the excellent cooperation and skillful performance rendered by his office in the matter. Assistant United States Attorney Martin J. Kinney was especially commended for his excellent work in bringing the case to a successful conclusion.

The FBI Special Agent in Charge has commended Assistant United States Attorneys James C. Sennett and Dominic J. Cimino, Northern District of Ohio, for the outstanding manner in which they prepared and presented a recent auto theft conspiracy case in which four defendants were found guilty on all counts and received long sentences. The letter stated further that Mr. Sennett and Mr. Cimino spent many days and nights in preparing for the trial, and that the diligence and initiative exhibited by them is a credit to the United States Attorney's office.

A recent newspaper editorial paid tribute to United States Attorney Hubert I. Teitelbaum, Western District of Pennsylvania, for his successful prosecution of six defendants in a Cuban gun-running case. The editorial stated that it was a difficult undertaking because it involved members of an international crime syndicate and that hundreds of hours were spent in investigation, countless interviews were held, and law enforcement agencies of the Federal government, state, county, and municipalities were brought into a state of cooperation rarely attained. The editorial further stated that the conviction of the accused men, represents an important victory for justice and a defeat for organized crime. The Assistant Regional Commissioner, Alcohol and Tobacco Tax Division, also congratulated United States Attorney Teitelbaum and his staff on his successful prosecution of this case, and particularly Assistant United States Attorney Daniel Snyder for his conduct of this complex case, in which the defendants were represented by distinguished defense attorneys, and in which a number of difficulties were presented.

Assistant United States Attorney George C. Caner, Jr., District of Massachusetts, has been congratulated by the Admiralty Section of the Civil Division for his very effective handling of a recent admiralty matter. Mr. Caner was particularly commended on the extraordinary reported decision on his motion to compel answer to interrogatories. The Admiralty Section stated it believes this unusual decision will be a very useful precedent in admiralty litigation.

The District Supervisor, Bureau of Narcotics, has congratulated Assistant United States Attorneys Glen Heyman and John Quan, Northern District of Illinois, on a job well done in a recent narcotics case which resulted in the conviction of all six defendants. The letter stated that this particular group of violators is considered to be among the most important convicted in several years and that they represented higher echelon Mafia-type hoodlums that operated on a national scale and with connections to persons engaged in the international traffic. The District Supervisor observed that the splendid results achieved in the case were, in a great measure, due to the excellent efforts of Assistants Heyman and Quan, and that their pretrial work and subsequent presentation of evidence in court were outstanding.

Three Assistants in the Southern District of Florida recently received commendations. Assistant United States Attorney Don M. Stichter was commended by the General Counsel, Selective Service System, for his work in securing the conviction of a registrant who failed to comply with an order to report for induction. The General Counsel stated that, despite Mr. Stichter's lack of prior experience in this type of case, he was a most capable advocate of the Government's position. The General Counsel also commended Assistant United States Attorney Lavinia L. Redd for her outstanding work in securing 16 convictions in cases involving the use of false registration certificates. The General Counsel stated that this has always been a difficult field of enforcement, and that this series of convictions is the most successful that has come to the attention of the Selective Service System. Assistant United States Attorney Stanley Brons has been commended by the FBI Special Agent in Charge for the manner in which he handled a recent trial. The Special Agent stated that the way in which Mr. Brons familiarized himself with the facts in the case, and the manner in which he presented the facts to the court, contributed immensely to the successful prosecution of the case.

Assistant United States Attorneys Robert F. Monaghan and John Quan, Northern District of Illinois, have been commended by the Chief Postal Inspector for their work in a recent trial of a case involving the sending of bills by the defendant to insurance companies for services actually not rendered. The Postal Inspector stated that the Assistants spent many weeks in the preparation of the case for trial, particularly in studying medical textbooks and conferring with specialists in the fields of ear, nose, throat and sinus surgery, and that the study included the use and effects of various types of anesthetics. The letter observed that Mr. Monaghan devoted most of his trial time to the handling of the medical features of the case, while Mr. Quan generally covered questions of law arising during the trial, but that he also demonstrated his knowledge of the medical subjects during some examinations and cross-examinations, and that both Assistants performed their work admirably.

The Commissioner of the Federal Housing Administration has expressed to United States Attorney Lynn Gillard, Northern District of California, his pleasure at the outcome of a recent condemnation trial involving a Wherry housing project and especially mentioning the very able presentation of the case by Assistant United States Attorney Charles R. Renda.

PERFORMANCE OF DUTY

On March 4, 1960 an armed Negro man entered the office of United States Attorney Ralph Kennamer, Southern District of Alabama, and, brandishing an automatic rifle, threatened to shoot him. Mr. Kennamer's secretary, Miss Anita Guice, ran from the office and phoned the FBI and the United States Marshal. For approximately 6 to 8 minutes, Mr. Kennamer was alone in his office with the man who kept the gun pointed at him and repeated his intention to kill him. When the Marshal's men and FBI agents arrived, and the intruder's attention was distracted by a noise behind him, Mr. Kennamer snatched the rifle from him by the barrel, and the officers took the man into custody. In commenting on the experience, Mr. Kennamer said that the minutes he spent looking down the barrel of the gun seemed like hours.

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ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

NUMBERING OF SPECIAL FIELD FORMS

On Page 1, Attorneys Bulletin No. 1 of January 2, 1959, field offices were requested to include identification on all special forms reproduced in their offices. To date, very few offices have indicated (by request for a duplicate inventory) that steps have been taken to properly identify forms mimeographed locally. As each such form is rerun to replenish field stocks, the proper form number and date should be added to the form and two copies of the form sent to the Department, attention: Forms and Reports Section, Management Office. Districts which have not requested this office for information as to the district number assigned should do so without delay.

All forms mimeographed locally should be properly numbered no later than December 31, 1960.

The following Memorandum applicable to United States Attorneys Offices has been issued since the list published in Bulletin No. 6 Vol. 8 dated March 11, 1960.

MEMO	DATED	DISTRIBUTION	SUBJECT
275	3-8-60	U.S. Attorneys	Census Violations

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244 R1	3-7-60	U.S. Marshals	Annual physical examination of Deputy U. S. Marshals and Chief Deputy U. S. Marshals

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ANTITRUST DIVISION

Acting Assistant Attorney General Robert A. Bicks

SHERMAN ACT

Supreme Court Reverses District Court Dismissal of Drug Case. United States v. Parke, Davis & Co. On February 29, 1960 the Supreme Court reversed the district court's dismissal, at the close of the Government's case, of a Sherman Act civil suit charging that a drug manufacturer had engaged in an illegal price-fixing conspiracy by (1) cutting off certain retailers who refused to adhere to its "suggested" retail prices in non "fair trade" areas; (2) persuading its wholesalers not to sell to the retailers; and (3) resuming selling to them (and authorizing the wholesalers to do so) only after they had undertaken to stop cut-price advertising. The district court held that the Government had failed to prove a conspiracy, on the ground that Parke Davis' actions involved only the unilateral selection of customers that is permissible under the Colgate case.

In an opinion by Mr. Justice Brennan (Mr. Justice Stewart concurring in the judgment), the Court held that Colgate, "so long as (it) is not overruled," means "no more than that a simple refusal to sell to customers who will not resell at prices suggested by the seller is permissible under the Sherman Act;" and that an illegal price-fixing combination may arise not only from an express or implied agreement, but also "if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy." The Court found that the "program upon which Parke, Davis embarked to promote general compliance with its suggested resale prices plainly exceeded the limitations of the Colgate doctrine," both by drawing the wholesalers into the plan and by securing assurances of cooperation among the retailers in terminating the price-cutting advertising.

Mr. Justice Harlan (with whom Justices Frankfurter and Whittaker joined), dissenting, was of the view that the district court's findings supported the dismissal of the complaint, and that "what the Court has really done here is to throw the Colgate doctrine into discard."

Staff: Richard A. Solomon, Edward R. Kenney and Henry Geller (Antitrust Division)

Grand Jury Proceedings; Impounded Documents; Denial of Return of. Socony Mobil Oil Company, Inc., et al. v. United States (C.A. 7, February 24, 1960). In this case, the Court dismissed defendant's appeal from an order of the District Court for Northern Indiana denying their application for return of impounded documents. The documents were delivered pursuant to subpoenas duces tecum to the

Grand Jury for its use in an investigation of alleged violations of the Sherman Act. Eight days before the Grand Jury returned an indictment, the District Court entered an ex parte order granting the Government's motion to impound the documents for safekeeping until the trial on any indictment which might be returned. Eight months after the return of the indictment and more than six months after the discharge of the Grand Jury, defendants, captioning their application "In Re Grand Jury Proceedings," moved for return of the documents, alleging that the Government had not shown good cause for continuing the impounding order. After full hearing, the District Court refused to reverse its prior exercise of discretion in impounding the documents, and, concluding that the application should properly be considered under the pending criminal proceeding, entered its order denying the motion.

On appeal from the order, the Court of Appeals, without reaching the merits, agreed with the Government that the application for return of the documents was not an independent proceeding, regardless of its caption, but merely incidental to and a part of the pending criminal proceeding. Thus the order was held to be interlocutory and its validity appealable only at the conclusion of the criminal case.

Staff: Richard A. Solomon and Donald L. Hardison
(Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General George Cochran Doub

COURT OF APPEALS

ADMIRALTY

Circumstantial Evidence Establishes Liability of Stevedoring Company for Damage to Government Vessel. United States v. The Bull Steamship Lines (C.A. 2, February 15, 1960). After respondent's longshoremen had loaded many large, heavy steel plates on both sides of the shaft alley in the No. 4 hatch of a Government vessel, oil was discovered flooding the lower hold and contaminating the ship and cargo. The oil had leaked from a horizontal puncture in a deep tank forming the forward bulkhead of the hold. On the basis of evidence as to the nature and location of the puncture and as to the method employed by the longshoremen in stowing the steel plates, the district court entered a judgment awarding damages to the Government.

On respondent's appeal, the Court of Appeals affirmed. It held that, although the Government had offered no direct evidence that a plate had struck the bulkhead, the overwhelming circumstantial evidence of the manner in which the plates were loaded and the location and nature of the puncture established that the damage had been caused when a plate was permitted to strike the bulkhead. The Court further agreed that respondent's handling of the cargo was negligent although the operation was difficult, and observed that if the operation was too complicated to perform without a substantial risk of damage, respondent should have so notified the Government.

Staff: Walter L. Hopkins (Civil Division)

AGRICULTURE

Department of Agriculture Regulation Establishing Method of Computing Farm Base Acreage for 1958 Wheat Crop Held Valid. Rigby, et al. v Rasmussen, et al., (C. A. 10, February 15, 1960). Pursuant to section 728.816 of the Department of Agriculture's 1958 wheat acreage allotment regulations, 7 C.F.R. 728.816 (Supp. 1959), the base acreage, which is determinative of the size of the 1958 farm allotment, is the average of the wheat history acreage earned on the farm in 1953, 1954, 1955, and 1956. The amount of wheat history earned in a particular year is based on the actual amount of acreage planted to wheat in that year, plus "diversion credit," if the acreage harvested in that year did not exceed the farm allotment for that year.

Rigby, et al., a group of wheat farmers who had been denied "diversion credit" in one or more years because they had harvested in excess of their allotment for that year, brought suit seeking a redetermination of their 1958 allotments on the ground that the regulation which provided for the

allowance and denial of "diversion credit" was invalid. They asserted that the regulation was unreasonable in its operation and in excess of the authority of the Secretary of Agriculture.

The district court held that the regulations "are in all respects valid." The Court of Appeals affirmed. It held that consideration of whether previous allotments had been exceeded was permissible, even though such consideration was not explicitly included among the factors which Section 334(c) of the Agricultural Adjustment Act of 1938, 7 U.S.C. 1334 (c), lists as the basis for determining farm acreage allotments. It concluded that such "improvisation" was necessary in order not to discourage compliance with acreage allotments. The Court held that "the regulation reflects the Secretary's best efforts to honor the provisions of the statutes * * *, while achieving a result in accord with the statutory scheme, and that is enough." Regarding the farmers' argument that the regulation was unreasonable because the denial of diversion credit was not affected by the amount by which a farmer exceeded his allotment, the Court declared that "although the regulation may not be the most reasonable and equitable which is possible * * *, we do not think it is palpably inconsistent with law. And our function is not to second-guess the Secretary to any greater extent than that."

Staff: Seymour Farber, Marvin S. Shapiro (Civil Division)

VETERANS' PREFERENCE ACT

Veterans' Preference Eligible Discharged on Liquidation of Agency Held Entitled to Position of Like Status and Pay in Successor Agency. Horace J. Feldman v. Herter (C.A.D.C., February 25, 1960). In 1949 plaintiff, an honorably discharged veteran entitled to preference in Government employment, was a clerk in a U. S. Military Government court in Germany. Military Government was liquidated and plaintiff was discharged by the Department of the Army. The Veterans' Preference Act of 1944, 5 U.S.C. 861, provides that when any functions of the agency are transferred to another agency, "all preference employees in the function or functions transferred * * * shall first be transferred to the replacing agency* * *." When a "preference eligible" is discharged he may appeal to the Civil Service Commission; and when the Commission submits its findings and recommendations to the proper administrative officer "it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends." 5 U.S.C. 863.

Plaintiff appealed to the Commission, which found that the functions of the Military Government courts had been transferred to the Department of State, that plaintiff should have been transferred, and that corrective action should be taken to restore him to "a position of like status and pay" in the Department of State. The Department rejected the recommendations on the ground that the functions of the Military Government courts had not been transferred to it, that it has no positions of "like status and pay" and that Section 12 of the Act does not apply to the Foreign Service.

Plaintiff sued to require the Secretary of State to take the corrective action recommended by the Commission. The District Court granted the Secretary's motion for summary judgment. On plaintiff's appeal the Court of Appeals reversed, holding that the functions of the Military Government courts had in fact been transferred to the Department of State and that the Department should carry out the Commission's recommendation as nearly as might be possible. It found it unnecessary to decide whether plaintiff's appointment should be in the Foreign Service or elsewhere in the Department of State.

Staff: United States Attorney Oliver Gasch and Assistant United States Attorney Walter J. Bonner (D.C.D.C.)

DISTRICT COURTS — ADMIRALTY

Government Vessel Not Unseaworthy by Reason of Customary Trunk Hatch Construction; Government Not Liable for Injuries Caused by Stevedore's Method of Operation. Oblatore v. United States v. American Stevedores, Inc. (E.D.N.Y., February 11, 1960). Libelant longshoreman was injured in a fall from a hatch board suspended from the cargo falls of a Government vessel, the hatch board being located within a rectangular trunk hatch composed of sheer bulkheads and providing only a 4 inch beam lip and three thwartship beams for walking space. The injured longshoreman claimed the vessel was unseaworthy in failing to provide adequate walking space and access ports from which to maneuver the hatch board, arguing that this deficiency required him to ride the board into place while suspended on the falls. Noting that the vessel was constructed in accordance with customary standards as approved by the American Bureau of Shipping, the Coast Guard and the pending safety regulations of the Department of Labor, the District Court found the vessel seaworthy and dismissed the libel. The Court further observed that since the longshoremen were in complete charge of the hatch, and selected the method of replacing the hatch board, the United States could not be charged with negligence.

Staff: Walter L. Hopkins (Civil Division)

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CIVIL RIGHTS DIVISION

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

Illegal Labor Union Political Payments. On February 24, 1960, a grand jury in St. Louis, Missouri, returned an indictment in twenty-two counts charging the Warehouse and Distribution Workers Union Local 688 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; The Taxicab Drivers' Local 405; five officers of the unions--Harold J. Gibbons, John Naber, William Latal, Philip C. Reichardt and Joseph Bommarito--and union member, Sidney Zagri, with having made labor union political contributions and expenditures in connection with a federal election in violation of the Taft-Hartley Act (18 U.S.C. 610).

Investigation revealed that the Political Action Committee fund used to support federal candidates was derived entirely from labor organization general funds. The money was used for outright political contributions and for expenditures in behalf of federal candidates. The offenses charged in the indictment all relate to the 1956 federal elections with the exception of one expenditure in 1958. Defendants were charged with illegal political payments totaling $12,763, ranging from $250 to $5,000 made to the campaigns of Senators Hennings of Missouri and Morse of Oregon, Representatives Roosevelt (Calif.) and Reuss (Wisc.), and candidates for Congress James Sullivan and Robert G. Dowd, both from Missouri.

The Political Action Committee fund used for political payments was obtained from general treasury funds by allocating twenty-five cents (later thirty-five cents) deducted monthly from the dues of each union member who signed a pledge card. A trial date has not been fixed.

Staff: Assistant United States Attorney Wayne H. Bigler, Jr. (E.D. Mo.); Henry Putzel, jr., and William J. O'Hear, (Civil Rights Division).

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CRIMINAL DIVISION

Assistant Attorney General Malcolm Richard Wilkey

EVIDENCE

Extension of Doctrine of Admissibility of Ex-spouse's Testimony. United States v. Frank Termini (C.A. 2, 267 F. 2d 18, certiorari denied 361 U.S. 822). The three-count indictment charged Termini with making or causing to be made false and fraudulent statements bearing on his Selective Service status, and submitting such statements to his local board in violation of 50 U.S.C. App. 462(a). On three different occasions Termini had presented written statements to his local board to the effect that on specified dates he maintained a "bona-fide family relationship with his wife and child in their home at Bronx, New York." On those dates defendant was married to Roslyn Termini and had a child by her. Roslyn Termini subsequently obtained a divorce from appellant. At the trial Roslyn, as well as her parents, testified that Termini had never maintained a bona-fide family relationship with his wife. A handwriting expert of the Federal Bureau of Investigation testified that two of the written statements purportedly signed by Roslyn Termini were not signed by her, but that her signature had been traced. After a non-jury trial, Termini was found guilty on all three counts.

On appeal, Termini relied on Hawkins v. United States, 358 U.S. 74, arguing, inter alia, that his ex-wife could not testify to anything which took place during the time of the marriage because her knowledge was gained from the confidential relationship between her and the appellant. In confirming the conviction, the Court of Appeals disapproved appellant's arguments. The Court noted that the testimony of the former wife was properly admitted since it pertained to matters concerning her residence with her parents and other members of the household, and that it is well settled that the privilege ends with the dissolution of the marriage as by divorce. Pereira v. United States, 347 U.S. 1, 6.

Staff: United States Attorney Cornelius W. Wickersham, Jr.; Special Assistant to the United States Attorney William H. Sperling (E.D. N.Y.)

FRAUD

Illegal Sale of Surplus Food Commodities (18 U.S.C. 371, 1001). United States v. Rufus H. Scholl, et al. (W.D. Pa.). Rufus H. Scholl, Administrator of Westmoreland County, Pennsylvania, Food Distribution Agency and Frank A. Diorio, Deputy Administrator, pleaded guilty to an indictment charging that they conspired to defraud the Government by selling for their own account butter, cheese, cereals and milk donated to the Commonwealth of Pennsylvania by the United States Department of Agriculture for free distribution to needy persons in Westmoreland

County. Scholl obtained excess quantities of the food commodities by padding the monthly lists of persons eligible to receive the foodstuffs, these lists being submitted by him to the Commonwealth's Department of Property and Supplies and in turn being submitted, as he knew, to the Federal Government. The padded rolls of eligible recipients of food commodities were charged as false statements in matters within the jurisdiction of the United States in violation of 18 U.S.C. 1001 in a separate twelve count indictment to which Scholl also pleaded guilty.

Scholl was sentenced to a jail term of one year and fined $1,000. Frank A. Diorio received a 6 months' sentence, plus a $500 fine. Richard W. Bittner and Earl Miller, restaurant operators who pleaded guilty to the conspiracy to divert the surplus foods, received fines of $1,000 and $500, respectively, and were placed on probation for a period of 2 years.

Staff: United States Attorney Hubert I. Teitelbaum; Assistant United States Attorney Daniel J. Snyder, (W.D. Pa.)

DENATURALIZATION

Res Judicata; Applicability of Rule 41 F.R. Civ. Proc. United States v. Frank Costello (C.A. 2, February 17, 1960). The facts and the district court's decision are discussed in the March 27, 1959 issue of the Bulletin, Vol. 7, No. 7, p. 181. The district court held that Costello's 1925 naturalization had been procured by wilful misrepresentation and concealment of material facts in that (1) he had stated in his naturalization proceedings that his occupation was "real estate," whereas he was then engaged in bootlegging; and (2) in view of his violation of the Eighteenth Amendment, he had made a false oath of allegiance. Defendant had contended that the Supreme Court's dismissal of the prior proceedings for want of the statutory "good cause" affidavit was an adjudication on the merits under Rule 41(b), Federal Rules of Civil Procedure. The district court rejected this contention, holding that the prior dismissal was on jurisdictional grounds and therefore no bar to further action.

In affirming, the Court of Appeals held that Rule 41(b) was inapplicable, but for a different reason. The Court thought it obvious that the Supreme Court, in directing dismissal of the earlier action, did not suppose that it was directing a determination on the merits which would preclude the Government from starting over again. In entering judgment dismissing the prior action in pursuance of this ruling by the Supreme Court, the district court was not exercising its own discretion but was merely acting mechanically pursuant to the direction of a superior court. Rule 41(b) applies where the district court has a real discretion in the matter, but has obviously no purpose where the trial court's disposition of the case has been predetermined by a superior court.

On the merits, the Court of Appeals held the district court's finding that Costello had misrepresented his occupation was amply supported by the evidence. With respect to the district court's conclusion that Costello had taken a false oath of allegiance, the Court of Appeals expressed some doubt. Conceding that his bootlegging activities in violation of the Eighteenth Amendment might spell out a lack of attachment to the principles of our Constitution, the Court pointed out that the complaint did not charge Costello with false affirmation of such attachment. It implied that the oath of allegiance was merely a political oath, foreswearing foreign allegiance, and distinguishable from the profession of attachment to Constitutional principles. However, since the district court's judgment was amply supported by the occupational misrepresentation, the Court found it unnecessary to rule on the district court's conclusion respecting the false oath.

Staff: United States Attorney S. Hazard Gillespie, Jr.; Chief Assistant United States Attorney Morton S. Robson (S.D. N.Y.)

ALIENS

Unlawful Reentry after Deportation; Collateral Estoppel by Judgment; Alienage; Prior Conviction of Illegal Entry as Alien. United States v. Rangel-Perez, 179 F. Supp. 619 (S.D. Calif.). On June 9, 1943, defendant was charged under 8 U.S.C. (1940 ed.) 180 with illegal reentry as an alien into the United States after prior deportation. The issue of alienage was litigated, both sides putting in evidence. Alienage was essential to a finding of guilty. Defendant was then convicted and again deported in 1948. On January 3, 1957, he was again found in the United States and has now been indicted under Section 276 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1326, for having been found here on that date after prior deportation as an alien.

To prove alienage, the Government produced: (1) substantially the same evidence relied upon to procure the 1943 conviction; (2) the record of that conviction, including the finding that the defendant was an alien on June 9, 1943; and (3) a baptismal record recently procured and authenticated by deposition of its custodian, taken in Mexico pursuant to a commission issued under 18 U.S.C. 3492-3496. Defendant moved to strike the evidence of the 1943 adjudication of alienage, contending he is entitled to a trial de novo of all elements of the offense now charged, including his nationality status. He also moved to strike the baptismal record and its supporting authenticating deposition on the ground that the authenticating procedures provided by 18 U.S.C. 3492-3496 unconstitutionally deprive him of his Sixth Amendment right to confront all witnesses against him. The District Court, sitting without a jury, found him guilty.

Departing from what it felt was the majority rule, the Court held that the doctrine of collateral estoppel by judgment must be applied

mutually in criminal as well as civil cases and is available to the Government as well as to the defendant. On the issue of alienage, therefore, which had been fully litigated in the 1943 trial, the Court held that the unappealed judgment of conviction conclusively established the defendant's alienage as of that date and there was no need to retry that issue in the instant case.

With respect to the question of whether defendant's established 1943 alienage continued until the time he was found here in 1957, the Court held that there is a presumption of the continuity of a status once proved to exist, and that the trier of fact could draw an inference of continued alienage, in the absence of evidence to the contrary.

Since the Government's case of alienage was thus sufficiently established without reliance on the baptismal certificate, the Court found it unnecessary to reach the defendant's constitutional argument.

Staff: United States Attorney Laughlin E. Waters;
Assistant United States Attorney Robert J. Jensen
(S.D. Calif.)

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Physical Persecution; Scope of Judicial Review. Ratkovic v. Esperdy, (S.D. N.Y., February 29, 1960). Plaintiff, a Yugoslav national, arrived in the United States on January 17, 1955 and was admitted as a crewman not to exceed a period of 29 days. He overstayed his time. Deportation proceedings were instituted resulting in an order for his deportation. However, he was granted the privilege of departing in lieu of deportation within a fixed period of time. He again failed to depart. Instead he began proceedings under section 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1253(h), asserting that he would be subject to physical persecution and requesting the deportation be stayed. He was given an opportunity to present his claim and any evidence he had in support thereof and he appeared without counsel, though afforded opportunity to obtain same.

In regular process his application was denied. He thereafter requested reopening of the hearing to present further evidence. This was granted. On this occasion he appeared with counsel. His application was again denied and he sought judicial review by writ of habeas corpus. He urged a denial of due process of law. The court dismissed the writ, stating:

> "We deem this claim to be spurious and but another tactic to extend relator's unlawful stay within the United States. The record demonstrates beyond cavil that relator has been afforded fair and repeated consideration of his application and that the suggestion that due process was denied him is utterly groundless. Under the circumstances this Court may not substitute its judgment for that of the Attorney General's representative. United States ex rel. Moon v. Shaughnessy, 2nd Cir. 1954, 218 F. 2d 316; United States ex rel Dolenz v. Shaughnessy, 2nd Cir. 1953, 206 F. 2d 392; United States ex rel. Granado Almeida v. Murff, S.D.N.Y., 1958, 159 F. Supp. 484, 485."

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Conspiracy to Defraud United States. United States v. Albert Pezzati, et al. (D. Colo.) As reported in the Bulletin of January 15, 1960, Volume 8, No. 2, nine defendants were convicted on December 17, 1959 of conspiring to defraud the United States and the National Labor Relations Board by means of false Taft-Hartley affidavits filed with the Board and illegally qualifying the International Union of Mine, Mill and Smelter Workers with the Board.

On March 14, 1960, Judge Arraj sentenced seven of the nine convicted Mine Mill officials to three years' imprisonment and to pay a fine of $2,000 each. Two other defendants, James Durkin and Jesse Van Camp, received sentences of eighteen months and fines of $1,500. The three defendants who had pleaded nolo contendere prior to trial were not sentenced but were continued on bail pending an appeal in the case.

Staff: United States Attorney Donald G. Brotzman, Assistant United States Attorney Charles M. Stoddard (D. Colo.), Lafayette E. Broome and Francis X. Worthington (Internal Security Division)

Contempt of Congress. United States v. Frank Grumman; United States v. Bernard Silber (D. D.C.) As reported in the last issue of the Bulletin, Judge Letts, on January 29, 1960, dismissed three contempt of Congress counts against Frank Grumman and one count against Bernard Silber. Both indictments involved refusals to answer questions before the House Committee on Un-American Activities in July, 1957. The defense motions to dismiss the counts were based on the argument that questions by the Committee relating to "Communism," being a "Communist", or knowing "Communists" were too vague to sustain a criminal indictment, in contrast to the specificity of the term "Communist Party" in the counts which were left standing by the Court.

The Solicitor General decided that no appeal should be taken from the dismissals of the counts in these indictments. It is planned that in future cases where this problem would be involved, a more expansive form of pleading the count should be utilized to show the context in which the word "Communist" was being used by the questioner and understood by the witness.

The Grumman case proceeded to trial on March 14 before Judge McGarraghy without a jury. Defendant was convicted on the one remaining count of the indictment on March 15. Sentence has been deferred pending pre-sentence investigation.

Staff: Assistant United States Attorney William Hitz (D.C.)

Contempt of Congress; Indigent Subpoena Under Rule 17(b). United States v. Edward Yellin (N.D. Ind.). On March 11, 1960 Judge Luther M. Swygert, who tried the case without a jury, found defendant Edward Yellin guilty as charged on four counts of an indictment charging a violation of 2 U.S.C. 192 (Contempt of Congress). Judge Swygert sentenced Yellin to a year's imprisonment on each count, the sentences to run concurrently, and imposed a fine of $250. Yellin was indicted on July 15, 1959 for refusing to answer questions propounded to him by a subcommittee of the House Committee on Un-American Activities in Gary, Indiana in February 1958. The subcommittee at that time was inquiring into Communist infiltration and propaganda activities in the Gary, Indiana area and the execution by administrative agencies concerned of the Communist Control Act of 1954 with respect to the rights and privileges under the National Labor Relations Act of labor organizations determined by the Subversive Activities Control Board to be Communist infiltrated. Yellin was convicted for refusing to answer questions concerning his residence, his membership in the Communist Party and his knowledge of Communist Party colonization in the steel industries in Gary. He based his refusals to answer on his alleged rights under the First Amendment and under the decision of the Supreme Court in Watkins v. United States (1957).

Representative Francis E. Walter, Chairman, House Committee on Un-American Activities, was subpoenaed by the defendant. Mr. Walter was interrogated principally concerning the dissemination of publications of the House Committee on Un-American Activities and his knowledge of the defendant's request that his testimony be heard in executive session of the Subcommittee. In addition, Thomas I. Emerson, Professor of Constitutional Law, Yale University Law School, was offered as a defense witness to testify concerning the "facts" to be considered in balancing the rights of a witness under the First Amendment against the need of the Congress for the information sought. The Court excluded Professor Emerson's testimony on the grounds that it was not a proper subject for expert testimony and that to admit such testimony would be to invade the province of the Court with respect to matters of law.

Defendant had petitioned the Court for issuance of indigent subpoenas under Rule 17(b), Federal Rules of Criminal Procedure, directed to officials of the House of Representatives, for the production of all information in the files of the Committee on Un-American Activities concerning Edward Yellin and his activities. The Court denied the petition on the ground that defendant had not shown the materiality of the requested documents as is required under Rule 17(b).

Staff: United States Attorney Kenneth C. Raub (N.D. Ind.); John C. Keeney (Internal Security Division)

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LANDS DIVISION

Assistant Attorney General Perry W. Morton

Condemnation; Combining Term and Subsequent Fee Takings of Aircraft Plant in Single Jury Trial Held Not Denial of Due Process or Abuse of Discretion; Admissibility of Evidence. Charles W. Carlstrom, et al. v. United States (C.A. 9, Feb. 15, 1960). The United States condemned an aircraft plant in San Diego, California, taking first a term for years commencing May 1, 1953, with option to renew for yearly terms from July 1, 1954, to June 30, 1958. The Government filed an amended complaint and declaration of taking on June 16, 1955, to take the property in fee. The case below is reported sub nom. United States v. 70.39 Acres of Land, 164 F. Supp. 451. The terms and subsequent fee taking were consolidated for trial of the issue of just compensation before a single jury. The jury returned a verdict which made 36 separate valuations and answered special interrogatories. The values were found for six parcels in the term taking, and six options to renew, and for nine tracts in the fee taking. In addition, the jury determined the portion of each award for the six parcels and nine tracts allocable to certain appurtenant parking rights.

The former landowners appealed complaining that it was error to permit the term and fee taking in one action and to allow the market value of the term and fee to be determined before one jury at one time. The Ninth Circuit held that whether the subsequent taking of a fee should be added to a suit containing originally only a term taking is a matter within the discretion of the trial court, and found no abuse in this case. The Court held it was also discretionary how the several tracts should be grouped for trial. While the Court of Appeals noted this was a difficult case, it felt that the trial court had handled it very competently. The Court of Appeals rejected the former landowners' argument that the case was so complicated that to require one jury to try it was a denial of due process. The Court distinguished Gwathmey v. United States, 215 F. 2d 148 (C.A. 5, 1954) discussing it at length because the former landowners had placed great emphasis on the case. The Court also held that because the jury had made an error in one small tract, which was corrected by the trial court, did not invalidate the entire result of the verdict.

The Court of Appeals also affirmed the trial court on numerous evidentiary rulings. It held that photographs showing deterioration and damage to various parts of the buildings taken were admissible. "No better evidence than actual photographs could be offered." The Court held that the cost of repairs was admissible to the extent repairs were required to put the property in a condition capable of use "to restore it to a 'normal maintenance' condition." Kinter v. United States, 156 F. 2d 5 (C.A. 3, 1946), was not in point because it involved the introduction of the cost of past repairs. The former landowners had tried to impeach the credibility of the government witness by showing that the repairs he had stated were "necessary" as of May 1, 1953, had not in fact been done by the date

of trial, 1957. After lengthy cross-examination the trial court called a halt, pointing out whether the repairs were made or not the property could be used and the usefulness was a matter of degree. The Court of Appeals held the supervision of cross-examination and its curtailment when over-extensive, "lies precisely within the discretion granted the trial court in such matters."

The former landowners' offer of proof of the cost of reproduction less depreciation was properly denied. "Reproduction cost is not the best evidence of fair market value if other evidence is available." The Court held the rental paid by the Government under leases of this plant which were made after the outbreak of the Korean War were not admissible. Relying, as had the trial court, on United States v. Cors, 337 U.S. 325 (1949), it was stated that the leases arose out of government necessity occasioned by war and did not reflect true market value.

There was no error in admitting the price for this plant paid by the landowners in 1948. The time difference goes to the weight and not the admissibility of the evidence. Nor was it error to admit against the declarant only the declaration as to value of the land condemned made by the former landowner before a State Board of Equalization in a tax proceeding. Finally, the Ninth Circuit held that the Government, by taking and paying for an option to renew the lease, had acquired the right to renew at the then existing rate of rental. Therefore, the former landowners had no right to show what the fair market value of the term might have been after the date of taking the original term.

Staff: A Donald Mileur (Lands Division)

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TAX DIVISION

Assistant Attorney General Charles K. Rice

CIVIL TAX MATTERS

Insolvency and Probate Proceedings

Our records show that several United States Attorneys' offices are not informing the Department of requests from District Directors or Regional Counsel to participate on behalf of the Internal Revenue Service in bankruptcy, receivership, or other insolvency proceedings and probate proceedings. Since requests are generally made directly to the United States Attorneys by the District Directors or the Regional Counsels' offices, it is essential that United States Attorneys inform the Tax Division immediately when requests are received and, if time permits, in advance of any action which may be taken in response to such requests.

In order to bring the Department's records up to date, each United States Attorney should have his files reviewed and advise the Department of those cases which have not previously been reported. In addition, instructions should be issued which will insure expeditious notification to the Department of new requests. This matter will be on the agenda for discussion at the forthcoming Conference in Washington.

Collection Suits

A review of the records show that there are approximately forty requests to commence action which have been sent from the Tax Division to the different United States Attorneys' offices in which the United States Attorney has not advised whether the action has been filed. It is requested that you review your cases and notify this office as to the status of all pending requests to file suit. It is important that these (and future) actions be filed within a reasonable time of receipt by the United States Attorney's office and that the Department be informed of the action taken. At the United States Attorneys' Conference in April, this office will take up with the United States Attorneys the cases where this office has not been advised that the complaint has been filed.

Appellate Decisions

Assessment and Collection: Claims Against Transferred Assets. Edna M. Fauci v. Edwin F. Hannon, Jr., Receiver, et al; Frances C. Denehy v. Edwin F. Hannon, Jr., Receiver, et al. (C.A. 1, February 24, 1960.) These separate actions in the District Court of Massachusetts were decided together by the Court of Appeals. In a prior action brought by the United States in the District Court against Charles M. Fauci Company, Inc., the taxpayer, and certain individuals, including Edna M. Fauci and Frances C.

Denehy, alleged to be transferees, the Government sought judgment against the Fauci Company for taxes assessed against it in the sum of $156,686.68, and to foreclose the Government's tax lien against Company properties which had been transferred to named transferees subject to such lien for taxes. The Company defaulted and judgment was entered against it for the amount of the claim. The case of the transferee liability was tried before a jury (instructions to the jury being reported at 2 AFTR 2d 6269), who found for the Government on all counts. The District Court thereafter appointed Edwin F. Hannon, Jr., as trustee to sell the properties in issue and pay the proceeds into Court. No appeals were taken from that judgment.

The instant cases arose in the course of the Trustee's execution of the District Court's order to sell the properties in issue in the first case. A money judgment was entered against Edna M. Fauci in the first proceeding fixing the amount of her transferee liability at $3,185.54. No money judgment was entered against Frances C. Denehy, the instructions to the jury in the first case indicating that Charles M. Fauci, Jr., had transferred the Fauci Company stock to her and in that capacity she had effected a transfer to Atlas Liquor Company properties of Charles M. Fauci Company, Inc.

In the present action, Edna M. Fauci had tendered to the trustee, Edwin F. Hannon, Jr., the amount of the judgment against her ($3,185.54), and brought an action against him in the District Court to enjoin the sale of certain of the described property in issue on the ground that she had an ownership interest in such property and should be entitled to prevent the sale. The Court of Appeals, affirming the District Court, denied the injunction on the ground that the previous judgment had determined that the Government's lien on the property "has priority over the claims of all parties to this action."

As to the present appeal of Frances C. Denehy, the receiver brought the action in the District Court against her, alleging that she was seeking in the Land Court of Massachusetts to foreclose a mortgage on the same property claimed by Edna M. Fauci, and asked the District Court to enjoin her from prosecuting such proceeding in the Land Court. The Court of Appeals, in affirming the decree of the District Court granting such injunction and ordering her to execute and deliver to the receiver a discharge of the mortgage, held that having failed to assert her right as a mortgagee in the prior proceeding Denehy was precluded from asserting it in such subsequent proceeding to foreclose.

Staff: Assistant United States Attorneys Thomas E. Goode and George C. Caner, Jr. (D. Mass.)

Counsel; Witness' Right to Be Advised by Counsel When Compelled to Appear Before Special Agent of I.R.S.; Section 6(a) of Administrative Procedure Act Assumed Applicable. Sidney Backer v. Commissioner (C.A. 5, February 18, 1960.) Appellant (Sidney Backer) was compelled to appear

before a Special Agent of the Internal Revenue Service to give testimony with respect to the tax liability of another person. He claimed the right to have as his counsel the same attorney who represented the taxpayer. The Service denied the appellant that right and informed him that he could have any counsel of his choice except the taxpayer's counsel. That denial was based on the long-standing policy of the Service to the effect that although a third-party witness is entitled to counsel of his own choice, he may not be attended by the taxpayer's counsel. Appellant contended that the Service could not so qualify his right to counsel since it was bound by Section 6(a) of the Administrative Procedure Act (5 U.S.C., 1005(a)), which provides broadly that any person compelled to appear before any agency or representative thereof shall be accorded the right to be accompanied and advised by counsel. The district court, following United States v. Smith, 87 F. Supp. 293 (Conn.), had held that although in this case there is no showing that the Service would be adversely effected by having the taxpayer's counsel present during the appellant's testimony, any possibility of prejudice to the investigation must be obviated, and therefore the Service's qualification of the right to counsel was permissible. The Court of Appeals reversed, holding that, under the circumstances of the case, appellant's right under Section 6(a) of the Administrative Procedure Act to any counsel of his choice could not be qualified.

The Court of Appeals' decision is extremely narrow. It noted in its opinion that the Service may qualify a third-party witness' right to counsel where there is evidence that there would be obstruction of the orderly inquiry process or evidence of improper conduct or tactics. Moreover, the Court indicated that the Service might otherwise properly limit a witness' choice of counsel by a formally adopted Department regulation, but that here the policy in question was contained only in a "Manual of Instructions for Special Agents, Intelligence Unit, July 10, 1945."

Staff: United States Attorney Frank O. Evans and
Assistant United States Attorney Floyd M. Buford (M.D. Ga.)

District Court Decisions

Injunction Denied Where Taxpayer's Mistaken Execution of Form 870 Was Not Due to Misrepresentation or Fraud by Government Personnel. Quigley v. Fox, Director (D.C. D.C., December 17, 1959, P.H. para. 60-147). Plaintiff pleaded guilty to income tax evasion and was incarcerated in Lewisburg Penitentiary on May 5, 1957. On May 10, 1957, the District Director sent a "30-day letter" to the plaintiff's residence in Washington, D. C., which letter advised that there were income tax deficiencies for the years 1950 through 1954 and stated that Forms 872 were enclosed and should be executed before June 30, 1957, if plaintiff wished to protest the findings as to the years 1950 and 1952 as the statute of limitations on assessment for those years would expire on that date. The Forms 872 were not, in fact, enclosed with the 30-day letter. Plaintiff's wife received the 30-day letter and took it to plaintiff's attorney. On May 28, 1957, plaintiff's attorney wrote the District Director and requested a

fifteen day extension for filing a protest. By letter dated June 17, 1957, the District Director acknowledged plaintiff's counsel's letter of May 28, 1957, and advised of the necessity of plaintiff's executing the Forms 872. By letter dated June 20, 1957, plaintiff's counsel advised the District Director that the Forms 872 had not been enclosed in the Director's letter of May 10, 1957 (the 30-day letter) and requested that the Forms be forwarded to him. On or about June 25, 1957, plaintiff's counsel had a telephone conversation with a representative of the Internal Revenue Service wherein plaintiff's counsel suggested that the Forms 872 be sent to plaintiff at Lewisburg Penitentiary. No commitment was made to plaintiff's counsel that the Forms 872 would be sent to the plaintiff. On June 27, 1957, plaintiff's counsel wrote plaintiff and advised him that a representative of the Service would contact him for the purpose of securing his signature to certain forms and that plaintiff should sign such forms. The Forms 872 not having been received, on Friday, June 28, 1957, at 11:00 a.m., a 90-day letter was sent to plaintiff; enclosed with this letter was a Form 870 (waiver of restrictions on assessment and collection). Plaintiff received the 90-day letter and on July 9, 1957, he executed the Form 870 and returned it to the District Director. Assessments were made against defendant for the years 1950 through 1954 within ninety days of sending the 90-day letter (by reason of plaintiff's execution of the Form 870) and certain property of pliantiff was seized. Plaintiff instituted this suit to set aside the seizure and to permanently enjoin defendant from seizing and disposing of plaintiff's property. The injunction was denied; the grounds for this holding were: (1) Plaintiff made no allegation or showing of irreparable injury. (2) Plaintiff made no allegation or showing of any misrepresentation or fraud on the part of officers of the Internal Revenue Service. (3) The circumstances under which plaintiff signed the Form 870 were not sufficiently exceptional or extraordinary to entitle plaintiff to relief.

Staff: United States Attorney Oliver Gasch (D.C.) and
Morton L. Davis (Tax Division)

CRIMINAL TAX MATTERS
Appellate Decision

Conspiracy to Evade Taxes; Statute of Limitations; No Double Jeopardy Where Court of Appeals (On Rehearing) Modifies Previous Order of Acquittal to Provide for New Trial. Forman v. United States decided February 23, 1960. The Supreme Court has affirmed the judgment of the Court of Appeals for the Ninth Circuit, reversing the conviction and remanding the cause for a new trial. The Government had conceded in the Court of Appeals that petitioner was entitled to a new trial because the charge to the jury (which included a "subsidiary-conspiracy" instruction of the kind disapproved in Grunewald v. United States, 353 U.S. 391) was hopelessly ambiguous on the issue of limitations. This case, which has been discussed here previously--See Bulletin, May 22, 1959, p. 328; December 5, 1958, pp. 733-734; and October 24, 1958, p. 654--involved two issues: (1) whether an indictment returned in 1953, alleging a continuing conspiracy to evade

income taxes for the years 1942-1945 by furnishing Treasury agents "false books and records, and false financial statements, and by making false" oral statements to them, was returned within the six-year period of limitations, even though more than six years after the last false tax return was filed (Cf. United States v. Beacon Brass Co., 344 U. S. 43); and (2) whether the Court of Appeals, having initially ordered the conviction reversed and a judgment of acquittal entered, infringed petitioner's constitutional protection against double jeopardy by modifying its opinion (on the Government's petition for rehearing) to provide for a new trial. The Court decided both issues in the Government's favor.

(1) The Supreme Court left no doubt that the theory of the Government embodied in the indictment is a valid one, i.e., that a tax-evasion conspiracy may continue to exist long after the false returns are filed if one or more of the conspirators continues to commit overt acts in pursuance of that objective, and that prosecution therefor is not barred if the Government alleges and proves that one of the overt acts was committed within six years of the return of the indictment. The Court stated:

> The correct theory, we believe, was indicated by the indictment, i.e., that the conspiracy was a continuing one extending from 1942 to 1953 and its principal object was to evade the taxes of Seijas and his wife for 1942-1945, inclusive, by concealing their "holdout" income. This object was not attained when the tax returns for 1945 concealing the "holdout" income were filed. As was said in Grunewald, this was but the first step in the process of evasion. The concealment of the "holdout" income must continue if the evasion is to succeed. It must continue until action thereon is barred and the evasion permanently effected. In this regard, the indictment alleged that the conspiracy to attempt such evasion actually did continue until 1953, when Seijas revealed the "holdout" income for the first time. * * *
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> * * * The indictment was based on one continuing conspiracy to evade Seijas' tax. The evidence supported it and * * * this clearly would have been the theory submitted to the jury.

(2) With respect to the double jeopardy question, petitioner contended that he had not asked the Court of Appeals to grant him a new trial on the ground of error in the instructions, and that since that Court's initial opinion ordered the cause remanded for entry of an acquittal, the Court was without power to modify its order so as to provide for a new trial. The Supreme Court rejected this argument, holding that when petitioner appealed from his conviction he opened up the whole case and subjected himself to the power of the appellate courts to do whatever justice requires, citing 28 U.S.C. 2106; Bryan v. United States, 338 U.S. 552; and United States v. Ball, 163 U.S. 662; and distinguishing Sapir v. United States, 348 U. S. 373. The Court held further

that the original order of the Court of Appeals was "entirely interlocutory and no mandate was ever issued thereon"; hence it was "subject to revision on rehearing" without violating the constitutional prohibition against double jeopardy.

Staff: Abbott M. Sellers (Tax Division). On the brief were Philip Elman (Solicitor General's Office) and Meyer Rothwacks and Richard B. Buhrman (Tax Division)

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I N D E X