Osborne

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

July 1, 1960

United States

DEPARTMENT OF JUSTICE

Vol. 8 No. 14

UNITED STATES ATTORNEYS

BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 8 July 1, 1960 No. 14

JOB WELL DONE

The Chief Postal Inspector has expressed his extreme pleasure at the successful prosecution of an important mail fraud case, and has conveyed the Postmaster General's pleasure with the outcome of the case which was handled by Assistant United States Attorney John F. Grady, Northern District of Illinois. The case, which involved mail fraud, aroused great interest in Chicago, and was tried by Mr. Grady a year ago, but resulted in a hung jury (one juror holding out for not guilty). The case was tried again recently with a successful conclusion.

The Legal Officer of the Norfolk Air Station has expressed appreciation for the courtesy extended and the results obtained by Assistant United States Attorney Harvey B. Cohen, Eastern District of Virginia, in a recent case involving the arrest of an enlisted man for reckless driving while on official business. Through Mr. Cohen's efforts the case was nolle prossed.

Assistant United States Attorney W. Wendell Stanton, Western District of Pennsylvania, has been commended by the Chief Postal Inspector, for his good work in the successful prosecution of a recent case involving mail fraud arising from the sale of knitting machines for work-at-home purposes. In conveying his appreciation for the successful outcome of the case, the Chief Postal Inspector stated that the prosecutions instituted in such cases have resulted in the virtual discontinuance of this type of fraud.

The Chief Counsel, IRS, has commended Assistant United States Attorney James B. Moses, Eastern District of Illinois, for his work in securing dismissal of a suit attempting to enjoin the Internal Revenue Service from exercising a levy. After filing of the suit by the taxpayer, Mr. Moses used such filing as a wedge to disclose the fact that taxpayer had $19,700 in cash and $4,100 in negotiable bonds secured in a strong box at his home. Mr. Moses' work resulted in the collection of $23,800.

The Chief Postal Inspector has commended United States Attorney Joseph S. Bambacus and Assistant United States Attorney Sam D. Eggleston, Jr., Eastern District of Virginia, for their very creditable work in bringing to a successful conclusion two cases involving the postal obscenity statute. The Chief Inspector stated that Mr. Eggleston, to whom the cases were assigned, proved exceptionally adept at preparing for the trials, and that his demeanor during the proceedings was outstanding.

The Regional Director, Railroad Retirement Board, has commended Assistant United States Attorney Jackson L. Kiser, Western District of Virginia, for his exceptional promptness in bringing cases to trial, and for the very effective results he has achieved. The Regional Director observed that it is very unusual to find cases disposed of, with an unbroken record of convictions, within less than a month from the time they are presented to the United States Attorney for consideration.

Assistant United States Attorney Lawrence Levine, Eastern District of New York, has been commended by the Associate General Counsel, Federal Aviation Agency, for his work in a matter of great concern to that agency. The matter involved obtaining certain Government property essential to the Air Traffic Safety Program from a bankrupt contractor. Through the prompt efforts of Mr. Levine, a court order was obtained on the same day the Federal Aviation Agency made its request. The property was removed soon thereafter, and harmful delay to important programs fortunately was avoided.

The Assistant Attorney General, Criminal Division, has commended United States Attorney Cornelius W. Wickersham, Jr., Eastern District of New York, on his victory in a recent FHA fraud case, and has expressed appreciation for Mr. Wickersham's efforts and those of his office. The Assistant Attorney General pointed out that the prosecution undoubtedly served as a warning to others who might be inclined to defraud the Federal Housing Administration.

United States Attorney William B. West, III, and Assistant United States Attorneys Clayton Bray and William L. Hughes, Jr., Northern District of Texas, have been commended by the Assistant Attorney General, Criminal Division, for their thorough and able preparation and trial of a recent case. The commendation stated that such devotion to duty reflects credit on Mr. West's office and is most gratifying to the Department of Justice.

The Chief Postal Inspector has expressed his appreciation for the fine handling of a vending machine mail fraud case by United States Attorney Kenneth Bergquist and Assistant United States Attorney Scott W. Reed, District of Idaho. One defendant was found guilty by jury verdict and another entered a plea of nolo contendere to a scheme which swindled victims in the States of Idaho, Washington and Wyoming of more than $50,000. The Chief Inspector observed that the successful prosecution will be of material importance in breaking up this type of racket in the Northwest.

The General Manager of a better business bureau branch office has expressed thanks to Assistant United States Attorney Gideon Cashman, Southern District of New York, for his fine cooperation in bringing about a successful conclusion of a recent case.

United States Attorney William B. West, III, and Assistant United States Attorney William N. Hamilton, Northern District of Texas, have received congratulations from the General Counsel, SEC, on their successful prosecution of a recent case. The letter stated that Messrs. West and Hamilton willingly devoted many hours of overtime, including week-ends and holidays, for almost three weeks to this matter; that the results achieved reflect the superior preparation and presentation made in the prosecution; and that the Commission greatly appreciates the excellent cooperation which Mr. West has consistently demonstrated in the prosecution of the cases which the Commission has referred to his office.

The Acting Attorney in Charge, General Counsel's Office, Department of Agriculture, has expressed pleasure and satisfaction with the results of the conference held with Assistant United States Attorney George R. Sewak, Western District of Pennsylvania, in connection with pending FHA claims cases. The letter expressed great appreciation for the attention that Mr. Sewak has given and is giving to such cases, and stated that he is doing an excellent job.

The General Counsel, SEC, has expressed sincere gratitude to Assistant United States Attorneys John Lankenau and Anthony R. Palermo, Southern District of New York, for their tireless efforts and most effective presentation of a recent case. These Assistants were also commended by the District Postal Inspector in Charge, for their efficient work in connection with the prosecution of a recent fraud case. The case was actively investigated by postal inspectors over a three year period, and the United States Attorney's office was actively engaged in such investigation for about two years. The Inspector's letter stated that Messrs. Lankenau and Palermo worked very late many nights and over a considerable number of week-ends preparing the evidence for the grand jury and for the trial, which resulted in a conviction of seven of the defendants and two firms. The Postal Inspector observed that the ramifications of the stock manipulations carried on by the defendants were highly involved, that Messrs. Lankenau and Palermo did an outstanding job in presenting the evidence in court in such a manner that it could be fully understood by a jury, and that the evidence of their ability is the successful outcome of the prosecution.

* * *

PERFORMANCE OF DUTY

United States Attorney Donald G. Brotzman, District of Colorado, has reported a recent example of fine cooperation on the part of United States Attorney James A. Borland, District of New Mexico, in collecting certain funds to apply on a judgment entered in Colorado.

A judgment was entered against an individual in Colorado in 1955. Due to a recent investigation it was ascertained that the judgment debtor had sold real estate in New Mexico and that a realtor in that state had a deposit belonging to the judgment debtor of approximately $8,900.

Mr. Borland moved quickly and ably to obtain a writ of garnishment, and collected the money to be applied on the unsatisfied portion of the judgment.

An example of excellent cooperation on the part of Assistant United States Attorney Norman Black, Southern District of Texas, has

been reported by Assistant United States Attorney Robert F. Nunez, Southern District of Florida. Mr. Nunez stated that in one of the most significant cases pending in his district, in which it was highly important that the discovery proceedings be correct the first time, Mr. Black rendered prompt and excellent cooperation, and did everything precisely as the Southern District of Florida desired.

* * *

OFFICE OF ALIEN PROPERTY

Assistant Attorney General Dallas S. Townsend

Ownership Rights in Trademark Exist Only as Appurtenance to Manufacturing or Marketing Business in United States. Custodian Acquired No Property Rights in Trademark Signifying German-made Product Not Associated With Exclusive Distributorship or Sales Business in United States. Rogers, et al. v. Ercona Camera Corp and Steelmasters, Inc. (C.A. D.C., March 17, 1960). Appellees are the exclusive distributors of an East German concern manufacturing goods bearing the ZEISS trademark. The Attorney General had seized the ZEISS mark and, as alleged owner thereof, had barred the importation of East German goods bearing that mark. Appellees sought a declaratory judgment that the Attorney General acquired no rights of ownership in the ZEISS mark as a result of his seizure and also sought an injunction enjoining the Attorney General, the Secretary of the Treasury, and the Commissioner of Customs from interfering with appellees' importation of such goods.

The ZEISS mark had originally been registered in the United States in 1912 by Zeiss, Jena, a German manufacturer. Zeiss, Jena, sold its products in the United States to various wholesalers and retailers, although most of its sales were made through a New York corporation which it controlled. The mark and the stock of the New York corporation were seized in World War I by the Custodian, and the mark thereafter was assigned by the United States to the Chemical Foundation, and in 1950 and 1951 the mark was reassigned to the Attorney General and the registration thereof renewed by the Attorney General in 1952. In 1925 Zeiss, Jena, formed a new corporation in New York (Carl Zeiss, Incorporated), all of whose stock was owned by Zeiss, Jena. The New York Zeiss, while not the exclusive distributor or sales agent for Zeiss, Jena, was the conduit through which almost all of the ZEISS-marked products were marketed in the United States. In 1942 the Custodian seized all the capital stock of Zeiss, New York, and in 1953 seized all the interest of Zeiss, Jena, and its successors in the goodwill of Zeiss, New York, and the trademarks and tradenames appurtenant to such business.

In 1945 when Jena, Germany, was occupied by the Soviet forces the Zeiss plants and business were sequestered. In 1948 the Soviet confiscated the plants, and they became "Property of the People." Shortly before the occupation 126 key employees of Zeiss, Jena, were moved from the Eastern Zone of Germany to West Germany and there established plants for the manufacture and sale of ZEISS-marked products. After the confiscation, the West Zeiss management registered the domicile of Zeiss, Jena, in West Germany. Both East and West German plants maintained business relations until 1950 and products from both plants were imported with the Attorney General's consent into the United States. Such consent, to a limited extent, was granted to appellees with respect to East Zeiss goods until August 1955; thereafter only West German products were permitted to be imported.

The appellees' suit did not place in issue any contention that they or East Zeiss were the true owners of the ZEISS mark. It was contended, however, that the Attorney General was not the owner because he acquired no property by his seizure and therefore could not, under the Trade mark Act of 1946 or the Tariff Act of 1930, bar the importation of goods bearing the ZEISS mark.

The Court held that ownership rights in a trademark can exist only as an appurtenance to a manufacturing or marketing business conducted in the United States. The ZEISS trademark had never had a business appurtenant to it in the United States to which the Attorney General succeeded by his seizure because neither Zeiss, New York, nor the World War I sales agency was an exclusive distributor. In the absence of an appurtenant business, the trademark was a naked one or one in gross to which no property rights attached. The Court also held that, although Section 7(c) of the Trading with the Enemy Act specifically authorized the Custodian to seize trademarks belonging to an enemy, it did not intend thereby to exempt the Custodian from principles of trademark law so as to authorize the seizure of a naked trademark. The judgment of the District Court declaring that the Attorney General acquired no ownership rights in the ZEISS mark and enjoining any embargo on the importation and sale in the United States of ZEISS-marked products from East Germany was affirmed.

Staff: The appeal was argued by Irving Jaffe; on the brief were George B. Searls, Irwin A. Seibel, and Paul J. Spielberg.

* * *

ANTITRUST DIVISION

Acting Assistant Attorney General Robert A. Bicks

SHERMAN ACT

Price Fixing - Prescription Drugs; Complaint Filed Under Section 1. United States v. Arizona Pharmaceutical Association, et al., (D. Arizona). On June 21, 1960, a complaint was filed against three associations of pharmacists and pharmacies in Arizona. They are charged with a combination and conspiracy in violation of Section 1 of the Sherman Act, with respect to sales of prescription drugs in Arizona. The terms alleged are that they agreed (a) to establish and maintain uniform prices for prescription drugs; (b) to cause, urge, and induce pharmacists and pharmacies in Arizona to determine and fix uniform consumer prices for prescription drugs by use of an arbitrary pricing schedule; and (c) to devise procedures to ascertain the names of pharmacists and pharmacies selling at prices other than those listed in the schedule, and to make contacts with such pharmacists and pharmacies to induce them to use that schedule.

Sales of prescription drugs to consumers in Arizona are alleged to exceed $10,000,000 annually, over one-half of which sales are made by members of the defendant associations. Note that prescription drugs are sold to consumers without names or trade names of manufacturers, hence, so-called fair-trade laws are inapplicable to such sales.

The prayer seeks injunctive relief, including a prohibition against each defendant association from advocating the use of any uniform mark-up or schedule for computing prices on prescription drugs. It also seeks such orders by the court with respect to the membership of each defendant association as are necessary to assure that members abide by the terms of any judgment entered herein.

Staff: George H. Haddock, Stanley E. Disney and Malcolm F. Knight (Antitrust Division)

Price Fixing - Corrugated Culverts; Indictment and Complaint Filed Under Section 1. United States v. Armco Drainage & Metal Products, Inc., et al. (D. N. Dakota). On June 17, 1960, a grand jury returned a two-count indictment against defendant, and two of its officials. In the first count it is alleged that the defendants and three South Dakota fabricators of corrugated culverts, who are named as co-conspirators, combined and conspired in violation of Section 1 of the Sherman Act. The terms of the alleged conspiracy are: (1) to charge uniform prices for corrugated culverts; and (2) to allocate among themselves sales quotas for corrugated culverts; and (3) to allocate among themselves customers for corrugated culverts. The second count contains similar allegations with respect to activities in North Dakota, and it names three North Dakota fabricators of corrugated culverts as co-conspirators.

Armco Drainage & Metal Products, Inc., is a subsidiary of a large, integrated steel corporation. It is the largest culvert manufacturer in the

United States, with a nationwide business in that product exceeding $30,000,000 annually. The commerce in culverts in South and North Dakota totals about $3,000,000 per year, more than half of which is controlled by Armco.

Simultaneously with the indictment, a companion civil complaint was filed against Armco Drainage & Metal Products, Inc. Injunctive relief prayed for includes prohibitions against the illegal practices alleged, and a prohibition from belonging to, participating in, or contributing anything of value to any trade association of culvert fabricators.

Staff: Earl A. Jinkinson, Bertram M. Long, Francis C. Hoyt and Joseph E. Paige.
(Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General George Cochran Doub

SUPREME COURT

INTERSTATE COMMERCE COMMISSION

Determination Made by Interstate Commerce Commission in Proceeding on Referral from Court of Claims Is "Order" of Commission Within Meaning of 28 U.S.C. 1336, and Reviewable Only by District Court. Pennsylvania Railroad Co. v. United States (No. 451, October Term 1959, June 13, 1960). In an action commenced in the Court of Claims by the Pennsylvania Railroad Company to recover certain transportation charges on materials shipped for the Government, a question as to the reasonableness of the rates was referred to the Interstate Commerce Commission in accordance with the decision in United States v. Western Pacific R. Co., 352 U.S. 59. On the Commission's report, favorable in major part to the United States, the Government moved for entry of judgment. The Railroad opposed, maintaining that such determination was an "order" within the meaning of 28 U.S.C. 1336, and thus independently reviewable in a district court. Thereupon the Railroad filed an action in the Eastern District of Pennsylvania to enjoin and set aside the Commission's "order." The Government argued that such determinations were merely ancillary to the pending litigation and were not reviewable "orders" under the statute. The Court of Claims denied the Railroad's motion for a stay and entered judgment on the Government's motion.

The Supreme Court granted certiorari, with the Government acquiescing because of confusion existing on this question and the increased number of referrals since the decision in the Western Pacific case, supra. In its brief on the merits the Government agreed with the carrier's position. The Supreme Court reversed the Court of Claims, holding that (1) the Commission's determination is a reviewable "order" under 28 U.S.C. 1336 for the reason that it determined a "right or obligation" and carried "legal consequences"; (2) the Court of Claims lacks basic jurisdiction to review Commission orders; and (3) the order is reviewable exclusively in district court by a one-judge rather than a three-judge district court, since it is essentially one "for the payment of money", which orders are exempt by statute from the three-judge procedure.

Although the Government desired and sought a somewhat broader decision encompassing the possibility of review by the referring court where the initial litigation was in a district court and a waiver of the venue provisions of 28 U.S.C. 1398 could be found, the Court held that these questions were not properly presented by this case. However, the decision is sufficient to resolve questions in currently pending district court suits concerning the character of a Commission determination on referral as a reviewable "order" under the statute.

Staff: Assistant Attorney General George Cochran Doub and Kathryn H. Baldwin (Civil Division)

COURTS OF APPEALS

ADMIRALTY

Longshoreman's Act; Deputy Commissioner Must Hold Hearing on Application of Act When Presented With Informal "Claim".

1. Atlantic & Gulf Stevedores, Inc. v. Donovan (C.A. 5, January 18, 1960, modified May 27, 1960). In 1957, plaintiff, an employer of longshoremen, paid compensation to one of its injured employees under the Longshoreman's and Harbor Workers' Compensation Act, 33 U.S.C. 901, et seq. The same employee subsequently filed a claim under the Louisiana Workmen's Compensation Act to recover additional compensation for the same injury. Plaintiff then filed suit in federal court seeking: (1) a declaration that the Federal Longshoreman's Compensation Act was claimant's exclusive remedy and, alternatively, (2) a mandatory injunction directing the Deputy Commissioner to determine the extent of the employer's liability under that Act. The district court sustained the Deputy Commissioner's motion to dismiss for failure to state a claim on which relief could be granted and the lack of jurisdiction to hear and determine issues prior to administrative adjudication.

On appeal, the Fifth Circuit in its original opinion, reversed, holding that (1) the Longshoreman's Act "by its terms prescribed that it should be exclusive remedy" if the injury in this case "occurred upon the navigable waters of the United States," and (2) "the Longshoreman's Act imposes the duty on the Deputy Commissioner to hold a suitable hearing to pass upon and adjudicate the contentions now made by the employer and properly before him for decision."

The Government petitioned for a rehearing on the ground that the Court's ruling required the Deputy Commissioner to hear and adjudicate a matter in which no claim had been filed. The majority of the panel modified the original opinion to hold that in this case a letter from the claimant's attorney to the Deputy Commissioner, requesting further compensation, constituted a "claim" within the meaning of the Act although it was not in the form prescribed by the Department of Labor. However, the Court expressly reserved the question of whether the Deputy Commissioner was under a duty to hold a hearing upon application of an interested party where no "claim" had been filed. Judge Brown, who wrote the original opinion, dissented from the holding that the Deputy Commissioner's duty to hold a hearing depended upon the filing of a "claim". He reiterated his position that a claim whether formal or informal is of little significance to the Commissioner's duty to adjudicate when faced with a demand by an interested party for a determination of his rights under the Act.

2. Employers Liability Assurance Corp. v. Donovan (C.A. 5, May 27, 1960). In a companion case to Atlantic & Gulf Stevedores, plaintiff, an insurance company, brought an action to force the Deputy Commissioner to hold a hearing on the case of a workman who had filed multiple actions

for the same injury in federal and state courts. The district court dismissed the complaint against both the Deputy Commissioner and the workman who had been joined as a defendant by plaintiff in an attempt to halt the multiplicity of litigation.

On appeal, the Fifth Circuit affirmed. Applying the rationale of Atlantic & Gulf Stevedores, the Court found that in this case the Deputy Commissioner had never been presented with a "claim" within the meaning of the Act and, therefore, was under no mandatory obligation to hold a hearing. The Court refused to consider the further question of whether the Deputy Commissioner had abused his discretion by failing to invoke the statutory provisions authorizing hearings and appropriate action by the Deputy even though no "claim" had been filed.

Staff: United States Attorney M. Hepburn Many and
Assistant United States Attorney Lloyd C. Melanson
(E.D. La.)

CIVIL SERVICE

Charges of Falsification of Records and Disclosure of Confidential Information Not "Misconduct" or "Purely Administrative Nature" Under Applicable Regulations. Whiting v. Campbell (C.A. 5, March 14, 1960, rehearing denied, April 13, 1960). Plaintiff was removed from her position as an Internal Revenue Agent on the basis of a number of charges ranging from being a "disturbing element in the office" to "falsification of records." After exhausting all administrative remedies, she filed suit in the district court to test the validity of her removal. The district court granted summary judgment for the Government.

On appeal, plaintiff argued that her discharge was not in accordance with the applicable regulations. Under these regulations, a separate procedure was required for "purely administrative" misconduct on the one hand, and complaints of a more serious nature on the other. Plaintiff contended that the charges against her of falsification of records and disclosure of confidential information were not "purely administrative conduct" and, as such, should not have been investigated and reviewed by her immediate superior. The Court of Appeals agreed and reversed, holding that there were serious charges and as such, the employee was entitled to impartial investigation to insure protection from unjustified dismissal.

Staff: United States Attorney W. B. West III and
Assistant United States Attorney William N. Hamilton
(N.D. Texas)

GOVERNMENT CONTRACTS

Government Not Liable to Its Contractor for Delay Caused by Labor Dispute. Fritz-Rumer-Cooke Co. v. United States (C.A. 6, June 8, 1960). Plaintiff contracted with an agent of the AEC to remove certain railroad tracks from an area surrounding a gaseous diffusion plant. The contract

required plaintiff to complete the removal within one month. However, one week after work began, the plant was struck and plaintiff's employees refused to cross the picket line for two and one-half weeks before work was resumed. As a result, plaintiff did not complete the job until approximately thirty days beyond the original completion date. Although the Government excused this delay in performance by granting an extension of time, plaintiff sought to recover for damages allegedly sustained as a result of the interruption of its work due to the strike.

Plaintiff alleged that the Government entered into the contract in question with the actual or constructive knowledge that a strike was imminent. In these circumstances, plaintiff argued, the Government, in choosing to award the contract, impliedly warranted to provide an available job site for the performance of that contract. The district court found for the Government and, on appeal, the Sixth Circuit affirmed.

The Court of Appeals reasoned that plaintiff's inability to complete the job without interruption was not due to any act or omission on the part of the Government or its agents. Rather, the Court pointed out, it was due solely to the refusal of the contractor's employees to cross the picket line, a matter beyond the control of the Government. Therefore, since this did not amount to a legal impossibility excusing performance and the contract contained no provision protecting plaintiff against delay caused by labor disputes, the contractor could not recover from the Government.

Staff: United States Attorney Hugh K. Martin and
Assistant United States Attorney Thomas S. Schattenfield
(S.D. Ohio)

NATIONAL BANKING ACT

Comptroller's Decision Authorizing Branch of National Bank Stayed by Preliminary Injunction; State Banks Have Standing and Suit Is Not Premature. Gidney v. Commercial State Bank of Roseville, et al. (C.A. D.C., May 12, 1960). Plaintiffs, two Michigan State banks, filed objections to an application for a branch office submitted to the Comptroller of the Currency by a national bank. A hearing was granted, but before it was held plaintiffs requested the Comptroller to give them sufficient notice of his decision prior to issuance of the certificate so that they could protect their rights if necessary. The Comptroller informed plaintiffs that it was not his policy to give advance notice of his decision. Whereupon plaintiffs secured an ex parte order restraining defendant and his agents for 10 days from issuing the certificate. The Comptroller then informed plaintiffs that he would not make any determination while the restraining order was outstanding.

Plaintiffs moved for a preliminary injunction in the district court to restrain the Comptroller from issuing the certificate "until such time as the cause is finally determined." The Government argued that the suit was premature and that plaintiffs were without standing

to sue. The district court granted the preliminary injunction. The court held that plaintiffs' suit was not premature because, once the certificate is issued, plaintiffs would be without an adequate remedy to test the Comptroller's decision. The court further found that plaintiffs had standing because they were threatened with irreparable and immediate damage.

On appeal the Government argued that (1) the complaint should have been dismissed because the court could not anticipate an administrative decision or interfere in its process; (2) plaintiffs would be able to challenge any adverse decision of the Comptroller by an action for declaratory judgment and mandatory injunction; (3) plaintiffs' legal complaints to the establishing of the branch were without merit; and (4) neither the National Banking Act nor the Administrative Procedure Act gives plaintiffs standing or authorizes judicial review of the Comptroller's decision. However, the Court of Appeals affirmed per curiam, incorporating by reference and with approval, the opinion of the district court.

Staff: John G. Laughlin, Jr. (Civil Division)

SOCIAL SECURITY ACT

District Court's Scope of Review Governed by Substantial Evidence Rather Than State Law. Gainey v. Flemming (C.A. 10, May 13, 1960). Plaintiffs claimed benefits under the Social Security Act on the grounds that they were surviving children of the decedent wage earner. A hearing was held before a referee who ruled that plaintiffs were not "surviving children" within the meaning of the statute because, at the time of their birth, the wage earner had not been legally divorced from his first wife (although he had purported to marry plaintiffs' mother). Plaintiffs instituted suit in district court to review that determination. On cross motions for summary judgment the district court upheld the referee's findings.

On appeal plaintiffs argued (1) the referee's findings were not supported by substantial evidence; (2) the district court should have examined the agency determination in the light of Colorado law and its presumption that a second marriage is valid; and (3) failure to invoke Colorado law and its presumption constituted a violation of plaintiffs' right to due process.

The Court of Appeals affirmed holding that the district court's scope of review was governed by the substantial evidence rule and not state law. However, the Court went on to point out that the referee impliedly recognized the presumption under Colorado law but found in effect that it was not sufficient to overcome other evidence that the wage earner had not divorced his first wife.

Staff: United States Attorney Donald G. Brotzman and Assistant United States Attorney Jack K. Anderson (D. Colo.)

DISTRICT COURTS

ADMIRALTY

Charter Parties; Unexercised Option in One Charter Does Not Foreclose Negotiation of Additional Charter on Independent Terms. Southeastern Oil of Florida, Inc. v. United States (S.D. Fla., May 10, 1960) (2 cases). These suits sought additional payments of charter hire under Military Sea Transportation charters. Libelant alleged that it executed the charters in question under the mistaken impression that the charter rates specified therein represented an average of certain similar MSTS charter rates, such averaging having been performed by MSTS in the exercise of option provisions contained in previous, unrelated charters of the same vessel. The Government, however, successfully contended that the charter rates involved had been negotiated by the parties without reference to the previous charters and that the option provisions of such previous charters had not been exercised. The Court found that libelant's mistakes, if any, were unilateral and in both cases also agreed with the Government that the suits were time barred, the breaches, if any, having occurred more than two years prior to the filing of the libels.

Staff: Carl C. Davis and Alan Raywid (Civil Division)

Administrative Law; Injunctive Relief Unavailable to Test Jurisdiction of Administrative Hearing. McDevitt v. Gunn, et al. (E.D. Pa., May 11, 1960). Plaintiff, licensed by the Coast Guard to act as master of certain tugboats, brought this suit to enjoin officers of the Coast Guard from holding a hearing to determine whether plaintiff's license should be suspended or revoked because of alleged acts of negligence. Plaintiff contended that at the time of the alleged negligent acts, he was not acting under authority of his license and that the Coast Guard, therefore, lacked authority to proceed with the hearing. Defendant's motion for summary judgment was granted, the Court holding that plaintiff's action was premature because he had not exhausted his administrative remedies, that the Coast Guard has the power to determine its own jurisdiction in the first instance, and that plaintiff was acting under authority of his license at the time the acts of negligence allegedly were committed. Plaintiff's motion for rehearing was denied.

Staff: United States Attorney Walter E. Alessandroni and Assistant United States Attorney Richard Reifsnyder (E.D. Pa.); Anthony W. Gross and Thomas P. Griesa (Civil Division)

Destruction of Oyster Beds; Authorized Naval Activities Do Not Constitute Unlawful Taking Under Fifth Amendment. Blake, et al. v. United States (E.D. Va., May 17, 1960) (3 cases). Libelants, pursuant to Virginia law, were the lessees of oyster grounds in the York River, the boundaries of the leaseholds having been marked by stakes imbedded

in the bottom of the stream. Finding that libelants had erected the boundary stakes in violation of 33 U.S.C. 403, which prohibits the building in navigable waters of wharves, piers * * * or other structures without prior approval of the Secretary of the Army, the Court further found that the Department of the Navy had properly delineated a portion of the York River as a Naval Minesweeping Practice Area and a Naval Drill Minefield Area. The area in question included varying sections of libelants' leaseholds.

The establishment of the minesweeping and minefield areas had been made by the Secretary of the Army after proper notice and opportunity for hearing, following which the boundaries of such areas and the prohibition of structures therein had been published in the Code of Federal Regulations. Although the Court agreed that libelants had "private property" in the oyster grounds and markers within the meaning of the Fifth Amendment, it nevertheless found the Navy's actions to have been a proper exercise of the Government's dominant power over navigation. United States v. Commodore Park, 324 U.S. 386. While libelants vigorously contested that the Navy's actions were not "in aid of navigation" and therefore not protected by the Government's rights under the commerce clause, the Court disagreed, citing numerous cases to the effect that the governmental activities were proper, even though purposes other than navigation would be served. The Court refused to go behind the published announcement of the Secretary of the Army that the areas in question had been established pursuant to 33 U.S.C. 1, 3, which invoke the benefit of navigation as a purpose. Accordingly, a final decree in favor of the Government was entered.

Staff: William C. Baker and Thomas P. Griesa
(Civil Division)

TORT CLAIMS ACT

Sonic Boom; Failure to Prove Aircraft Operated by Government Employees. Rice v. United States (S.D. Calif., June 1, 1960). Plaintiff filed suit in the district court for damages to her home allegedly resulting from the "sonic boom", or shock wave, created by the passage of the sound barrier by a jet aircraft flying in the immediate vicinity. The evidence indicated that private as well as Government jet aircraft had been operating in the area for some time prior to the filing of the complaint. At trial, the issues were separated under Rule 42(b) and the Court found that, assuming the plaintiff's damage was in fact caused by the "sonic boom", she had failed to prove by a preponderance of the evidence that such vibration was produced by aircraft operated by Government employees acting within the scope of their employment.

Staff: United States Attorney Laughlin E. Waters and
Assistant United States Attorney Richard Levine
(S.D. Calif.)

Statute of Limitations; Disability Provision of 28 U.S.C. 2401(a) Does Not Apply to Tort Claims Suits. Morton v. United States (E.D. Ill., May 25, 1960). Plaintiff filed suit on behalf of her daughter for injuries sustained by the child more than two years before the action was commenced. The Government moved to dismiss on the ground that she was absolutely barred by the two-year provision of 28 U.S.C. 2401(b). The District Court granted the Government's motion, holding that while the daughter would be disabled from bringing suit within the meaning of subparagraph (a) until she reached majority, that provision had no application to the tort claim limitations period set forth in subparagraph (b).

Staff: United States Attorney C. M. Raemer and
Assistant United States Attorney James B. Moses
(E.D. Ill.)

* * *

CIVIL RIGHTS DIVISION

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

Civil Rights Commission; Rules of Procedure; Civil Rights Act of 1957. Hannah v. Larche, No. 549; Hannah v. Slawson, No. 550, (U.S. Sup. Ct., June 20, 1960). In July 1959 the Civil Rights Commission scheduled a hearing in Shreveport, Louisiana, under authority of 42 U.S.C. 1975c(a)(1), section 104(a)(1) of the Civil Rights Act of 1957, to investigate written allegations of deprivations of the right to vote because of race or color. Registrars of certain parishes, subpoenaed to appear, requested names of complainants and copies of affidavits submitted by complainants. Upon denial of this request the registrars and certain private citizens sought to enjoin the Commission from holding the hearing, alleging that the Commission's Rules of Procedure were unconstitutional in not requiring disclosure of the identity of complainants and not allowing cross-examination of witnesses. After the District Court for the Western District of Louisiana had issued a temporary restraining order, a three-judge court held that, while the 1957 Act was appropriate legislation under the Fourteenth and Fifteenth Amendments, and Article I of the Constitution, the rules and procedures of the Commission were not authorized by Congress and therefore invlaid, and it enjoined the holding of further hearings under the existing rules.

The Supreme Court, on direct appeal in No. 549 and on certiorari in No. 550, reversed and remanded both cases. The Court held (1) that the rules of procedure adopted by the Commission--based on the "fair play" rules used by the House in conducting investigations--were authorized by Congress and (2) that these rules were not violative of the Due Process clause of the Fifth Amendment. As a purely investigative body the Commission is not bound, said the Court, by the standards required in adjudicatory proceedings, such as those involved in Greene v. McElroy, 360 U.S. 474, upon which the lower court had relied heavily.

In a concurring opinion Mr. Justice Frankfurter emphasized his view of "the authoritative relevance of In re Groban, 352 U.S. 330, and Anonymous v. Baker, 360 U.S. 287" to the instant case, pointing out that the investigations under attack in these cases--probe of a state fire marshal into the origin of a fire and an inquiry into alleged improper practices at the bar--were much more likely to result in prosecution of witnesses than the Commission proceedings, but were upheld by the Court because their objectives were general and investigatory rather than adjudicatory of wrong-doing. Mr. Justice Harlan and Mr. Justice Clark concurred on the same basis. Mr. Justice Douglas and Mr. Justice Black wrote a lengthy dissent, holding the procedure unconstitutional and expressing the view

that, by contrast to legislative committees, the Civil Rights Commission is not an arm of Congress but an arm of the Executive. Under the dissenters' view the Executive Branch may deny confrontation and cross-examination to persons accused of crime only in grand jury proceedings.

Staff: Deputy Attorney General Lawrence E. Walsh; Harold H. Greene, David Rubin (Civil Rights Division).

Voting; Refusal to Register Applicants on Account of Race or Color; Suit Against State; Civil Rights Act of 1957; Civil Rights Act of 1960. United States v. Alabama (No. 398, U.S. Sup. Ct., May 16, 1960). In February 1959 the United States brought an action for declaratory and injunctive relief against the Board of Registrars of Macon County, Alabama, and two individual registrars, under the Civil Rights Act of 1957 (42 U.S.C. 1971(c)). Subsequently, the complaint was amended to include the State of Alabama as a party defendant. Respondents were charged with depriving Negroes of the right to vote by racially discriminatory practices.

Because the registrars had purported to resign their offices during a controversy with the Civil Rights Commission over production of voting records, the District Court for the Middle District of Alabama dismissed the complaint as to them, holding that the resignations were effective even for purposes of federal law. The Court further held that the Board of Registrars was not a suable legal entity, and that the Civil Rights Act of 1957 did not authorize suits against the State. (171 F. Supp. 720. United States Attorneys Bulletin, April 10, 1959, page 207). The Court of Appeals for the Fifth Circuit affirmed in all respects (267 F. 2d 808), and the Supreme Court granted certiorari. (361 U.S. 893). The case was argued May 2, 1960 by the Solicitor General.

On May 6, 1960, the Civil Rights Act of 1960 was signed into law. Section 601(b) of the Act amends 42 U.S.C. 1971(c) by expressly allowing actions such as the one here involved to be brought against a State. For this reason the Supreme Court held, citing American Foundries v. Tri-City Council, 257 U.S. 184 and related cases, that the District Court had jurisdiction to entertain the action against the State. The Court expressed no view on any of the other issues of the case, it vacated the judgments, and remanded the case to the District Court for reinstatement against the State of Alabama.

Staff: Solicitor General J. Lee Rankin; Harold H. Greene, D. Robert Own, David Rubin (Civil Rights Division).

* * *

CRIMINAL DIVISION

Assistant Attorney General Malcolm Richard Wilkey

BRIBERY

Conspiracy; Offenses Committed Abroad. United States v. James W. Harlow et al. (W.D. Texas). The indictment in this case included eight counts charging the individual defendants with bribery, and one count charging all four defendants with conspiracy to defraud the United States. Trial began in San Antonio, Texas, on June 6, 1960, and was concluded on June 16, 1960, with a verdict of guilty as to all defendants on all counts.

This is one of the few cases that have been prosecuted in the United States for offenses committed abroad. Venue of the substantive counts was laid under the "found" provision of 18 U.S.C. 3238. The investigation of the case was conducted principally in Europe by Army C.I.D. agents and revealed that purchasing officials of the European Exchange System (similar to the Army Post Exchange) were soliciting and accepting bribes to influence their decisions in connection with the award of contracts to European vendors. The investigation spanned a period of several years and indicated that the bribe payments were deposited in anonymous accounts identified only by number in Swiss banks. Efforts to examine the bank deposits were defeated because of Swiss bank secrecy laws. However, two of the vendors became cooperative and their testimony indicates that they alone paid in excess of $235,000 in bribes.

The investigation and prosecution of the case was difficult and expensive. It was necessary to bring many witnesses from Europe to San Antonio, Texas. However, it demonstrates the constant vigilance of the Government to insure that its employees remain true to their trust and that if this trust is violated, even by acts committed abroad, the offenders will eventually be apprehended and brought to justice.

Staff: United States Attorney Russell B. Wine (W.D. Texas); William A. Paisley and J. F. Cunningham (Criminal Division)

AIRCRAFT BOMB HOAX

False Reports of Attempt to Bomb Aircraft; Judicial Definition of "False Information." United States v. Raymond J. Otten (N.D. Ill.). On May 27, 1960, the Court denied defendant's motion to dismiss a criminal information charging him with violation of the Bomb Hoax Act, 18 U.S.C. 35. On May 31 defendant pleaded guilty and was sentenced to two years' probation.

The specific issue facing the Court was whether remarks by defendant which did not specifically state that an attempt was to be made to bomb or otherwise damage or destroy the aircraft, but from which that conclusion would naturally be inferred, constituted the conveyance of "false information" as prohibited by the statute.

As set forth in the bill of particulars, defendant, while waiting to board a plane, had stated to a fellow passenger that "The mad bomber is aboard," and had made other remarks to the effect that the tail and the back of the plane would be quite shaky, that there might be a bomb on the flight, and that he hoped the plane wasn't bombed. His motion to dismiss on the ground that the information as supplemented by the bill of particulars did not state an offense was, in effect, based on the contention that "false information" and "false statements" are synonymous. He argued that only his remark pertaining to the "mad bomber" was a direct statement of fact, and that the fact stated was not of the type prohibited by the statute since he did not state that "the mad bomber" would attempt to destroy the plane. Therefore he contended that he could not be said to have conveyed false information.

The Government, on the other hand, successfully argued that "false information" is of a different and broader order than "false statement," that it consists of a false impression created in the mind of the person to whom the information is conveyed, and that false information could even be conveyed by the uttering of true statements. On this basis, it contended that it lay within the province of a jury to find that defendant's statements conveyed false information by putting into the minds of those that heard them the false impression that an attempt would be made to destroy the plane. To sustain its position, it relied upon state civil fraud cases; upon Silverman v. United States, 213 F. 2d 405, and Linden v. United States, 254 F. 2d 560, two mail fraud cases in which the false representation was conveyed by means of true statements; and United States v. Prochaska, 222 F. 2d 1, an extortion case, which held that language can be said to convey a threat if, within the context in which it is used, that is its reasonable connotation.

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

FRAUD

False Statement Re Post Exchange Activities Within Purview of 18 U.S.C. 1001. United States v. Stanley Newell Howell (N.D. Calif., May 23, 1960). Defendant was indicted at San Francisco in 5 counts for concealing by means of a scheme or device a material fact, to wit, the actual gross sales of the Bay Area Exchange, an Army Post Exchange, and in 5 additional counts for causing employees of the Exchange to file false schedules.

Howell's motion to dismiss the indictment on the ground that a Post Exchange was not such an agency of the United States that false statements made in relation to Post Exchange activities would support prosecution under Section 1001, was denied. The Court relied upon Daniels v. Chanute Air Force Base Exchange, 127 F. Supp. 920, and cases cited therein. It is believed that this may be the first direct holding that an Army Post Exchange is within the purview of Section 1001.

Staff: United States Attorney Laurence E. Dayton; Assistant United States Attorney John Kaplan (N.D. Calif.).

FRAUD

Irregularities in Civil Service Examinations for Post Office Positions (18 U.S.C. 371, 1001). United States v. Andrews, et al. (S.D. N.Y.). On April 4, 1960, fifty-four indictments were returned in connection with irregularities involved in the taking of civil service examinations for Post Office positions by persons other than the applicant. To date 38 of the 54 defendants have pleaded guilty to the charges. Trial of the remaining defendants will be held at an early date.

Staff: United States Attorney S. Hazard Gillespie, Jr.; Assistant United States Attorney Kevin Thomas Duffy (S.D. N.Y.).

FRAUD

FHA Matter. Kem Home Improvement Corporation (E.D. N.Y.). On June 2, 1960, twenty defendants in this case (previously reported in Bulletin, Vol. 8, No. 5, p. 140, dated February 26, 1960) were sentenced to periods ranging from three to eighteen months. In addition these defendants, with the exception of the President of the corporation and another highly placed official, were fined $1,000; the latter two were fined $2,000.

In perhaps one of the most flagrant FHA Title I frauds uncovered, over $1,000,000 in kickbacks were made to the home owners and the loans now in default and upon which the Government may have liability are already in excess of $900,000.

Staff: United States Attorney Cornelius W. Wickersham, Jr.; Assistant United States Attorney Francis Rhinow (E.D. N.Y.).

FRAUD

False Statements; Conspiracy. United States v. Charles Emil Kinsing and John F. Sherwood (W.D. Pa.). The trial of this case

(previously reported in Bulletin dated February 26, 1960, Vol. 8, No. 5, p. 140) resulted in the conviction of the defendants on all counts of the indictment. They were each sentenced to imprisonment for six months, and were each fined $500, plus costs.

The case arose out of the activities of a representative of the Civil Aeronautics Administration in the negotiation of a contract for the removal of trees for a price of $1,490. Investigation disclosed that only a part of the trees were removed and that the persons actually performing the services received only $150.

Staff: United States Attorney Hubert I. Teitelbaum; Assistant United States Attorney John F. Potter (W.D. Pa.).

FEDERAL RESERVE ACT

Aiding and Abetting Misapplication; Conspiracy. United States v. John R. Hendrickson (S.D. Calif.). On April 11, 1960, defendant after being found guilty on all 26 counts of an indictment charging him with conspiracy and aiding and abetting a bank officer in the misapplication of bank funds of more than $3,500,000 (18 U.S.C. 371; 656, 2), received sentences aggregating 25 years. Since 1953, George Hewlett, cashier of the former Long Beach National Bank, had been giving Hendrickson cashier's checks, without any consideration, to be used by the defendant for investments in oil wells and to carry his many failing business enterprises. By fictitiously charging the bank's books with monies due from correspondent banks and clearing houses, Hewlett was able to deceive bank auditors and federal examiners over the years because of the time required for items to clear from one bank to another. When the offense was discovered, Hewlett committed suicide. Restitution to date is in the amount of $17,410.89. Defendant has filed motions with the Court attacking the sentencing procedure.

Staff: Assistant United States Attorney Bruce A. Bevin, Jr. (S.D. Calif.).

FEDERAL FOOD, DRUG, AND COSMETIC ACT

Substantial Prison Sentence Imposed On Peddler of Amphetamine Sulfate Tablets. United States v. Chester Menk (S.D. Ind.). Upon a plea of guilty to a three-count information under 21 U.S.C. 331(k) alleging the sale of dl-amphetamine sulfate tablets in unlabeled bottles to Food and Drug Inspectors, defendant was sentenced to serve two years and to pay a fine of $1,000, plus costs. The illicit sales of the prescription-type drug involved were made by defendant out of a highway truck stop and restaurant he owned and operated. This case results from a widespread and intensive investigation of the illegal practices of selling stimulating drugs, known as "pep pills" or "bennies," through

unauthorized outlets such as truck stops, gas stations, and highway restaurants. This Department and the Department of Health, Education, and Welfare have been giving these cases very close attention. It has been observed that sentences imposed under the Act for criminal violations, particularly those involving illicit sales of these dangerous drugs, have become increasingly severe. The two-year term imposed here is the heaviest sentence ever imposed by this District Court for a food and drug violation.

Staff: United States Attorney Don A. Tabbert;
Assistant United States Attorney James W. Bradford (S.D. Ind.).

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Burden of Proof in Suspension Cases; Effect of Invoking Fifth Amendment Re Communist Party Membership. Kimm v. Rosenberg (U.S. Supreme Court, June 13, 1960). Certiorari to review decision of Court of Appeals for Ninth Circuit upholding validity of deportation order (263 F. 2d 773). Affirmed.

The alien applied for suspension of deportation under the Immigration Act of 1917, as amended by the Internal Security Act of 1950. He was asked if he was a member of the Communist Party but refused to answer, claiming the Fifth Amendment privilege against self-incrimination. The Court of Appeals affirmed refusal of suspension on the ground that the alien had not met the statutory requirement of showing that he was not a member of or affiliated with the Communist Party. He urged that he had presented affirmative and uncontradicted evidence of his eligibility for suspension and that the burden of proof was on the Government to show his affiliations, if any, with the Party. The per curiam decision said, however, that such membership was an absolute disqualification under the statute which terminated the discretionary authority to grant suspension as to any alien who was deportable because of membership in the Communist Party. This alien offered no evidence on this point, although the regulations placed on him the burden of proof as to the statutory requirements precedent to the exercise of discretionary relief.

The decision stated that an applicant for suspension, which is a matter of discretion and of administrative grace, must upon the request of the Attorney General or his duly delegated agent, supply such information as is within his knowledge and has a direct bearing on his eligibility under the statute. The decision said that it did not pass upon the question whether the petitioner was justified in his personal refusal to answer but that this did not relieve him of the burden of establishing the authority of the Attorney General to exercise his discretion in the first place.

Four members of the Court dissented.

Staff: John F. Davis, Office of the Solicitor General, argued this case.

Formosa Held "Country" Within Meaning of Section 243 of Immigration and Nationality Act; Congressional Purpose in Enacting Statute. Rogers v. Cheng Fu Sheng and Lin Fu Mei (C.A.D.C., June 10, 1960). Appeal from decision that aliens were not properly ordered deported to Formosa (Taiwan) under section 243 of Immigration and Nationality Act, 8 U.S.C. 1253 (see Bulletins Vol. 7, No. 18, p. 532; No. 22, p. 623 and Vol. 8, No. 6, p. 176). Reversed.

The question here involved was whether Formosa is properly to be considered a "country" within the meaning of the deportation statute. The district court ruled that it was not, and enjoined deportation to Formosa on the ground that "the place to which deportation may be ordered . . . . is a country and not a particular location," and Formosa is neither a country itself nor part of any country, its status being "in limbo."

The Court of Appeals pointed out that the statute provides some nine places to which aliens may be deported and with one possible exception not here relevant, the place is described as a "country." Congress did not define that term, however, and it therefore must be given its ordinary meaning, consistent with the purposes of the legislation. Since Formosa is a well-defined geographical, social and political entity and since there is a government on Formosa which has undisputed control of the island, the Court felt that it is a "country" within the meaning and purposes of the statute. It said this construction comports with the Congressional purpose to reduce the number of undeportable aliens by increasing the number of places to which such persons may be sent. To hold otherwise would open to doubt the Attorney General's power to deport aliens to areas of the world where diplomatic status is unsettled.

The appellate court did not attribute such significance to language differences in the present and prior deportation statutes as to require the conclusion that such changes were intended to run counter to the Congressional purpose of tightening the deportation laws. The Court said further that since it concluded that the word "country" as used in section 243(a) is not limited to national sovereignties in the traditional diplomatic sense, the possibilities of foreign affairs embarrassment which the district court feared do not arise. Nor does this construction involve judicial intervention into political matters entrusted to the Executive and Legislative Branches.

Staff: Assistant United States Attorney Harry T. Alexander (Dist. Col.) United States Attorney Oliver Gasch, Assistant United States Attorneys Carl W. Belcher and Louis M. Kaplan on the brief.

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Contempt of Congress. William A. Price v. U.S.; Robert Shelton v. U.S.; Herman Liveright v. U.S.; Mary Knowles v. U.S.; Goldie E. Watson v. U.S.; Bernhard Deutch v. U.S.; Norton Anthony Russell v. U.S.; John T. Gojack v. U.S. (C.A.D.C.) In Liveright, Price, Shelton and Knowles the appellants were indicted under 2 U.S.C. 192 for refusing to answer questions before the Senate Internal Security Subcommittee; the other four were indicted under the same statute for refusing to answer questions before the House Un-American Activities Committee. In each of the hearings, at which appellants refused to answer certain questions, the subject matter involved aspects of Communist activity in various fields of endeavor in the United States. All of these cases were originally set for hearings en banc in 1958 but were held in abeyance pending the Supreme Court's decision in Barenblatt v. United States, 102 U.S. App. D. C. 217, 252 F. 2d 129, certiorari granted, 357 U.S. 929 (1958). After the Supreme Court affirmed Barenblatt's conviction (360 U.S. 109), the Circuit Court rescinded its order for en banc hearings and directed counsel in all eight cases to file memoranda with respect to the effect of the Supreme Court's opinion in Barenblatt. After receipt of the memoranda, Gojack and Shelton were heard by a panel of the Court of Appeals. Thereafter the Court ordered that the remaining six cases be set for argument before the same panel. The Court affirmed the convictions of Price, Shelton, Liveright, Deutch, Russell and Gojack. In Knowles and Watson, the Court reversed the convictions and remanded the cases with instructions to dismiss the indictments. In both of these cases the Court found that the subject of the inquiry was not made clear to the defendants as required by Watkins v. U.S., 354 U.S. 178, and Barenblatt v. U.S., supra.

Staff: Assistant United States Attorneys William Hitz and Doris H. Spangenburg (Dist. Col.)

Social Security Benefits; Congressional Power to Terminate Benefits Upon Deportation. Flemming, Secretary of Health, Education and Welfare v. Ephram Nestor (Sup. Ct., June 20, 1960). A 1954 amendment to the Social Security Act, §§ 202(n), 42 U.S.C. 402(n), provides for the termination of old-age benefits payable to aliens who after September 1, 1954 (the date of enactment of the section) are deported for any one of the fourteen grounds incorporated in 202(n) from the eighteen grounds for deportation set out in 241(a) of the Immigration and Nationality Act (8 U.S.C. 1251 (a)). Appellee Nestor, who became entitled to Social Security benefits in November 1955, was deported in July 1956 for having been a member of the Communist Party in the 1930's. This being one of the benefit-terminating deportation grounds specified in 202(n), Nestor's benefits were terminated by the Secretary. The district court was of the view that Social Security benefits were an "accrued property right" in the circumstances of this case, and that 202(n) was repugnant to the

Due Process Clause because it deprived appellee of such rights upon deportation. (U.S. Attorneys Bulletin, Vol. 7, No. 3) On direct appeal to the Supreme Court, the district court's decision was reversed in a 5-4 decision. Speaking for the majority, Mr. Justice Harlan concluded that a person covered by the Social Security Program does not have such a right in benefit payments as would make every defeasance of "accrued" interests violative of Due Process. When dealing with a withholding of a noncontractual benefit under a social welfare program, the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification. A beneficiary's residence abroad, however, is of obvious relevance to the question of eligibility. The fact that a beneficiary is forced to live abroad -- because he is deported -- is irrelevant. To review the deportation would be tantamount to allowing a collateral attack on the deportation order; such was not open to appellee in the present proceedings. Nor does 202(n) violate the ex post facto and bill of attainder provisions of the Constitution. Though it was urged that the termination of Nestor's benefits amounted to punishing him without a judicial trial, the majority held that the disqualification of certain deportees from receipt of Social Security benefits bears a rational connection to the purposes of the Social Security Act, and does not, without more, evidence a Congressional desire to "punish" a certain group. The clearest proof would have to be adduced to establish the unconstitutionality of a statute on such grounds. The legislative record, however, falls short of any persuasive showing that Congress was concerned with the grounds of deportation, as distinguished from the fact of deportation. Though Congress did not apply the termination provision to all deportees -- it excluded four classes of deportees -- it was the fact of deportation which remains an essential condition for loss of benefits. The fourteen classes of deportees included in 202(n) embrace the great majority of those deported -- a circumstance which vitiates any inference that Congress intended to punish only certain classes of deportees. Mr. Justice Brennan, with whom the Chief Justice and Mr. Justice Douglas joined, dissented on the grounds that by enacting 202(n), Congress worked its will only on aliens deported for conduct displeasing the lawmakers; therefore, 202(n) imposed punishment in violation of the prohibition against ex post facto laws. Mr. Justice Douglas, in a separate dissent, disagreed with the holding of the majority that Social Security benefits were gratuities. To him, 202(n) was evidence of a Congressional intent to take away from a person by legislative fiat property which he has accumulated because he had acted in a certain way or embraced a certain ideology; in short, 202(n) was a bill of attainder. Mr. Justice Black, in a separate dissent, reasoned that Social Security benefits were insurance and that the Constitution forbids such taking as the present. "The basic constitutional infirmity," said Justice Black, "is that [202(n)] is a part of a pattern of laws all of which violate the First Amendment out of fear that this country is in grave danger if it lets a handful of Communist fanatics or any other extremist group make their arguments and discuss their ideas. * * *"

Staff: John F. Davis (Assistant to the Solicitor General); Bruno A. Ristau (formerly of the Internal Security Division, now with the Civil Division)

Suits Against the Government. Hazel T. Ellis, et al. v. Frederick Mueller (C.A.D.C.) The plaintiff (appellant), a former employee of the Department of Commerce, was discharged from that agency for making false and unwarranted statements about a fellow employee, reflecting on his character, loyalty and suitability for continued Government service. Subsequently she appealed this dismissal to the Civil Service Commission under the provisions of the Veterans Preferance Act of 1944. After extensive hearings the Commission sustained the decision of the Commerce Department. Plaintiff thereupon instituted suit in the District Court for the District of Columbia alleging that certain procedural errors within the Department of Commerce vitiated her discharge, inter alia, that the administrative official who preferred the charges leading to her dismissal likewise determined the sufficiency of her answers to these charges and thereupon dismissed her. Appellant contended that in so doing this official acted as "prosecutor, judge, jury and executioner" of her cause. This she alleged constituted procedural error. The lower Court granted the defendants' (appellees') motion for summary judgment. On June 23, 1960 the Court of Appeals, in a per curiam opinion, affirmed the decision of the lower court, holding that the function of the court in cases of this nature is not to review the merits of a discharge. As appellant had a full hearing before the Commerce Department and the Civil Service Commission, and no procedural rights were denied her, the decision below was affirmed.

Staff: Anthony F. Caffersky, Kevin T. Maroney
(Internal Security Division)

* * *

TAX DIVISION

Assistant Attorney General Charles K. Rice

CIVIL TAX MATTERS

NOTICES

1. Notice of State Court Decisions

United States Attorneys should provide immediate written notification to the local Regional Counsel's office of the entry of an adverse court decision. Such notice should advise Regional Counsel explicitly of the applicable state court appellate time limits within which the Government's appeal processing must be completed. Adoption of this procedure should enable Regional Counsel to commence early preparation of his appeal recommendation and so shorten the time within which the final appeal decision is reached.

United States Attorneys are reminded of the requirements of Title 6 of the Manual that the Department be notified immediately of court decisions and that all necessary files and material be forwarded for consideration by the Department in determining the question of appeal. In reporting state court decisions, local practice requirements and time limits should be set forth.

2. Extinguishing Junior Federal Tax Liens

In two recent cases, the Supreme Court of the United States has ruled that remedies provided by federal law for the extinguishment of junior federal tax liens, e.g., 28 U.S.C. 2410, are not exclusive; hence a junior federal tax lien may be removed through appropriate state procedures, even though such procedures do not require that the United States be made a party and the United States has no actual notice of the proceeding.

In Bank of America National Trust and Savings Association v. United States (decided June 13, 1960), the Supreme Court held that a sale by the trustee-mortgagee pursuant to powers of sale contained in a deed of trust and two chattel mortgages effectively extinguished the junior federal tax lien from both the real and personal properties involved.

In United States v. William J. Brosnan, et al. (decided June 13, 1960), the Court held that a sale of realty pursuant to local law, in the course of Pennsylvania State judicial proceedings where no notice was given to the United States, effectively extinguished a junior federal tax lien.

No doubt these decisions will materially affect the Government's position under 28 U.S.C. 2410. Study of the problems created by these decisions and consultations with the Revenue Service are continuing. In the interim your offices should handle pending "2410" cases in the same

manner as they have been handled in the past. The Department hopes shortly to communicate with your offices regarding the position to be taken and the possible effect of these decisions on pending "2410" proceedings.

Meanwhile, it is requested that each of your offices inform the Tax Division of what procedures under local law are available in your state to a mortgage holder or other lienholder to foreclose his lien. The information furnished should include, where a judicial proceeding is necessary, the type of proceeding and also, whatever the nature of the procedure followed, whether a junior lienholder is entitled to notice under state law.

Appellate Decisions

Excise Tax on Air-Conditioners; Meaning and Validity of Administrative Rulings Defining Taxable Air-Conditioners in Terms of Horsepower. Cory Corp. and Mitchell Mfg. Co. v. Sauber (S. Ct., June 20, 1960). This litigation originated as test refund suits, brought to determine whether sales of taxpayers' air-conditioners in 1954 and 1955 were subject to the excise tax levied on sales of "self-contained air-conditioning units" by Section 3405(c) of the 1939 Code and its successor, Section 4111 of the 1954 Code.

The dispute centered about administrative rulings promulgated by the Commissioner in 1948 and 1954, whereby he undertook to define taxable air-conditioners in terms inter alia of horsepower. The rulings provided that only air-conditioners with a "total motor horsepower" of less than one horsepower were subject to the tax. This horsepower test was framed by the Commissioner, in collaboration with the industry, on the understanding that all air-conditioners which Congress meant to tax (i.e., household-type, or non-commercial-type) were units of less than one horsepower.

Taxpayers contended that the rulings exempted their units from the tax. Pointing to the stipulated fact that their units had an actual horsepower output in excess of one, they argued that the rulings were framed and had to be read in terms of actual horsepower, and hence, without more, that their units were exempt from tax. The Government, on the other hand, pointing to the stipulated fact that the taxpayers' units had a nominal horsepower rating (i.e., the rating assigned to such units by the manufacturer for purposes of sale) of less than one horsepower, contended that the rulings were framed and had to be read in terms of nominal horsepower. The Government urged that the rulings had to be so construed in order to avoid conflict with the statute, since any other interpretation, in its view, would operate to exempt self-contained units of the non-commercial, or household-type.

The district court agreed with taxpayers that the rulings were framed and had to be read in terms of actual horsepower, and held (without discussion of the reach of the statute) that the rulings operated to exempt the taxpayers' units from the tax. The court of appeals reversed. It held that taxpayers' units were clearly within the reach of the statute,

and that the rulings, insofar as they purported to confer exemption from the tax, were null and void. The court refused to enter the controversy over the meaning of the ruling.

The Supreme Court has now reversed the Seventh Circuit, with four justices dissenting. The majority, in a short per curiam opinion, holds that the rulings are valid, and the horsepower test controlling. Hence, the Court remands the case to the Seventh Circuit for that court's disposition of the constructional question which it had not reached, i.e., whether the rulings mean nominal or actual horsepower.

Staff: Howard A. Heffron, First Assistant, and Grant W. Wiprud (Tax Division)

Exclusion from Gross Income of Property Acquired by Gift; Question in Each Case Where Exclusion Claimed Depends Upon Dominant Reason Which Explains Transferor's Action in Making Transfer and Is One of Fact. Commissioner v. Duberstein; Stanton v. United States; United States v. Kaiser (S. Ct., June 13, 1960). These three cases involved the same basic provision of the Internal Revenue Code (Sec. 22(b)(3) of the 1939 Code; Sec. 102(a) of the 1954 Code) which excludes from a taxpayer's gross income the value of property acquired by gift. In two opinions by Justice Brennan (the Duberstein and Stanton cases were treated in one opinion) the Supreme Court declined the Government's invitation to set forth a definitive rule to be applied to the frequently recurring question of whether a particular payment is excludible as a gift, holding instead, that the issue in each case is one of fact to be decided by a jury or a trial court sitting without a jury. In so holding, the Court rejected the former characterization of the problem in Bogardus v. Commissioner, 302 U.S. 34, as a mixed question of law and fact subject to full appellate review. The Court said that while numerous factors are involved in this factual determination, the transferor's dominant reason for making the transfer is the critical inquiry. The common law concept of "donative intent" and the transferor's characterization of his intent are irrelevant to determination of whether a gift was made within the meaning of the revenue laws. Once made by court or jury, familiar principles require the initial factual determination to be sustained on appeal unless unsupported by the evidence or unless the lower court's finding is "clearly erroneous." Applying this analysis to the three cases in question, the Supreme Court reached varying results:

Commissioner v. Duberstein. Taxpayer, president of the Duberstein Iron & Metal Company, had extended business dealings with the Mohawk Metal Corporation in New York City during the course of which he suggested the names of possible customers to the president of Mohawk. In 1951 the Mohawk president called taxpayer and said such information had been so valuable that he wished to make him a present of a new Cadillac automobile. The expense of this "gift" was deducted by Mohawk as a business expense. The Commissioner asserted a deficiency based on the inclusion of the value of the Cadillac in gross income and the Tax Court upheld this determination, finding the record "barren" of evidence revealing any intention to

make a gift. The Court of Appeals for the Sixth Circuit reversed. The Supreme Court, with four Justices concurring specially and Justice Douglas dissenting, reinstated the Tax Court's decision. The majority held that in light of the factual nature of the inquiry the Tax Court was warranted in concluding that this was income in spite of the fact that the parties called it a "gift" and even though the "donor" was not even under a moral obligation to recompense the taxpayer; and that the Tax Court could properly find that "it was at bottom a recompense for Duberstein's past services, or an inducement for him to be of further service in the future".

Stanton v. United States. Here taxpayer had been employed for 10 years as comptroller of Trinity Church and president of a wholly owned real estate management corporation, Trinity Operating Company, for which he was paid $22,500 yearly. In 1942 he resigned from both positions to go into business for himself. While there was some suggestion of ill feelings between taxpayer and the directors of the Operating Company, they voted him a "gratuity" of $20,000 upon acceptance of his resignation. The Commissioner treated this as additional income, but the District Court for the Eastern District of New York made the simple, oral finding that the $20,000 was an excludible "gift". The Court of Appeals for the Second Circuit reversed, holding that the payment was motivated primarily by business connected reasons and should be treated as income. In the Supreme Court four Justices (Brennan, Warren, Clark, and Stewart) were of the opinion that the case should be remanded to the District Court for more complete findings; Justice Whittaker concurred in this result, but would have analyzed the issue as a mixed question of fact and law in line with Bogardus v. Commissioner, 302 U.S. 34. Four dissents were registered, but on differing grounds. Justices Black and Douglas were of the view that the District Court's decision that the payment was a gift was supported by the record and should be reinstated. Justice Harlan concurred in a dissenting opinion by Justice Frankfurter which maintained that the Second Circuit correctly treated the payment as income.

United States v. Kaiser. Here taxpayer was a striking employee of the Kohler Company who received strike assistance in the form of room rent and food vouchers from the labor union conducting the strike. He was not a member of the union at the time. While the assistance was limited to strikers, the amount varied according to need and was offered to union members and non-members alike. Taxpayer paid the assessed deficiency and sued for a refund on the theory that the assistance was excludible from income. A jury held the assistance was a "gift", but the District Court for the Eastern District of Wisconsin entered judgment n.o.v. for the Government on the ground it was income as a matter of law. By a divided vote the Seventh Circuit reversed and reinstated the jury verdict. The Supreme Court, with three dissents, affirmed the Seventh Circuit. The majority opinion held that the instructions to the jury were correct and there was sufficient evidence to support the verdict. Justice Douglas concurred but was of the view that the payment was so plainly a gift the taxpayer could have obtained a directed verdict. Justice Frankfurter, in a separately concurring opinion joined in by Justice Clark, agreed with the majority's

disposition of the case, but indicated that the result here was probably due to "special circumstances" since strike benefits ordinarily would not be classed as gifts. The dissenting opinion by Justice Whittaker, joined by Justices Harlan and Stewart, accepted the basic test but found no reasonable basis in the evidence for the jury's conclusion. The dissenters would hold the assistance was income as a matter of law since it was made solely to win the strike and was not motivated by generosity, affection, or purely charitable impulses.

Staff: Wayne G. Barnett and Philip Elman (Office of the Solicitor General); Norman H. Wolfe (Tax Division)

Priority of Subcontractors' Claims Over Federal Tax Liens Against General Contractors Levied Upon Balance Due from Owner of Property to Taxpayer-Contractor. Robert Aquilino v. United States; United States v. Durham Lumber Company (Sup. Ct., June 20, 1960). In both of these cases, federal tax liens for delinquent taxes owed by a general contractor were levied upon the balance due to such contractor from the owner of the property. In both instances the priority of the federal tax lien was opposed by subcontractors who had been employed to perform services or supply materials for the contractor. In Aquilino the federal tax liens arose in December of 1951 and March, 1952 and were appropriately filed on October 31, 1952. The services and materials were supplied in August and September, 1952 and mechanic's liens were filed in November, 1952, subsequent to the filing of the federal tax liens. The subcontractors claimed that there existed no property rights of the taxpayer-contractor to the balance remaining due from the owner to such contractor in view of the provisions of Section 36-a of the New York Lien Law declaring that such balance constitutes a trust fund for the payment of the subcontractors' claims. The New York Court of Appeals overruled these contentions and held that the Government's rights under its tax liens were superior to those of the subcontractors. In Durham the federal tax liens against the delinquent taxpayer-contractor became effective on August 13 and November 22, 1954. The subcontractors did not give notice to the owner of their claims for payment in accordance with the provisions of North Carolina law until January, 1955. The Court of Appeals for the Fourth Circuit, affirming the decision of the district court in bankruptcy proceedings, held that under the applicable provisions of North Carolina law the taxpayer-contractor had no property rights to the balance remaining due from the owner, except as to amounts in excess of those necessary to pay subcontractors' claims, and that consequently the rights of the subcontractors were superior to those of the Government under its tax liens.

The Supreme Court (Justices Harlan and Black dissenting) vacated the judgment in Aquilino and remanded the case for further proceedings and affirmed the judgment in Durham. The Court held that the question as to whether a taxpayer has property or property rights to which a federal tax lien may attach is a question of state law and that its prior decisions upholding the superiority of federal tax liens as a matter of federal law are applicable only after it has been determined that such property rights

do exist. In that event the priority of the federal tax liens becomes a matter of federal law. Since the Court was of the view that it could not determine from the opinion of the New York Court of Appeals whether these principles had been correctly applied it vacated the judgment and remanded the case to the Court of Appeals for a determination as to whether the taxpayer-contractor had property rights in the balance owing by the owner, under state law, to which the federal tax liens could attach. Applying the same reasoning in Durham the Court noted that the Court of Appeals for the Fourth Circuit had determined that under North Carolina law the taxpayer-contractor had no property rights in the balance remaining due from the owner. Under such circumstances the Court followed rules established in prior decisions that it would not disturb the judgment of a state court or of a lower federal court applying state law unless shown to be unreasonable; it therefore affirmed the judgment of the Court of Appeals. The dissenting Justices were of the view that the decisions were not in accord with numerous prior decisions of the Court in federal tax lien matters and that the rights asserted by the subcontractors in each case did not involve a question of determination of property rights under state law but a question of the priority of payment of the claims of such subcontractors which should be determined in accordance with federal law in favor of the Government.

Staff: Howard A. Heffron, First Assistant (Tax Division), Daniel M. Friedman, Assistant to the Solicitor General, A. F. Prescott and Myron C. Baum (Tax Division)

State Court Decision

Liens; Failure of United States to Fully Comply With Local Rules and Statutes Relating to Distribution of Proceeds of Sale Barred Recovery of Amounts Disbursed for Realty Taxes Which Were Junior to Federal Tax Lien. First National Bank of Erie v. Louis W. Courtney; United States Intervenor (Court of Common Pleas, Erie County, Pa., March 16, 1960). Plaintiff bank instituted suit for foreclosure of a mortgage on certain real estate and the United States intervened asserting its tax lien on the property. The mortgage was prior to the federal tax lien, but the tax lien was prior to local real estate taxes due. However, under Pennsylvania law, the real estate taxes were entitled to payment prior to the mortgage.

The foreclosure sale resulted in proceeds of $59,341.31, which amount was insufficient to pay all claims in full. Under local procedure, the sheriff posted in the office of the county prothonotary the proposed schedule of distribution which provided first for payment of costs of sale, second the real estate taxes, third the claim of the plaintiff bank, and the remainder to the United States. State statutes and local rules provide that such proposed distribution shall be final and conclusive unless, within ten days after such posting, exceptions are filed with the prothonotary and with the sheriff.

It was the position of the United States that the rule set out in United States v. New Britain, 347 U.S. 81, should be applied in this case; that is, the amount due the bank should be set aside, and the Government's tax claim next paid; and if the remaining proceeds were insufficient to cover the real estate taxes, that deficiency should be taken from the amount set aside for the bank. Therefore, timely exceptions to the proposed distribution were filed by the United States with the prothonotary but were not filed with the sheriff until after the ten-day period had expired. Upon expiration of the ten-day period the bank promptly applied to the sheriff for payment and received payment of its claim in full. The United States then filed a motion with the court for an order directing the bank to return to the sheriff the amount of the real estate taxes, or directing that that amount be paid to the United States by the bank.

In its opinion, entered March 16, 1960, the Court denied the Government's motion, stating that it was conceded there was no legal right to the relief sought, but appeal had been made to the Court's discretion to the end that the rule, requiring that exceptions be filed not only with the prothonotary but also with the sheriff, be set aside in that instance. The Court concluded that "Any creditor of a debtor without sufficient assets to pay all of his debts in full expects to and must submit to existing laws which dictate circumstances under which priority in payment is to be determined".

Staff: United States Attorney Hubert I. Teitelbaum, and Assistant United States Attorney Thomas J. Shannon (W.D. Pa.) Mamie S. Price (Tax Division)

Tax Liens; State Procedure Effective to Remove Junior Federal Liens. United States v. William J. Brosnan, et al.; Bank of America National Trust and Savings Association v. United States (Sup. Ct., June 13, 1960). The basic issue in each of these two cases was whether a federal tax lien, admittedly junior to defaulted mortgages held by third parties on the properties subject to the tax liens, were extinguished by state proceedings to which the United States was not, and was not required by state law to be, a party.

In the Brosnan case, the mortgagee, proceeding under a confession-of-judgment provision of a mortgage bond, obtained an in personam judgment against the mortgagee-taxpayer, pursuant to which the property was sold under a writ of fieri facias, as provided under Pennsylvania law. Thereafter, the United States instituted suit under Section 7403 of the Internal Revenue Code of 1954, in which it sought foreclosure of its tax lien. The Supreme Court, though agreeing that the United States had not been made a party, affirmed the decisions of the District Court and the Third Circuit (264 F. 2d 762) and held that the Government's lien on the property involved had been effectively removed by the Pennsylvania proceedings.

In the second case (Bank of America National Trust and Savings Association v. United States), California real and personal properties,

subject to a deed of trust and two chattel mortgages, were sold by the trustee - mortgagee pursuant to powers of sale. The United States received no actual notice of the sale. Thereafter, the mortgagee, which had bought in at the sale, brought suit against the United States under 28 U.S.C. 2410, to quiet its title, claiming that the exercise of the powers of sale had effectively extinguished the federal tax lien. The Ninth Circuit, reversing the district court, dismissed the suit, holding that the federal lien could be divested only in the manner prescribed by Congress (265 F. 2d 862). The Supreme Court reversed.

The Supreme Court while restating the well established principle that federal tax liens are wholly creatures of statute, and while acknowledging that detailed provisions of federal statutes governed their creation, continuance, validity and release, nevertheless found it "desirable to adopt as federal law state law governing divestiture of federal tax liens". Accordingly it concluded that, "Until Congress otherwise determines, we think state law is effective to divest Government junior liens in cases such as these".

It is to be noted that the Supreme Court, instead of following its rules of uniformity, has left the question of the effective divestiture of a federal junior tax lien one to be decided under the procedure of each of the fifty states.

Staff: Daniel M. Friedman (Solicitor General's Office), George F. Lynch (Tax Division).

* * *

INDEX