Osborne

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

November 4, 1960

# United States

# DEPARTMENT OF JUSTICE

Vol. 8 No. 23

# UNITED STATES ATTORNEYS

# BULLETIN

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## REQUESTS TO INCUR TRAVEL EXPENSE

United States Attorneys are reminded that Forms 25-B, requesting authority to incur expense for travel should be submitted to the Executive Office for United States Attorneys. (See Title 8, page 102, United States Attorneys' Manual.)

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## MANUAL CORRECTION SHEETS

Requests for additional correction sheets or missing pages for United States Attorneys' Manuals should show the district to which such material is to be sent. Departmental requests should show the division, as well as the name and room number of the individual requesting the material.

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## MONTHLY TOTALS

Totals for the month ended August 31, 1960, show a continued and encouraging increase over those of the same period for the previous fiscal year. Filings of new criminal and civil cases are up, and terminations of both categories of cases have also increased. The increase in new criminal cases filed was a very substantial one but the increases in civil cases filed, and in terminations were minimal. Because terminations did not keep pace with filings, the pending caseload rose to 28,539, or 1157 more cases than were pending on the same date of fiscal 1960. The increase in civil cases pending was especially marked. Set out below is a comparison of the totals for August 1959 and 1960:

| | August 1959 | August 1960 | Increase or Decrease Number | % |
|---|---|---|---|---|
| **Filed** | | | | |
| Criminal | 3,849 | 4,055 | + 206 | + 5.4 |
| Civil | 4,112 | 4,167 | + 55 | + 1.3 |
| Total | 7,961 | 8,222 | + 261 | + 3.3 |
| **Terminated** | | | | |
| Criminal | 3,340 | 3,372 | + 32 | + 1.0 |
| Civil | 3,309 | 3,369 | + 60 | + 1.8 |
| Total | 6,649 | 6,741 | + 92 | + 1.4 |
| **Pending** | | | | |
| Criminal | 8,236 | 8,420 | + 184 | + 2.2 |
| Civil | 19,146 | 20,119 | + 973 | + 5.1 |
| Total | 27,382 | 28,539 | +1157 | + 4.2 |

The outlook in the field of collections continues to be bright.

For the month of August 1960, United States Attorneys reported collections of $1,801,810. This brings the total for the first two months of this fiscal year to $4,964,395. This is $741,489, or almost 15 per cent, more than the $4,222,906 collected in July and August of fiscal year 1960.

During August $1,993,020 was saved in 88 suits in which the government as defendant was sued for $3,008,356. 53 of them involving $1,845,176 were closed by compromises amounting to $504,867 and 15 of them involving $892,764 were closed by judgment against the United States amounting to $510,469. The remaining 15 suits involving $270,416 were won by the government. The total saved for August 1960 amounted to $1,993,020. The amount saved for the first two months of the current fiscal year was $3,403,687 and is a decrease of $1,767,928 from the $5,171,615 saved in July and August of fiscal year 1960.

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## JOB WELL DONE

The Regional Attorney, Department of Agriculture, has commended Assistant United States Attorney George E. McNally, Southern District of Alabama, on the splendid and efficient manner in which he handled a recent complex civil case which was brought to a successful conclusion.

Assistant United States Attorney Frank J. Ferry, District of New Jersey, has been commended by the Director, Food and Drug Administration, for his handling of a recent case involving the violation of probation for insanitary conditions in frozen food manufacturing. The letter stated that Mr. Ferry thoroughly acquainted himself with the inspectional and scientific evidence and did an excellent job of effectively presenting the facts to the Court.

The FBI Special Agent in Charge has congratulated Assistant United States Attorney Robert E. Scher, Southern District of New York, for his success in obtaining a conviction in a recent case involving violation of the White Slave Traffic Act. This accomplishment was unique in that the only Government witness recanted and claimed she had given false testimony during the trial. The Government was able to obtain sufficient evidence, however, to satisfy the Court and the motion for a new trial was denied and the sentence was carried out. The letter stated that Mr. Scher's diligence, his thoroughness of preparation, which required long hours of legal research, and his aggressiveness were the contributing factors in the successful prosecution of the case.

United States Attorney Clifford M. Raemer and Assistant United States Attorney James B. Moses, Eastern District of Illinois, have been

commended by the District Engineer, Army Corps of Engineers for the able manner in which they handled the Government's interest in a recent condemnation case, which was rendered especially difficult to try because of the unusual legal complications which arose.

Assistant United States Attorney Ralph F. Scalera, Western District of Pennsylvania, has been congratulated by the Assistant Regional Commissioner, Alcohol and Tobacco Tax Unit, on his diligence in preparing a recent case for trial and on the workmanlike manner in which he presented the case to the court and jury. The letter stated that this was the first refill case to be tried in this region since the enactment of the Excise Tax Technical Changes Act of 1958. The letter further stated that the news of the successful outcome of the case should have a deterrent effect on future potential violators.

The Associate Director, National Parks Service, has expressed appreciation for the successful efforts of United States Attorney Laughlin E. Waters and Assistant United States Attorney Richard Dauber, Southern District of California, in the handling of a complex and vexing quiet title action involving lands in the Kings Canyon National Park.

The General Counsel, Securities and Exchange Commission, has expressed to Assistant United States Attorney Jerome J. Londin, Southern District of New York, sincere appreciation and commendation on the speed and thoroughness with which he handled a recent case. In according high praise to Mr. Londin for his work in this case, the General Counsel stated that it was only through the skillful examination of the witnesses before the grand jury that the complete case was made and the culpability of additional persons established. The letter further stated that the indictment of the additional defendant should have a most salutary effect, and undoubtedly will be of great assistance to the Commission in its overall enforcement program. The General Counsel also commended Mr. Londin, as well as Assistant United States Attorney Peter H. Morrison, for their fine work in obtaining the first indictment returned under the Investment Company Act. In expressing the Commission's appreciation for the consummate skill and long hours of work which were devoted to this case, the General Counsel stated that the indictment should prove most beneficial in the Commission's regulatory and enforcement activities in the Investment Company field.

The District Engineer, U. S. Army Corps of Engineers, has expressed appreciation for the very effective handling by Assistant United States Attorney Robert J. Kay, Western District of Wisconsin, of a recent condemnation trial which resulted in a verdict very favorable to the Government. The letter stated that Mr. Kay's interest in the case, and his excellent presentation were largely responsible for the favorable verdict.

United States Attorney George E. Rapp, Western District of Wisconsin, has been commended by the Chief Regional Attorney, Veterans

Administration, for his work in a recent case. In thanking Mr. Rapp for his assistance in the matter, the Chief Regional Attorney stated that defendant's counsel was very complimentary of Mr. Rapp's brief and that it was apparent that the presiding judge incorporated in his opinion much of the material from Mr. Rapp's brief. Mr. Rapp has also been congratulated by the Assistant Chief Counsel, Office of Defense Lending, on a splendid job well done in a recent case which resulted favorably to the Government. Mr. Rapp was also commended by the National Chairman, Federal Service Joint Crusade, for his very effective cooperation in helping that Crusade to exceed all prior records of contributions for the fourth consecutive year.

Assistant United States Attorney Clark A. Ridpath, Western District of Missouri, has been congratulated by the FBI Special Agent in Charge, on his handling of a recent case which involved the testimony of fifteen witnesses and the presentation of nineteen Government exhibits. In commending Mr. Ridpath for his work in this case, which resulted in a verdict of guilty on all four counts of the indictment, the Special Agent stated that Mr. Ridpath handled the matter in an outstanding manner and represented the Government most effectively during the course of the trial.

FBI Director J. Edgar Hoover has expressed appreciation for the excellent manner in which Assistant United States Attorney Otto J. Taylor, Western District of Missouri, represented the Government in the trials of a recent case. The letter stated that Mr. Taylor's extensive preparation and knowledge of pertinent details were demonstrated in his adeptness in drawing favorable testimony from defense witnesses, and, that no doubt this was a major factor contributing to the successful conclusion of the trials.

The Regional Director, Fish and Wildlife Service, has expressed appreciation for the splendid cooperation rendered by United States Attorney Cornelius W. Wickersham, Jr., and Assistant United States Attorney James Patterson, Eastern District of New York, for their vigorous program of prosecution of violations of the Federal migratory bird regulations. The letter stated that their work permitted real progress in creating a situation for better observance of such regulations during the hunting season in the New York area.

Assistant United States Attorney Robert D. Simmons, Western District of Kentucky, has been commended by the FBI Special Agent in Charge, for his outstanding work in the trial of a recent case, and particularly for his final summation to the jury. The letter stated that the case was a difficult one to prosecute, and that it could only have been won by a careful presentation and analytical evaluation of the testimony. The letter further stated that the verdict returned by the jury was the result in great part of Mr. Simmons' summation.

The Regional Attorney, Department of Labor, has congratulated United States Attorney William B. Jones, Western District of Kentucky,

on the excellent results achieved in a recent wage and hour case, and has expressed appreciation for the personal attention and interest which Mr. Jones devoted to the case. The case resulted in the imposition of a substantial fine, together with the payment of $44,000 in back wages to some 249 employees, and the entry of a permanent injunction against the parent corporation.

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# ANTITRUST DIVISION

Assistant Attorney General Robert A. Bicks

## SHERMAN ACT - CLAYTON ACT

Monopoly - TV Antenna Equipment; Final Judgment for Government. United States v. Jerrold Electronics Corporation, et al., (E.D. Pa.). On defendants' motion to amend the findings set forth in the Court's opinion of July 25, 1960, hearings were held on September 12, 1960. On October 10, 1960, the Court filed a supplemental opinion denying ten of defendants' 13 proposed amendments.

Three conclusions drawn by the Court adverse to the Government's position are as follows:

1. That sales of community system equipment upon the condition that the purchaser subscribe to Jerrold engineering services are not a violation per se of Section 1 of the Sherman Act. The Court had held that although this practice violated Section 1 of the Sherman Act at some time during the time covered by the complaint, it did not constitute a per se violation under the authority of the Northern Pacific case. The Court refused to alter its position in its supplemental opinion for the reason that statements in opinions of the Supreme Court are only binding as to questions and factual situations "actually before the court" and do not control the judgment in a subsequent suit when the same point is presented for decision, citing Cohens v. Virginia, 6 Wheat. 264, 399 (1821).

2. That sales of community system equipment upon the condition that the purchaser not deal in competitive equipment not approved by defendants did not violate Section 3 of the Clayton Act. Although the Court had found multiple violations of Section 3 of the Clayton Act arising out of other activities of defendants, it refused to reconsider its holding in this respect.

3. The Court at the urging of the Government modified its position with regard to the participation of the individual defendant Milton Jerrold Shapp and the parent corporation in the attempt to monopolize. The Judge stated that, although he felt it was unnecessary to make a finding on this subject, if such a finding were necessary he would find that Mr. Shapp participated in the activities which were held to constitute an attempt to monopolize. His opinion was amended accordingly.

On October 11, 1960, the Court entered a final judgment, adjudging that defendants had combined and conspired to sell community equipment on a full system basis and to tie a service contract to equipment sales in violation of Section 1 of the Sherman Act, had contracted to sell and had made sales of equipment upon unlawful conditions in violation of

Section 3 of the Clayton Act, had made vertical acquisitions of community antenna systems resulting in a foreclosure of a share of the market to competitors sufficient to justify an injunction as to future acquisitions, and that defendant Jerrold Northwest had attempted to monopolize trade and commerce in violation of Section 2 of the Sherman Act.

Each defendant was ordered to cancel all provisions of its service contracts inconsistent with the judgment and was enjoined and restrained from future violations of the antitrust laws involved, provided that defendants could refuse to guarantee equipment installed in a system if the purchaser thereof installed additional equipment which in defendants' opinion might impair the quality of television reception or otherwise damage the system. However, if defendants avail themselves of that proviso, they are required to prepare a complete list of equivalent equipment manufactured by competitors which might be used in conjunction with Jerrold equipment. The judgment contains other injunctive provisions, including a prohibition against acquisitions of television antenna systems already built at the time of the proposed acquisition until April 2, 1962.

On October 20, 1960 the Government filed a motion to amend final judgment entered in this case to strike the limitation on acquisitions to those systems "already built at the time of the proposed acquisitions."

Defendants have notified the Government informally of their intention to appeal the judgment entered.

Staff: Wilford L. Whitley, Jr., John F. Hughes and Sidney Harris (Antitrust Division)

Price Fixing - Electrical Meters. United States v. Sangamo Electric Co., et al., (E.D. Pa.). An indictment was returned on October 20, 1960, at Philadelphia charging Sangamo Electric Company, General Electric Company, and Westinghouse Electric Corporation with violation of the Sherman Act through a combination and conspiracy to fix and maintain prices for the sale of watt-hour and demand meters. At the same time and place, a companion civil case was filed charging defendants with a violation of the Sherman Act and asking injunctive relief against the practices alleged.

The indictment charges that beginning at least as early as January, 1956, Sangamo, General Electric and Westinghouse engaged in a conspiracy to fix and maintain prices for watt-hour and demand meters and to sell the meters to private and governmental utilities at the agreed-upon prices. It was charged that during the past five years, representatives of the defendant firms discussed and agreed upon prices for watt-hour and demand meters at meetings held in Boston, Chicago, New York, St. Petersburg, Florida, and Atlantic City, New Jersey.

According to the indictment a six percent price increase for watt-hour and demand meters was discussed and agreed upon in a Boston hotel in January 1956, while on four additional occasions (April 1957,

November 1957, August 1958 and November 1958) representatives of Sangamo, General Electric and Westinghouse met and agreed on additional price increases, all of which were put in effect.

Both the indictment and the civil complaint allege that defendants used various means to avoid detection of the conspiracy, such as: use of plain envelopes addressed to the residences of the corporation representatives, rather than to their offices, without identification of the senders; placing of telephone calls from and to residences rather than the offices of the firm representatives; and the destruction of written communications shortly after their receipt.

Defendants together with Duncan Electric Company (not named in the case) are alleged to be the only United States manufacturers of the meters and their total sales in 1959 are said to be in excess of $71,000,000.

Relief sought by the Government in the civil case seeks to require defendants to issue new price lists based upon cost independently arrived at; prevent any communication among defendants with respect to further prices and bids; and to enjoin each of the types of activities alleged to be part of the conspiracy. Relief sought in this case is similar to that asked in 19 previous cases against manufacturers of electrical equipment.

Staff: William L. Maher, Donald G. Balthis, Walter L. Devany, III, and John J. Hughes, (Antitrust Division)

Monopoly - Fire Insurance. United States v. Insurance Board of Cleveland, (N.D. Ohio). The complaint in this case charged that the Insurance Board of Cleveland, an association of insurance agents, conspired with its members to restrain and monopolize and attempted to monopolize interstate commerce in the business of selling and writing fire insurance, and especially challenged six rules which governed the activities of the Board's membership. In August, 1956, the Court ruled on motions made by both parties for summary judgment, holding for the defendants that; (a) as to two of the rules, the issues were moot; and (b) injunctive relief was not warranted with respect to a third rule. It held for the plaintiff that; (a) a fourth rule violated the Sherman Act; and (b) as to the two remaining rules, summary judgment could not be granted because of contested issues of fact. By agreement between counsel the issues as to one of the two remaining rules were not pressed.

The trial, before Chief Judge McNamee between March 7 and March 14, 1960, was limited to a consideration of whether the so-called "Mutual Rule" of the Insurance Board of Cleveland violated Section 1 of the Sherman Act. The "Mutual Rule" refers to an agreement among the members of the Board to refrain from representing any mutual insurance company.

In his October 7, 1960 opinion, Judge McNamee held that the "Mutual Rule" "constitutes an unreasonable restraint of trade - that it interferes with the natural flow of commerce and is injurious to the public." The contentions of the parties were discussed at length in the opinion, the Government taking the position that the "Mutual Rule" was illegal per se as a group boycott (Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5; Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207), defendants, on the other hand, denying that the "Mutual Rule" amounted to a group refusal to deal. The Court, as it had previously, on cross motions for summary judgment, held that the "Mutual Rule" was not illegal per se, stating that the cases plaintiffs relied upon did not condemn as per se violations all group refusals to deal, irrespective of their intent and effect and the means employed to accomplish the purposes of the combination.

The Court found, however, that the Government's evidence showed that the "Mutual Rule" "operates to restrict the opportunity of agency mutual companies to sell a competitive type of insurance," and diminishes the opportunity of competitors of Board members to compete in a free market. The Court also pointed out that the "Mutual Rule" has the further effect "of securing the members of the Board against competition between and among themselves in the sale of mutual insurance." In view of the substantial amount of insurance sold in the relevant market area by the members of the Insurance Board, it was held that the "Mutual Rule's" impact upon competition was sufficient to violate the Sherman Act.

Staff: Robert B. Hummel, Norman Seidler and Dwight Moore (Antitrust Division)

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# CIVIL RIGHTS DIVISION

Assistant Attorney General Harold R. Tyler, Jr.

## REVOCATION OF PAROLE

United States Board of Parole Not Required to Provide Counsel for Indigent Prisoners at Parole Revocation Hearings. Clark v. Stevens, et al., (E.D. Mich., October 12, 1960). This action involved a petition for writ of habeas corpus brought by a mandatory releasee which was based on the fact that the Government failed to provide him with counsel at his revocation hearing before the Board of Parole under the provisions of 18 U.S.C. 4207. There were previous holdings that a prisoner is entitled to counsel at such proceedings. Robbins v. Reed, 269 F. 2d 242 (C.A. D.C. 1959); Cannon v. Stucker, (E.D. Mich., June 16, 1960). The Court in this case held that the lack of attorney under these circumstances is not so fundamentally unfair as to be violative of "due process." It also pointed out that this question cannot be resolved by reference to the Sixth Amendment of the United States Constitution, since a revocation hearing is not a criminal prosecution.

Whether or not a prisoner is entitled to have such legal representation in any case is, at present, very much in doubt since there have been several holdings that he is not so entitled. Lopez v. Madigan, 174 F. Supp. 919; McCreary v. Kenton, (D. Conn., June 27, 1960); Hock v. Hagan, (M.D. Pa., March 25, 1960); Washington v. Hagan, (M.D. Pa., March 25, 1960). The latter case is presently pending before the Court of Appeals in the Third Circuit.

Staff: United States Attorney George E. Woods, Jr., and
Assistant United States Attorney John L. Owen (E.D. Mich.)

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# CRIMINAL DIVISION

Assistant Attorney General Malcolm Richard Wilkey

## EXPATRIATION

Procedure for Review of Expatriation Ruling Where Person Involved Is Outside United States; Sections 360(b) and (c) of Immigration and Nationality Act (8 U.S.C. 1503(b)(c)); Section 349(a)(10) of Act (8 U.S.C. 1481(a)(10)) Declared Unconstitutional. Joseph Henry Cort v. Christian A. Herter (Three-Judge Court, D.C.). Plaintiff, born in Boston in 1927, is a physician and research physiologist. In May 1951, he departed from the United States for temporary work in England. He was ordered to report for induction into the armed forces of the United States in September 1953, but he did not appear and he was thereafter indicted for failure to comply with the induction order. At the instance of the United States, the British Government refused to renew his residence permit, but instead of returning to the United States he went to Czechoslovakia, where he is presently employed. In 1959, he applied for a passport to return to the United States. The State Department denied the application on the ground that he had been expatriated under Section 349(a)(10) of the Immigration and Nationality Act of 1952, which provides that a United States national shall lose such nationality by departing from, or remaining outside of, the United States during a period of national emergency for the purpose of avoiding service in the military, air, or naval forces of the United States.

Thereafter, in March 1960, plaintiff filed a suit in the United States District Court for the District of Columbia against the Secretary of State under Sections 11-305 and 11-306 of the District of Columbia Code, 28 U.S.C. 1331 and 2201, and Section 10 of the Administrative Procedure Act (5 U.S.C. 1009), inter alia, to set aside the certificate of expatriation issued against plaintiff, to enjoin the enforcement of Section 349(a)(10) of the 1952 Act as unconstitutional, and to declare him to be a United States citizen. Both sides moved for summary judgment, and the Government, in addition, filed a motion to dismiss on the ground that plaintiff had failed to pursue the procedure set forth in Sections 360(b) and 306(c) of the 1952 law, which the Government asserted was the exclusive remedy available to him to obtain a review of the expatriation ruling.

A three-judge constitutional court, convoked to hear the case, rejected the Government's contention that Sections 360(b) and 360(c) comprised the sole procedure for review of the expatriation ruling because neither the legislative history nor the statutory language specifically made other judicial remedies unavailable. Then after concluding that the evidence was clear, convincing, and unequivocal that plaintiff had remained outside the United States to avoid military service, the Court ruled for plaintiff on the ground that Section 349(a)(10) of the 1952 statute is unconstitutional. In reaching this conclusion, the Court relied on Trop v. Dulles, 356 U.S. 86, in which the Supreme Court declared unconstitutional

Section 401(g) of the Nationality Act of 1940, providing for the loss of nationality by any United States national who deserted from the armed forces in time of war if he was subsequently convicted of the offense by court martial and dishonorably discharged therefor. In Trop, the Chief Justice and three of his associates concluded that, assuming that Congress has authority to provide for the divestment of citizenship, divestment under Section 401(g) would constitute cruel and unusual punishment in contravention of the Eighth Amendment. Justice Brennan, in agreeing that Section 401(g) was beyond the power of Congress, cast his decision on the ground that a requisite rational relationship between the statute and the war power did not appear.

The Court here could see no distinction between Section 401(g) and Section 349(a)(10). Otherwise, according to the opinion by Judge Matthews, two of the Judges would have sustained Section 349(a)(10) for the reasons stated in the dissent in Trop. The dissenters took the position in that case that Section 401(g) did not constitute "punishment" in a constitutional sense and was a proper enactment under the war powers.

Staff: United States Attorney Oliver Gasch;
Assistant United States Attorneys Edward P. Troxell, John F. Doyle and Harold D. Rhyndance, Jr. (D. D.C.)

## MAIL FRAUD

Advance Fee Racket. United States v. Edward W. Anspach, et al., d/b/a Beneficial Business Loan Service Corporation (D. Colo.). In the largest advance fee loan racket case to reach trial stage to date Edward W. Anspach and Walter F. Turner, President and Vice-President, respectively, of Beneficial Business Loan Service Corporation (BBLSC), were convicted on October 7, 1960, of defrauding owners of business enterprises by inducing them to pay large fees in advance for purported services to be rendered by BBLSC in obtaining loans for use in their enterprises in violation of the Mail Fraud Statute (18 U.S.C. 1341). Among the false representations used to induce the business owners to sign contracts with BBLSC were that the company had extensive loan markets, including established lending agencies, wealthy individuals and other sources, there being more money available for loans than there were eligible borrowers; that over 90 per cent of applicants had received loans, and that the advance fee was merely to insure acceptance of the loan when granted and would be refunded if the loan were not obtained. The investigation disclosed that hundreds of businessmen received neither their loans nor the return of their advance fees, with only an insignificant number of loans actually obtained. With headquarters in Pasadena, California, and branch offices in Denver, Dallas, Atlanta, Chicago and New York, BBLSC at peak operation employed scores of salesmen and netted over $300,000 in advance fees. Eight trial days were used to present the Government's case. Defendants produced no evidence of loans obtained.

Sentencing of the defendants is expected after November 10, 1960 and will be reported in the Bulletin.

Staff: United States Attorney Donald G. Brotzman; Assistant United States Attorneys Richard P. Matsch and Jack K. Anderson (D. Colo.)

## RACKETEERING

Interferences With Commerce By Threats or Violence; Extorting Unloading Fees from Interstate Truckers; Hobbs Act (18 U.S.C. 1951); Conspiracy. United States v. Raymond Kennedy, et al. (S.D. N.Y.). The four defendants in this case were indicted on a total of 181 counts of violating the Hobbs Act and one count of conspiring to violate the Hobbs Act. Defendants made a practice of frequenting meat processing establishments in the New York City area. As trucks pulled into the plants to unload meat products, defendants demanded of each driver an unloading fee ranging from $5 to $23 per truck. No service was rendered for these fees and drivers who balked at paying the fee were threatened with violence and in some instances were assaulted. The fees were usually collected as a condition precedent to permitting the truck to be unloaded. In most instances the fees were demanded as a union requirement although only one of the defendants was a member of a union.

All four defendants were convicted and drew sentences ranging from 7-1/2 years to 15 years.

Staff: United States Attorney S. Hazard Gillespie, Jr., Assistant United States Attorney Charles N. Shaffer, Jr. (S.D. N.Y.)

## OBSTRUCTION OF JUSTICE

Defendant Who Sought to Bribe Federal Judge Found Guilty of Obstruction of Justice (18 U.S.C. 1503). United States v. Milton Margoles (E.D. Wisc., October 10, 1960). After defendant had been found guilty of income tax fraud, an intermediary contacted one Villmow, a friend of the sentencing judge's son, regarding a proposition to make arrangements for an agreement between the judge and the defendant whereby the latter would receive a suspended sentence rather than a term of imprisonment. Villmow was noncommittal until he had time to inform the judge and his son of the situation and the Federal Bureau of Investigation was contacted. Defendant and Villmow held several conversations until defendant gave Villmow a bond "for the judge." Defendant was convicted on two counts for corruptly endeavoring to influence an officer of the court and to influence, obstruct, or impede the due administration of justice, but was acquitted by the jury of "indirectly" offering a bribe to a judge in violation of 18 U.S.C. 206.

The advantage of trying these cases under 18 U.S.C. 1503 is that the concept of "endeavor" is not restricted by the traditional principles of the law of attempts and the offense is complete at an early stage of preparation. See e.g. United States v. Russell, 255 U.S. 138 (1921).

Staff: United States Attorney Edward G. Minor;
Assistant United States Attorney Matthew M. Corry
(E.D. Wisc.)

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# IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

## DEPORTATION

Declaratory Judgment; Notice of Deportation Hearing; Discretionary Denial of Voluntary Departure. Rotondi v. Esperdy (S.D. N.Y., Sept. 30, 1960). Plaintiff sought declaratory judgment (28 U.S.C. 2201) to nullify an order of deportation. His deportation hearing was commenced on the day following his arrest but was adjourned for four days at counsel's request. At the resumed hearing counsel permitted it to proceed and did not suggest that he desired or needed any further time. The order of deportation resulted after voluntary departure was denied. His appeal from the order was dismissed by the Board of Immigration Appeals. Since his arrest plaintiff has been in detention.

Plaintiff contended that the order of deportation is defective in that only one day's notice of hearing was given in violation of 8 CFR 242.1(b). (He retained new counsel after the adverse order was entered). The Court held that while the regulation provides for seven days' notice of hearing it also provides for less notice "at the request of and for the convenience of the respondent", and absent a clear showing that plaintiff had been prejudiced by shorter notice the Court would not disturb the original hearing and order. "What plaintiff really seeks is merely another bite of the cherry" said the Court.

Plaintiff also contended that the privilege of voluntary departure depends upon numerous "equities" which were not fully developed at the hearing and that, if they had been, the special inquiry officer would probably have granted voluntary departure. On this point, the Court found that the record showed that the special inquiry officer was fully cognizant of the facts upon which plaintiff relied and there was no reason to disturb the administrative decision. The Court added that, far from abusing his discretion, it affirmatively appeared that the special inquiry officer's discretion was properly exercised.

Habeas Corpus; Validity of Deportation Order; Lodging of Additional Charge; Crime Involving Moral Turpitude - Bribery of Amateur Athlete. U.S. ex rel. Sollazzo v. Esperdy (S.D. N.Y., Oct. 3, 1960). Upon his release from confinement in prison relator was taken into custody by respondent to enforce an order of deportation. The order was based on relator's convictions for attempted robbery, first degree (1933) and bribery of amateur athletes (1951) for each of which he was sentenced to more than a year.

In petitioning for a writ of habeas corpus, relator urged that it was improper to lodge a deportation charge during his hearing, and that the crime of bribery did not involve moral turpitude within the meaning of the immigration law in effect when he had his hearing in 1951 (Sec. 19(a), 1917 Act; former 8 U.S.C. 155(a)).

The Court found his first contention without merit. The regulations then in force (8 CFR 150.6(1) and 151.2(d)) provided authority for the lodging of additional charges against a respondent "if it appears during a hearing that (he) may be deportable on grounds other than or in addition to those stated in the warrant of arrest."

As to the second contention, the Court said that while legislative codifications and amendments have extended the common law concept of bribery to include other than public officials, the gist of the offense remains the same, i.e., corruptly influencing one in the discharge of his duties, responsibilities, or loyalties, moral and even contractual. The corrupt intent together with the element of fraud necessarily present in crimes under the genus "bribery" leaves no room for doubt and compels the conclusion that the crime of bribery of a participant in an amateur game involves moral turpitude. (See Jordan v. DeGeorge, 341 U.S. 223, and cases therein).

Writ dismissed. Relator appealed.

Stay of Deportation; Evidence de hors the Record; Country of Deportation. Chi Sheng Liu v. Holton (D. Hawaii, Sept. 27, 1960). Plaintiff, a citizen of Nationalist China, sought to restrain the defendant from deporting him to Formosa. In addition to contending that Formosa is not a country within the meaning of sec. 243(a) of the 1952 Act (8 U.S.C. 1253(a)), he claimed that he was denied due process in that in proceedings under sec. 243(a) of the Act (8 U.S.C. 1253(h)) the Attorney General's delegate took into consideration evidence with which plaintiff was not confronted and which he had no opportunity to refute, namely the disposition of the case of one Captain Wei Min.

The Court found that the contention that Formosa is not a country has been decided adversely to plaintiff's contention by the Court of Appeals for D.C., in the case of Rogers v. Cheng Fu Sheng, et al., 280 F. 2d 663 (petition for certiorari filed 9-7-60, No. 393).

It also said that the Attorney General's delegate, in a proceeding under sec. 243(h) and its implementing regulations (8 U.S.C. 1253(h); 8 CFR 243.3(b)(2)), may consider and act on evidence de hors the record (U.S. ex rel. Dolenz v. Shaughnessy, 206 F. 2d 392; Namkung v. Boyd, 226 F. 2d 385).

Complaint dismissed.

Habeas Corpus - Petitioner Not in Custody - Complaint Assimilated to Administrative Procedure Act; Suspension of Deportation - Constructive Presence in U.S. McLeod v. Peterson (C.A. 3, Oct. 6, 1960). In 1956 appellant, a native of Jamaica, was found deportable and was granted voluntary departure after his application for suspension of deportation was denied because he was eligible for a nonquota visa. He did not appeal and went to Canada and applied for a visa.

No visa being forthcoming he reentered illegally twice in 1957 and again was found deportable in 1959. Again suspension of deportation was denied but on the ground that he lacked the five years' physical presence in this country required by sec. 244(a)(2) - (8 U.S.C. 1254(a)(2)). He did not appeal from an order of deportation. He then petitioned for a writ of habeas corpus and appealed from its denial by the district court on the ground that he was out of custody on bond.

The Court of Appeals said that while this ground was proper, in view of the circumstances of the case, the full hearing below, and the lengthy consideration in the appellate court, it would be captious to dismiss the action and to require the institution of proceedings under sec. 10 of the Administrative Procedure Act, 5 U.S.C. 1009. Accordingly, it treated the complaint as if it were based on the Administrative Procedure Act.

The Court then found that appellant's absences in Canada in 1956 and 1957, being the direct result of his being "lulled" by assurances of Service representatives into not pressing his legal rights (and possibly by failure of his counsel to appeal from the adverse order), did not interrupt the continuity of his presence in the United States within the meaning of sec. 244(a)(2) - (8 U.S.C. 1254(a)(2)).

Remanded to stay deportation pending outcome of application to Attorney General for discretionary relief pursuant to 8 U.S.C. 1254.

## EXCLUSION

Judicial Review of Exclusion Proceedings; Jurisdiction of Court; Review of Consular Action. Licea-Gomez v. Pilliod and Local Board No. 19 (N.D. Ill., Oct. 11, 1960). Plaintiff, in an action under sec. 10, Administrative Procedure Act (5 U.S.C. 1009), sought review of a final order of exclusion under sec. 212(a)(20), 1952 Act (8 U.S.C. 1182(a)(20)). He contended that his excludability should also have been adjudicated under sec. 212(a)(22) of that Act (8 U.S.C. 1182(a)(22)).

While in this country as a temporary visitor in 1952 he applied to his local draft board for exemption from service on account of alienage. After his return to Mexico his application for a resident visa was denied by an American consul there on the ground that he was ineligible for a visa by reason of such exemption from service under sec. 212(a)(22) - (8 U.S.C. 1182(a)(22)).

Plaintiff conceded that the exclusion order was proper for lack of an immigrant visa and it was not a review of what was decided that he sought, but rather he sought to enlarge upon the scope of the exclusion proceedings to include the determination of his eligibility for citizenship. In effect, he sought judicial review to test the validity of the consular denial of his visa application.

The Court held that since plaintiff's eligibility for citizenship was not directly in issue or germane to the exclusion proceedings the

Court could not grant specific relief by deciding that question, for admittedly such a decision would not affect his exclusion. To make such an adjudication would be going beyond the Constitutional grant of jurisdiction to the federal courts to decide only cases or controversies, and for a controversy to exist the Court must be able to grant specific relief.

Furthermore, the Court held that under the present law a consul's decision to withhold a visa is not reviewable, not even by the Secretary of State (8 U.S.C. 1104 and 1201); that while Congress has been criticized for its position in this matter, it is up to that body to remedy it and not the courts.

Complaint dismissed.

## IMMIGRATION

Habeas Corpus - Alien Crewman; Adjustment of Status; Influence of Pending Legislation. U.S. ex rel. Trujillo-Gonzales v. Esperdy (S.D. N.Y., Sept. 21, 1960). Petitioner, a native of Colombia, deserted his ship at New York on May 5, 1960 and within five days had obtained employment at Baldwin, L.I. He failed to notify either his shipping company or his Consulate of his whereabouts. On June 17, 1960 he was taken into custody as a deportable alien and he then applied for adjustment of his status to that of a permanent resident (sec. 245, 1952 Act; 8 U.S.C. 1255).

On the assumption that his above actions provided reasonable grounds to believe that he was not a bona fide nonimmigrant crewman when he was temporarily admitted, but intended all along to jump ship, his application was denied and his appeal from the denial dismissed. He then petitioned in habeas corpus challenging the administrative denial. The Court found the administrative decision to be correct and fair procedurally and substantively under the circumstances of the case.

In ruling on petitioner's contention that the Service prejudged the case by consideration of legislation then pending before Congress to amend sec. 245, the Court held that this was speculation, and that, in any event, it was not unreasonable for the Attorney General to take cognizance of Congressional attitudes in the exercise of his discretion in matters of this nature (Hintopoulos v. Shaughnessy, 353 U.S. 72).

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# INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Conspiracy to Violate Espionage Statutes. United States v. Igor Y. Melekh and Willie Hirsch (N.D. Ill.) On October 27, 1960 a federal grand jury in Chicago, Illinois, returned a three-count indictment charging Igor Y. Melekh and Willie Hirsch with a conspiracy to violate 18 U.S.C. 793, 951 and Willie Hirsch alone with a substantive violation of 18 U.S.C. 951. Count I of the indictment charges that Melekh and Hirsch, throughout the entire period from June 1958 to the present, conspired with Kirill S. Doronkin, a co-conspirator but not a defendant, and with persons unknown, to obtain information, particularly information relating to the military installations within the City of Chicago and Cook County, Illinois, including aerial photographs thereof, on behalf of the U.S.S.R. in violation of 18 U.S.C. 793. Thirteen overt acts performed in the Northern District of Illinois and elsewhere are alleged.

Count II of the indictment, under the general conspiracy statute, charges Melekh and Hirsch with conspiring to violate 18 U.S.C. 951, which statute requires agents of a foreign government to register with the Secretary of State.

Count III of the indictment charges Hirsch individually with acting as an agent of the U.S.S.R. without prior notification to the Secretary of State in violation of 18 U.S.C. 951. Melekh was charged with aiding and abetting in the commission of this offense in violation of 18 U.S.C. 2.

Melekh and Hirsch were arrested in New York City on October 27, 1960 and bail was set for $50,000 each.

Staff: United States Attorney Robert Tieken (N.D. Ill.)
and William S. Keeney (Internal Security Division)

Trading with the Enemy Act. United States v. Sterling Packers Corporation and J. E. Bohannon, Sr. (W.D. Ky.) On September 26, 1960 the grand jury at Louisville returned a three-count indictment charging the Corporation and its president with violations of the Trading with the Enemy Act (50 App. U.S.C. 5(b)) and the Foreign Assets Control regulations promulgated thereunder (31 CFR 500.101 et seq.) by exporting and conspiring to export without a license $22,781 worth of tobacco to a Hong Kong company which had been designated under the Act as a national of China. Arraignment is set for November 14, 1960.

Staff: United States Attorney William B. Jones (W.D. Ky.)

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# TAX DIVISION

Assistant Attorney General Charles K. Rice

## Procedure for Handling Disputes in Concluding Refund Suits

In view of some difficulty which has been encountered in this area, we are reissuing the following announcement which appeared in United States Attorneys' Bulletin No. 21, Vol. 6, dated October 10, 1958:

In the payment of judgments and compromise settlements in tax cases, there will arise a certain number of situations in which the computation of the taxpayer or his counsel will not agree with the Government's computation. In order to expedite the handling of such disputes, the Tax Division and the Internal Revenue Service are inaugurating a new "shortcut" procedure.

The United States Attorney will customarily be furnished with a copy of the Revenue Service's recomputation. This recomputation should be furnished to the taxpayer's attorney. If taxpayer's attorney is not satisfied with the Service's computation, he should then be advised to reconcile the differences with the office of the District Director from which the refund was authorized. If the differences cannot be reconciled in this manner, the matter will then be referred by the District Director to the appropriate official of the Revenue Service in Washington, without reference back to the United States Attorney or the Department of Justice. The District Director will receive his instructions as to his authority and method of handling such cases directly from the appropriate official of the Revenue Service in Washington.

## CIVIL TAX MATTERS
## Appellate Decisions

Liens; Priority in Construction Contract Fund Between U. S. and Surety for Laborers and Materialmen; Retained Percentage Required by State Law Held to Create Property Interest to Which Federal Lien Does Not Attach. Johnson Service Co., et al. v. Leo Roush et al., United States, Defendant, Cross-Complainant-Appellant. (Wash. Sup. Ct., October 6, 1960.) This case involved the priority of payments out of a fund of $16,118.54 to debtors of the taxpayer-contractor to whom the fund is owing by a school district. The Washington Supreme Court affirmed the Superior Court of Grant County in dividing the fund into two portions: first, $10,004.63 constituting the 15% percentage retained under state law for the benefit of the State Tax Commission, and sub-contractors; and $6,113.91, or the excess retained by the school district over the required retained percentage. As to the retained percentage, the Court held that the taxpayer-contractor had no property or right to property to which the federal liens could attach. It relied on Aquilino v. United States, 363 U.S. 509 and United States v. Durham Lumber Co., 363 U.S. 522, in holding that

whether taxpayer had a property interest in the fund is a question of property and not of priority, and is to be determined by state law. Consequently, it awarded this portion of the fund to the State Tax Commission, to a subcontractor, and to a surety in partial satisfaction of claims of laborers and materialmen to which the surety had been subrogated. As to the remaining portion of the fund, or $6,113.91, the Court awarded $5,400 in liquidated damages to the school district, pursuant to the construction contract for failure of the taxpayer to complete the work on time, and $713.91 to the United States in partial satisfaction of its lien. The Court thus held in favor of the Government on the appeal of the surety. It rejected the surety's claim of priority over the United States, stating that the surety could not acquire by subrogation any greater rights to this portion of the fund than the subcontractors had to which the surety was subrogated; that the Government's lien was made specific and perfected prior to the liens of the subcontractors; and, therefore, under federal law, which governs in priority matters, the federal lien takes precedence.

Staff: I. Henry Kutz, Carolyn R. Just (Tax Division)

Liens: Priority Between (1) Tax Liens and Mechanics' Liens, (2) Tax Liens and Claim of Surety, and (3) Tax Liens v. Attorneys' Fees. United States v. Chapman, (C.A. 10, July 29, 1960). Petition for rehearing by surety denied. Here the Tenth Circuit held that subcontractors' claims for labor and material were superior to federal tax liens with respect to a balance due on a public improvement contract since under the contract between the owner and the taxpayer-contractor the latter was not entitled to the balance except upon proof, never furnished, of payment for labor and materials; hence, it held, sustaining the trial court, that the taxpayer-contractor had no property to which the federal liens could attach. However, the Court of Appeals did reverse the trial court as to the surety, holding that it was not a purchaser within the meaning of Section 6323 of the 1954 Code, and that the federal tax liens were superior to its claim. It also held that the attorneys' fees had to be paid pro rata by the laborers and materialmen, and not from funds impressed with the federal tax liens.

Staff: George F. Lynch (Tax Division).

Income - Ordinary v. Capital; Gain on Sale of Automobiles Previously Leased or Rented Held Ordinary Income. Greene-Haldeman v. Commissioner (C.A. 9, September 21, 1960). Taxpayer was a large Chrysler-Plymouth automobile agency, selling new and used cars, parts and services, as well as automobile finance and insurance services. Taxpayer also rented cars for long and short terms prior to selling them as used cars either through its regular used car sale facilities or through the lessee's exercise of an option to buy. By engaging in the car rental business, taxpayer was able to obtain more new cars from the manufacturer at a time of scarcity. Both long and short term rental vehicles were depreciated by taxpayer.

The Court of Appeals affirmed and adopted a Tax Court holding that the gain on the sale of these cars was ordinary income because they were

"property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business" within the meaning of Section 117(j)(1)(B) of the Internal Revenue Code of 1939. The Court of Appeals adhered to its earlier position that "primarily" means "substantial" or "essential" rather than "principal" or "chief." The Court upheld Tax Court language indicating that taxpayer had as one of its primary purposes the ultimate sale of these cars to its customers in the ordinary course of its business at the time it acquired the property, and that this intention continued, unaltered, while the cars were being rented and later held until customers purchased them. The Court also held that the Tax Court's consideration of such factors as the taxpayer's sales activity, the frequency, continuity, and substantiality of sales, and the proximity of sales to purchases are factors which are relevant to the determination.

In a separate opinion, Judge Pope expressed his agreement with the Court's affirmance, on the ground that the Tax Court's finding was not clearly erroneous.

Staff: Rita Hauser and Kenneth Levin (Tax Division)

## District Court Decisions

Liens; Security Exception of Section 6323(c) of Internal Revenue Code of 1954. Big Farm Tire Corp. v. J. L. Boland, et al. (E.D. Va., Sept. 19, 1960). Plaintiff interpleader was debtor on a note due taxpayer. Taxpayer delivered the note to Virginia Trust Company, as security for a debt of $5,000. Subsequently, federal tax jeopardy assessments were made against the taxpayer and notices of liens therefor filed. Thereafter, the City of Richmond served a demand on Virginia Trust Company, which under state law affixed a lien on the balance of the note due taxpayer, and on the same date, taxpayer assigned such balance to the Central National Bank, for the account of Samuel Z. Troy, for a pre-existing indebtedness. The amount of $12,654.30 was paid by the interpleader into Court in discharge of the note. Since all parties conceded the priority of Virginia Trust Company, $5,000 was paid to it, leaving a balance of $7,654.30.

Although the federal tax liens were prior in time to the claims of the City and Troy, these claimants relied on Section 6323(c) of the Internal Revenue Code of 1954, which provides that the federal tax lien is invalid as against a prior mortgagee, pledgee or purchaser of a "security." The Court held this provision inapplicable; neither the City nor Troy was a mortgagee or purchaser, since they gave no present consideration, and if a pledgee, neither was a pledgee of a "security." Taxpayer had no power to transfer the note, since a bearer note can be transferred only by delivery, and the note had already been delivered to Virginia Trust Company. He was the owner only of an equity in the note. In addition, the Court denied attorney fees and costs out of the fund to the interpleader, under the holding of United States v. Liverpool & London & Globe Ins. Co., 348 U.S. 215. Accordingly, the Court ruled

that the Government has first priority, but delayed distribution of the fund, pending decision of a Tax Court case determining the amount of the tax liability.

Staff: United States Attorney Joseph S. Bambacus and Assistant United States Attorney Stanley Keeter (E.D. Va.); Robert L. Handros (Tax Division).

Liens; Tenancy by Entireties. Beulah Pilip v. United States, et al. (D. Alaska, Sept. 14, 1960). Plaintiff and her husband, Clem Pilip, were owners of certain real property as a tenancy by the entireties. Tax liabilities were assessed against Clem and Beulah Pilip jointly, Clem Pilip individually, Clem Pilip doing business as Clem Pilip Company, and the Pilip and Butt Painting Contractors, Inc., a corporation. On November 30, 1955, Beulah Pilip, as attorney in fact for Clem and Beulah Pilip and Pilip Paint Company (successor to Pilip and Butt Paint Company, Inc.), executed a power of attorney to a real estate dealer, authorizing payment of rents from the properties to the District Director for satisfaction of tax liabilities of these parties. Thereafter, rents were collected by the District Director and applied to all of the liabilities involved. Subsequently, the property was seized by the District Director for satisfaction of a remaining liability due from Clem and Beulah Pilip jointly.

Plaintiff brought this action for various forms of relief, claiming that it was improper to apply rents from the property to liabilities of her husband or the corporation. The Government counterclaimed and filed a third party complaint for foreclosure of tax liens on the property. A receiver was appointed to collect the rents and held them subject to order of the Court. The Court held that, under Alaska statutes, creditors of each spouse may reach the interest of such spouse in entireties property, which is the right to one-half the rents during the joint lives of the spouses and the right of survivorship, and further that, under the power of attorney, it was proper to apply the rents to the taxes of the corporation. The Court ruled that the District Director must account for rents he received, applying them as follows: first, to the joint liabilities of husband and wife, and the liabilities of the corporation; second, one-half of the balance to the individual liabilities of the husband, including doing business as Clem Pilip Company; and third, any balance to be refunded to plaintiff. Further, the receiver was directed to pay one-half of the funds in his hands to the District Director, and one-half to the plaintiff. If any balance then remained on the individual liability of the husband, his interest in the real property was to be sold for satisfaction thereof.

Staff: United States Attorney George M. Yeager and Assistant United States Attorney Merrell L. Andersen (D. Alaska).

Jurisdiction; Court Had No Jurisdiction Over U.S., Its Agents or Employees in Condemnation Action to Determine Merits of Assessment for

Unpaid Income Taxes; Injunctive and Declaratory Relief With Respect to Such Taxes Are Statutorily Prohibited; Taxpayer Has Adequate Remedy at Law in Suit for Refund. United States v. 675.335 Acres of Land, 60-2 USTC 9709 (S.D. Cal.). In 1953 the United States filed action to condemn a tract of land in the Mojave Desert for the Air Force. A final judgment was entered in January, 1956, awarding $740,000 to the Mojave Corporation and Verner Britton, its majority stockholder. Between 1953 and 1956 the entire sum of $740,000 was paid jointly to the Mojave Corporation and Britton. Subsequently, a controversy arose between Britton and the Internal Revenue Service as to how much of the compensation paid in 1953 was income to him rather than to the corporation. Britton consented to the assessment of the tax and, rather than pay the tax and sue for a refund, he unsuccessfully sought an administrative abatement. In 1960 he secured an issuance in the condemnation action of an order for the Government to show cause how the money jointly paid in 1953 should have been divided. The United States Treasury Department was named in this order.

The Court dismissed the action for lack of jurisdiction over the controversy and the parties for the reasons that (1) the Court had no jurisdiction over the United States, its agents or employees in the condemnation action to determine the merits of the assessment against Britton for unpaid income taxes for 1953; (2) injunctive and declaratory relief with respect to such taxes are statutorily prohibited; and (3) Britton had an adequate remedy at law, i.e., to pay the taxes, file claim for refund and six months thereafter file suit thereon.

The Court also held that Britton had failed to comply with the Federal Rules of Civil Procedure requiring the filing of a complaint and service of process in a separate action and that no justiciable case or controversy remained, since the award in the condemnation action made in January, 1956 was a final judgment.

Staff: United States Attorney Laughlin E. Waters and Assistant United States Attorney Edward R. McHale (S.D. Calif.)

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