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UNITED STATES ATTORNEYS

BULLETIN

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JOB WELL DONE

United States Attorney Robert Vogel, District of North Dakota, has been commended by the Chief Postal Inspector for his successful presentation of two recent mail fraud cases. The Inspector stated that the 36 defendants in one case is not only the largest number of persons to be indicted in a case of this kind, but the indictment represents the first attempt to join as defendants officers and salesmen of an "advance fee" operation on a national scale. The letter further stated that Mr. Vogel, when originally consulted with regard to prosecutive action, immediately took an active interest in the case, and his activities leading up to this important indictment were most impressive.

The Regional Attorney, Department of Agriculture, has commended United States Attorney Franz E. Van Alstine, Northern District of Iowa, for his successful handling of a recent case in the face of what appeared to be insurmountable legal obstacles. The letter stated that it would be well for all to know of the quality of work exemplified by Mr. Van Alstine in this case.

United States Attorney Chester A. Weidenburner and his staff, District of New Jersey, have been commended by the District Director, I & N Service for their fine cooperation and assistance in helping throughout the year. In particular Assistant United States Attorney Paul Smock was commended for his patient and thorough handling of the complicated attempts on the part of aliens to gain adjustment of status fraudulently. The letter stated that the number of indictments arising in these matters was outstanding. Assistant United States Attorney Charles Hoens was commended for his invaluable guidance in one matter, and for his exceptionally fine work on behalf of the Service in the numerous declaratory judgment actions in which it became involved.

The Director, Federal Bureau of Investigation, has commended Assistant United States Attorney Minor Morgan, Northern District of Texas for his diligence and the splendid manner in which he represented the Government in a recent criminal case.

The members of the Federal Grand Jury by unanimous resolution voted to commend United States Attorney Fallon Kelly and staff, and in particular Assistant United States Attorney Clifford J. Janes, District of Minnesota, for their splendid cooperation, effective assistance, perseverance and attention to duty in all matters investigated by the jury. The letter stated that the Grand Jury admired the method of operation, long hours, sacrifices of their time and comfort to carry out assigned duties performed by Mr. Kelly and his staff, and that the members have the highest respect for their attitude and abilities.

The Postal Inspector has expressed appreciation for the unremitting efforts of Assistant United States Attorneys Richard M. Matsch and Jack K. Anderson, District of Colorado, in a recent mail fraud case resulting in the conviction of three offenders of an "advance fee" scheme. The scheme was the notorious promotion of a work-at-home deal through a local corporation to sell more than 800 knitting machines to women in the Denver area who were victimized of more than $375,000. The letter stated that the results of this case are particularly significant in view of a previous unsuccessful trial involving the promoters of a similar but smaller swindle. The letter further stated that the successful prosecution in this and other cases involving "advance fee" schemes will have a strong deterrent effect on confidence men planning to promote mail frauds in the district.

Assistant United States Attorney Charles Thomas McCally, District of Columbia, obtained the first conviction in the district under the statute covering the misuse of the name "United States" by collection agencies or skip tracers. After a thirteen day trial, one of the longest in the history of the Municipal Court, defendant was found guilty as charged and sentenced to pay a fine of $500 or serve 90 days.

United States Attorney William C. Spire, District of Nebraska, was named the Outstanding Young Man in National Government in Omaha by the Omaha Junior Chamber of Commerce.

One of the finest accolades ever received in the Executive Office for United States Attorneys was that given by the judge who presided at the trial of a recent case involving the theft of Canadian Government bonds. In his letter to United States Attorney S. Hazard Gillespie, Jr., Southern District of New York, commending the work of Assistant United States Attorney Winthrop J. Allegaert, the judge wrote:

"He was thoroughly prepared and had an extraordinarily fine command both of the facts and of the law in this case. In addition, he manifested great courtesy throughout the proceeding to his adversaries and to the Court and on every occasion which necessitated the use of good judgment on his part, I found that he was always able to get to the heart of the matter and to reach a conclusion which was both consistent with the Government's interest and with the expedition of the trial. Indeed, his conduct was so exemplary that each one of the five defense counsel paid him a compliment at the beginning of his summation and, when I charged the jury, I could not help adding my own expression of thanks and appreciation.

"The entire case was tried on a high level of professional competence and this was indeed an unusual privilege, particularly in a criminal case.

"I might add that the case was far from an easy one and presented a number of unusual problems. In addition, the indictment was ten years old and that fact, of itself, was a heavy burden for the prosecution to carry.

"I wish to express my congratulations to Mr. Allegaert through you and to congratulate you upon having such a splendid lawyer on your staff."

IMPORTANT CORRECTION

In the list of Departmental officials set out on page 1, Title 1, United States Attorneys Manual, the name of Howard A. Heffron is listed as Assistant to the Deputy Attorney General for United States Attorneys. Mr. Heffron is Assistant Deputy Attorney General and his name should be inserted, in pen and ink, in place of John D. Calhoun. Matters relating to the operation of the United States Attorneys' offices should continue to be forwarded to Mr. Philip H. Modlin, Acting Head, Executive Office for United States Attorneys.

OBITUARY

Sincere condolences are extended to United States Attorney Frank D. McSherry, Eastern District of Oklahoma, on the death of his wife which occurred on December 21, 1960.

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ANTITRUST DIVISION

Assistant Attorney General Robert A. Bicks

SHERMAN ACT

Consent Decree Successfully Defended Against Fourth Attack. United States v. Swift & Co., et al., (N.D. Ill.). On December 12, 1960, Judge Julius J. Hoffman filed a Memorandum of Decision denying, in toto, the petitions of Swift, Armour and Cudahy to modify, in material respects, the historic "Packers Consent Decree" entered against them, and Wilson Packing Company, in 1920 in the District of Columbia. This is the fourth time this important decree has withstood attack. Swift & Co., v. U.S., 276 U.S. 311 (1928), U.S. v. California Cooperative Canneries, 279 U.S. 553 (1929), and U.S. v. Swift & Co., 286 U.S. 106 (1932).

Prior History of the Case

The original antitrust suit which led to the 1920 decree charged the major packers with conspiring to monopolize not only the meat packing industry but also the grocery and retail food fields. By the 1920 decree the defendants were enjoined from, among other things (1) operating, or holding any interest in, public stockyard companies, stockyard terminal railroads or stockyard market newspapers; (2) using or permitting others to use their distributive facilities for the handling of some 114 meat substitute products (fish, vegetables, fruit, groceries, etc.) and 30 other articles unrelated to meat or food; (3) engaging in, or holding any interest in, the business of manufacturing, selling or transporting any of these prohibited items; (4) selling meat at retail; (5) holding any interest in any public cold storage plant, and (6) selling fresh milk or cream.

Following its entry in 1920 in the District of Columbia, the decree was subject to two separate direct attacks to set it aside (on the grounds of lack of jurisdiction) (Swift & Co., v. U.S., supra, and United States v. California Cooperative Canneries, supra). It was also subject to indirect attack in 1929 by Swift and Armour who petitioned the court to modify the decree so as to permit them to handle, at all distribution levels, a full line of groceries in addition to meat, and to own and operate retail food stores for the sale of both meats and groceries. In their petitions the packers alleged that, since entry of the decree in 1920, there had occurred such economic changes in the meat and grocery industries that they no longer had power to monopolize or restrain the food industry, and that future application of the decree to them would be inequitable.

Following lengthy trial, the District Court (Judge Bailey) granted a limited modification, permitting the defendants to manufacture and deal, at wholesale only, in the prohibited grocery items, but in all other respects denied their petitions. On appeal, the Supreme Court on May 2, 1932 reversed the District Court, refused to permit the decree to be modified, and dismissed defendants' petitions.

Present Proceedings

The present phase was commenced with petitions filed by Cudahy on November 29, 1956 and Swift and Armour on December 14, 1956 in the District Court for the District of Columbia for modifications of the 1920 decree. The relief sought by them was, with one exception, substantially the same which they sought in 1929, i.e., to modify the decree so as to permit them to (a) handle and deal in the prohibited grocery and other items at all levels of distribution; (b) to use their facilities (or permit others to use them) for distribution and sale of such items; (c) to own and operate retail stores for the sale of both groceries and meats; and (d) to distribute and sell fresh cream and milk. In addition, defendant Cudahy sought freedom to own and operate public cold storage warehouses.

The grounds alleged in each petition were essentially the same as were contained in their earlier petition in 1929 -- that is, that such economic changes had occurred at all levels of the food and grocery business that defendants, if freed from the decree, would have no power to monopolize; that the decree worked an economic and competitive hardship upon them; that their competitive position in the meat industry had declined to such levels that they no longer occupied positions of dominance or constituted a threat of monopoly; and, finally, that prospective application of the decree to them was inequitable and unjust.

Simultaneously with the filing of the petitions for modification, defendants also filed motions under 28 U.S.C. 1404(a) to transfer the case, in its entirety, from the District of Columbia to the Federal District Court at Chicago. The Government strongly opposed the motion to transfer, and filed an extensive motion for summary judgment. Over the Government's objection the case was transferred to Chicago, and subsequently that Court denied the Government's motion for summary judgment and directed trial.

The trial occupied some 3 1/2 months, and produced a transcript in excess of eight thousand pages. Nearly one thousand exhibits were received in evidence, containing an even greater volume of pages. Pre-trial and post-trial briefs ran into an additional thousand pages. The Memorandum of Decision itself consists of 46 pages.

In denying the petitions for modification the Court, after discussing the long history of the case, the grounds for the original decree and its objectives, and comparing the relevant economic and industry facts of today with those existing at the time of the entry of the decree, made the following comments:

"In determining whether a case for modification has been made, then, the starting point is the entry of the decree itself, and all subsequent change must be measured against the applicable standard . . . it is clear that the test is not that which controls the issuance of an original decree." (p.30).

"The initial inquiry . . . is whether the original need for the decree still exists . . . It is our duty to ask not whether the decree is needed today, but whether if it was needed in 1920, the intervening changes have eliminated that need." (p. 31).

"The continued need for the decree and the hardship suffered by the defendants are neither alternative standards for modification, either of which will suffice," nor cummulative prerequisites, both of which must be established . . . They are rather correlative elements of a single standard. As need is diminished, a lesser showing of hardship will tip the scales in favor of modification, and as the defendants' suffering increases, their burden of showing decreased need is correspondingly lightened." (pp. 32-33).

"Change is inevitable, but it is only change that reaches the underlying reasons for the decree that is relevant. Conditions existing at the time of original entry must be compared with conditions at the time of requested modification, and the significance of the difference measured in the light of these original reasons." (p. 33).

"The petitioners therefore bear the burden of proof on their petitions, and the burden is heavy . . . They . . . must show that the decree when entered was supported by conditions which have so altered with the passage of time that the restraint can no longer be justified, and that they are suffering injury, without counterbalancing advantage to the public interest, sufficient to move a court of equity to act . . . . . The defendants' . . . consent will remain beyond recall until the decree operates to oppress him in ways uncontemplated at its issuance, or until circumstances have so changed that the foundations of the decree, whether adequate or not, are completely undermined. The way of escape is narrow. A broader avenue would destroy the utility of consent decrees." (p. 35).

"Today the defendants in combined totals own assets in excess of one billion dollars, over one half the value of the assets of the entire meat industry. They account for nearly half the nation's meat sales. They slaughter nearly 40% of the commercially slaughtered livestock in the nation. The petitioners remain, to the extent that they were in 1930, the dominating forces in the meat industry. While Cudahy, the smallest of the three, has declined in recent years, it remains one of the nation's largest packers, exceeded by a wide margin only by Swift and Armour, and equalled in approximation only by five competitors." (p. 43).

"If the defendants were to engage in the business of operating general retail food stores, they would enjoy a substantial advantage over their rivals as a result of their control of nearly half the nation's meats and meat products. Vertical integration through acquisition of existing retail stores or chains would tend to restrain competition by providing the defendants with captive outlets for both their meats and groceries, to the exclusion of competitive

products . . . (p. 44). If defendants were permitted to sell groceries and fresh milk and cream at wholesale along with their meats, the competitive advantages of offering a full line of products and the economies resulting from large volume and combined managerial and sales staffs would afford the defendants a competitive advantage similar to that which has largely eliminated the butcher shop, the green grocer, and the bakery shop from the retail trade . . . ." (p. 45).

"Applying the tests dictated by the Swift decision it must be concluded that the petitioners have failed to discharge the burden of establishing that the dangers, if they once existed, have been "attenuated to a shadow" by changed circumstances.

"To the extent that the petitioners' hardship is only the denial of the opportunity to diversify into more rewarding branches of the food industry, the burden is not new or unforeseen, but was specifically contemplated in the framing of the decree."

"It has been said that the decree itself offends the policies of the antitrust laws since it restrains lawful competition by the defendants. The point illustrates one of the many paradoxes of the Sherman Act, that it is sometimes necessary to restrict competition in order to preserve it." (p. 45).

Staff: Harry N. Burgess, Alfred Karsted, Robert J. Ludwig, Lewis Markus, Ernest L. Hays, Earl Jinkinson, Willis Hotchkiss, Ned Robertson, Elliott B. Woolley (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General George Cochran Doub

COURTS OF APPEALS

GOVERNMENT EMPLOYEES

Laches: Delay Caused by Dismissal of Suit for Failure to Substitute Indispensable Parties Held Prejudicial to Government. Benson, et al. v. Zahner (C.A. D.C., November 17, 1960). In a reduction in force, Zahner was separated from employment with the Department of Agriculture. One year after separation he filed suit for judicial review of his removal. Thirty-three months later the suit was dismissed, without prejudice, for failure to substitute indispensable parties. Two weeks after dismissal, Zahner instituted a new action. On review, the district court held the discharge improper and directed reinstatement. On appeal, the Court of Appeals reversed on the ground that the action was barred by laches. The Court held that the original delay in the commencement of the original suit in combination with the delay caused by Zahner's failure, due to lack of diligence (which was to be presumed in absence of contrary evidence) to substitute parties, must be viewed as prejudicial to the Government.

Staff: John G. Laughlin and Marvin Shapiro (Civil Division)

Employee Demotion; Postmaster General Indispensable Party to Suit for Reinstatement. Fagan v. Schroeder, et al. (C.A. 7, December 9, 1960). Plaintiff, an employee at the Chicago Post Office, sought court review of a final order by the Postmaster General demoting him from PFS-10, a supervisory position, to PFS-6, a non-supervisory position.

Plaintiff-employee sought to have both the decision of the local subordinate official and that of the Postmaster General set aside and to be restored to his former position. Defendants asserted that the Postmaster General was an indispensable party and that he was not subject to the jurisdiction of the district court. The district court, applying Williams v. Fanning, 332 U.S. 490 and Shaughnessy v. Pedreiro, 349 U.S. 48, held that the Postmaster General was not an indispensable party because the relief sought would not require him to take action by exercising a power lodged in him since the decree would expend itself upon the subordinate officials. The court rendered a declaratory judgment stating the orders demoting Fagan were null and void.

The Court of Appeals held the Postmaster General to be an indispensable party to a suit to review his final order relating to agency disciplinary action against an employee who challenges the validity of the administrative proceedings. The Court noted that the decision was in the exercise of the Postmaster General's discretion and that any agency action pursuant to a court decree setting aside the order would require the exercise of

discretion by either the Postmaster General or the subordinate officials, thus bringing the case within the principle of Williams v. Fanning, supra. The district court judgment was vacated and the case remanded with instructions to dismiss without prejudice.

Staff: Donald Hugh Green (Civil Division)

REMOVAL OF ACTIONS AGAINST FEDERAL OFFICERS

Statute Authorizes Removal by Any Persons Entitled to Remove. Bradford, et al. v. Harding, et al., (C.A. 2, November 29, 1960). Plaintiff brought suit for false arrest and imprisonment on a mail fraud charge against 54 defendants, including some federal officers. Some but not all of the federal officers joined in a petition for the removal under 28 U.S.C. 1422. Plaintiff promptly moved to remand on the ground of the failure of all defendants to join in the petition. The district court denied the motion to remand. The Court of Appeals affirmed on the ground that the policy in favor of removal of federal suits and the history of the removal statute required that the term "by them" in 28 U.S.C. 1422 be read to mean by any of them.

Staff: United States Attorney, Cornelius W. Wickersham, Jr. (E.D.N.Y.). Assistant United States Attorney, Myron Beldock (E.D.N.Y.).

DISTRICT COURT

FEDERAL TORT CLAIMS ACT

Liability to Trespasser in Stilling Pool Below Dam; Effect of Contributory Negligence. Frances Vanzura, Widow, etc., et al. v. United States (W.D. Tex., November 21, 1960). Plaintiffs' decedent and other fishermen went into the stilling pool below a dam across the Brazos River in order to fish, dressed in winter clothes, including boots, and carrying the usual fishing paraphernalia. The approaches to the area were fenced and there were numerous large signs warning of danger and instructing persons not to cross the channel as the gates of the dam might be opened at any time. Despite the cooperation of local officials, fishermen frequently fished in and about the area. A siren was sounded to indicate the sudden release of water. On the day in question the siren was sounded, a sluice gate opened, and the water below the dam began to rise suddenly. The tower operator, an employee of the Army Corps of Engineers, could not see the place where the fishermen were. All of the fishermen but plaintiffs' decedent got to higher ground in safety, but he delayed to reel in his fishing line, held on to a string of fish and all his paraphernalia and undertook to wade to land. Although he was an excellect swimmer, he was drowned in the swirling and rising water.

The Court found that, although the Government had sufficiently expressed its unwillingness to receive the public in the area, the danger was open and obvious, the Government knew or ought to have

known that fishermen frequented the area and that there was too short an interval between the sounding of the siren and the opening of the sluice gates. The Court also found that Vanzura was contributorily negligent in belatedly wading into the flow of water, carrying his string of fish and paraphernalia which increased the precariousness of his balance, and accordingly entered judgment for the Government.

Staff: United States Attorney, Russell B. Wine (W.D. Tex.)
Assistant United States Attorney, K. Key Hoffman, Jr. (W.D. Tex.)
Milan M. Dostal (Civil Division)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Harold R. Tyler, Jr.

Publication and Distribution of Anonymous Political Literature Concerning a Federal Candidate. On November 15, 1960, an information was filed in the District Court for North Dakota charging John W. Scott in two counts with violation of Section 612, Title 18, United States Code (publication of anonymous political statements).

Investigation shows that during the month of June 1960 John W. Scott published and distributed in the District of North Dakota copies of a certain pamphlet concerning Quentin Burdick, Democratic candidate for United States Senator from the State of North Dakota. The pamphlet, entitled "Is This Smear - Or Are They Facts?", did not contain the names of the publisher or distributor.

The defendant has filed a motion to dismiss the information on the ground that the statute is unconstitutional under the Supreme Court's decision in Talley v. California, 262 U.S. 60.

Staff: United States Attorney Robert Vogel; Henry Putzel, Jr., William J. O'Hear (Civil Rights Division).

CRIMINAL DIVISION

Assistant Attorney General Malcolm Richard Wilkey

FRAUD

Misuse of Name on Skip-tracing Forms to Indicate Federal Agency. United States v. Wacksman (Mun. Ct., District of Columbia). Pursuant to Public Law 86-291, 73 Stat. 570, 18 U.S.C. 712, effective November 20, 1959, denouncing as a misdemeanor misuse of names by collection firms to indicate Federal agency, an information was filed in August 1960 against Mrs. Wacksman operating as National Deposit System and Allied Information Agency. In the operation of her debt collection agency which had a Washington, D. C. address, defendant sold printed skip-tracing forms at $30 per hundred to merchants throughout the United States. The forms used the term National Deposit Certificate, the legend National Deposit System and were gang punched as though designed for IBM use, like Government checks. Emblazoned on their face was a replica of the American eagle and it was represented to the addressee that a sum not exceeding $100 was on deposit for him if he would complete the questions on the reverse side. The forms were sent in brown window envelopes and were to be returned to National Deposit System, Att: Department of Disbursements. Upon return of these forms the addressees received two cents and of course the creditors were then free to use the information obtained in tracing delinquent accounts. Mrs. Wacksman attempted to circumvent the statute's application by printing a disclaimer on the form which was of smaller and less bold type than the remainder of the printing to the effect the concern was not a Federal agency or instrumentality. However, in contacting prospective customers she employed a circular calling attention to various points of form and phraseology calculated to impress the recipient with the federal character of National Deposit System.

Mrs. Wacksman's activities had also come to the attention of the Federal Trade Commission, which received evidence in an appropriate hearing, thereafter issuing a cease and desist order from which her counsel took an unsuccessful appeal. It was necessary to draft a charge under the statute covering her business operation subsequent to the hearing, the activities prior thereto being protected by the immunity provisions of 15 U.S.C. 49. Trial commenced on November 17 and concluded December 6, the jury returning a guilty verdict. The principal defense of good faith reliance upon advice of counsel that use of the disclaimer would render the business legitimate was to no avail. The jury apparently decided the over-all format of the cards was calculated to mislead and the manner in which Mrs. Wacksman solicited business was inconsistent with a profession of innocence. On December 8, 1960 defendant was sentenced to pay a fine of $500 or to serve 90 days in jail.

It is expected that this prosecution will have national as well as local significance as a deterrent to others contemplating skip-tracing activities, since it would materially contribute to

the success of the enterprise to utilize a Washington mailing address.

Staff: Assistant United States Attorney Charles Thomas McCally (Dist. of Col.).

DENATURALIZATION

Motion to Vacate Denaturalization Judgment Under F. R. Civ. Proc. 60 (b). Polites v. United States (U.S. Supreme Court, November 21, 1960). Petitioner was naturalized in 1942 under the provisions of the Nationality Act of 1940. In 1952, denaturalization proceedings were brought against him under that Act, charging that the naturalization had been illegally procured in violation of Section 305 of that Act. Section 305 barred naturalization if, within ten years prior to filing the naturalization petition, the alien had been a member of an organization advocating the forcible overthrow of our Government. At the trial, the Government proved that petitioner had been an active member and officer of the Communist Party from 1931 to 1938 and that the Party then advocated the overthrow of our Government by force and violence. The district court found that petitioner had illegally procured his naturalization and ordered it revoked.

Petitioner appealed to the Court of Appeals for the Sixth Circuit. Other appeals involving the same issue were then pending in that court. Before petitioner's brief was due, the judgments in those cases were affirmed. Petitions for certiorari were filed and petitioner's time to file his brief on appeal was extended to await disposition of the certiorari petitions. When they were denied, petitioner's counsel (who was also counsel in the other cases) stipulated for dismissal of his appeal with prejudice, and it was dismissed on November 10, 1954. Four years later, petitioner moved the district court under Rule 60(b)(5) and (6) to set aside the denaturalization judgment. The motion was based on the intervening decisions in Nowak v. United States, 356 U.S. 660 (1958), and Maisenberg v. United States, 356 U.S. 670 (1958), which petitioner contended definitely decided the issue. Therefore, contended petitioner, it is no longer equitable that the denaturalization judgment should have prospective application. The district court denied the motion (see United States Attorneys Bulletin, Vol. 6, No. 26, December 19, 1958, pp. 750, 751) and the Court of Appeals affirmed per curiam.

In the Supreme Court, the Government urged two bases for affirmance: (1) That a freely made decision not to appeal a denaturalization judgment may not be excused by permitting recourse to Rule 60(b) as a substitute for appeal, even in the face of a subsequent change in the applicable law, citing Ackermann v. United States, 340 U.S. 193 (1950); (2) that in any event, the denaturalization judgment was proper, the Nowak and Maisenberg decisions being inapposite. Petitioner contended that under those decisions, a showing of scienter was necessary, and the

Government here had failed to prove he was aware of the Communist Party's unlawful objectives. The Supreme Court affirmed in a 5-4 decision. The majority found it unnecessary to decide that, under Ackermann, relief under Rule 60(b) is inflexibly to be withheld even though there has later been a clear and authoritative change in the governing law. The majority concluded that Nowak and Maisenberg are distinguishable, since the naturalizations there took place under an earlier statute with different eligibility requirements, and therefore did not work the controlling change in the governing law asserted by petitioner. The Court found it unnecessary to decide whether the district court's interpretation of Section 305 as not requiring scienter was correct, since that issue was not before the Court.

Staff: Charles Gordon (Immigration and Naturalization Service);
Beatrice Rosenberg and Jerome M. Feit (Criminal Division).

NEW LEGISLATION

There were enacted during the 86th Congress, 1st and 2d Sessions, approximately 39 statutes containing provisions of particular interest to the Criminal Division. A list of such statutes is included with this issue of the Bulletin. Legislative histories of some of these statutes have already been compiled and are on file in the Legal and Legislative Research Unit of the Division; the others are in process of being compiled.

	Public Law
Agriculture - Livestock Feed	86-299
Agriculture - Promoting Foreign Trade in Grapes and Plums	86-687
Animals - Horses and Burros - Methods of Hunting	86-234
Animals - Humane Slaughter of Livestock - Effective Date of Act	86-547
Bankruptcy - Claims - Elimination of Oaths	86-519
Bankruptcy - Concealment of Assets	86-701
Banks and Banking - National Banking Laws - Revision	86-230
Civil Rights Act of 1960	86-449
Coast Guard - Lifesaving Equipment, Regulation	86-244
Communications Act Amendments, 1960 (Payola)	86-752
Costs - Proceedings in Forma Pauperis	86-320

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Contempt of Congress; Failure to Appear. Wheeldin v. United States (C.A. 9). Wheeldin was indicted in the Southern District of California for contempt of Congress because he failed to appear in response to a subpoena of the House Un-American Activities Committee. He was found guilty after a trial without a jury and sentenced to 30 days imprisonment and a fine of $100 (8 Bull. 146). The Court of Appeals for the Ninth Circuit (Chambers and Koelsch, Circuit Judges, and Bowen, District Judge) affirmed in a per curiam opinion originally filed October 17, 1960, on the authority of Barenblatt v. United States, 360 U.S. 109. The Court said that an evil intent was not necessary to the offense, and that a deliberate and conscious intent to disobey the subpoena is all that is needed. The original opinion included a statement: "The Clerk will tax the cost of transcript and other proper costs to the appellant." December 8, 1960, an amended opinion was filed which omitted that statement.

Staff: The appeal was handled by Assistant United States Attorneys Robert John Jensen and Meyer Newman (S.D. Calif.)

False Non-Communist Affidavit: Venue, Production of Grand Jury Minutes; Section 3500. Travis v. United States (S. Ct.) The appeals in this case were argued in the District of Colorado on December 13, 1960.

Travis was indicted in 1954 under a six-count indictment charging the filing in 1951 and 1952 of false affidavits under the Taft-Hartley Act. Two counts were dismissed prior to trial and he was convicted on the remaining four. The judgment was reversed on the ground of improper cross-examination of defendant's character witnesses. 247 F. 2d 130 (C.A. 10). After a second trial he was again convicted on the four counts. Motions for a new trial on the ground that the testimony of prosecution witness Fred Gardner in the case of United States v. West (8 Bull. 146), showed him to be an untrustworthy witness were denied, and the Court of Appeals affirmed. 269 F. 2d 928 (C.A. 10) Certiorari was granted on three petitions, one as to the denial of each of two motions for a new trial, and one as to the affirmance of the conviction.

The appeals covered a wide range of questions. Travis was an officer of the International Union of Mine, Mill and Smelter Workers and the affidavits were prepared in Denver and mailed to the National Labor Relations Board in Washington; petitioner argued that the venue could be laid only in the District of Columbia, citing United States v. Valenti, 207 F. 2d 242 (C.A. 3). He also argued at length that the trial court erred in refusing to order grand jury minutes of the testimony of prosecution witnesses which resulted in the return of the indictment and before other grand juries as to the same or related matters produced for his use in cross-examination, and that at any rate the court should have inspected the grand jury minutes in camera to determine whether they

should be produced. In addition, he argued that the "two-witness rule" applicable to perjury cases should have been applied, that admissions made by him to Government witnesses had to be corroborated, that the court erred in its handling of motions for production of documents under 18 U.S.C. 3500, and in its instructions to the jury as to the meaning of "membership" in the Communist Party, and that the evidence was insufficient.

Staff: The case was argued for the Government by George B. Searls (Internal Security). With him on the brief were Jack D. Samuels and Robert L. Keuch (Internal Security)

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. (See U.S. Attorneys Bulletin, Vol. 8, No. 23, page 693). On November 17, 1960, the defendant Corporation entered a plea of guilty to all three counts of the indictment and was fined a total of $7,500. The indictment was then dismissed on motion of the Government as to the other defendant, J. E. Bohannon, Sr.

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

Trading with the Enemy Act. U.S. v. Atkinson (N.D. N.Y.). On August 15, 1960 the defendant entered a plea of guilty to an information charging violations of the Trading with the Enemy Act. (See U.S. Attorneys Bulletin, Vol. 8, No. 19, page 608). On November 14, 1960 the defendant was sentenced to probation for a period of two years. The Court took into consideration "the very valuable cooperation" given to the United States by the defendant.

Staff: United States Attorney Theodore F. Bowes and Assistant United States Attorney Kenneth P. Ray (N.D. N.Y.)

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TAX DIVISION

Assistant Attorney General Charles K. Rice

CIVIL TAX MATTERS
Appellate Decisions

Deduction - Marital. In Meyer v. United States, decided November 21, 1960, the Supreme Court for the first time construed the marital deduction allowed in computation of the estate tax (Section 812(e) of the 1939 Code and Section 2056 of the 1954 Code). The decedent had selected an optional mode of settlement common under life insurance policies which provided for payment of equal monthly installments to his wife for her life, with 240 installments guaranteed, and further provided that if the wife should die before receiving the 240 installments her daughter would receive the remainder of them. The executors, relying upon In re Reilly's Estate, 239 F. 2d 797 (C.A. 3), had contended that the sum, representing the portion of the proceeds of the policies actuarially computed by the insurance companies as necessary to continue the installment payments to the wife for her life expectancy beyond the 20 years certain, constituted a separate "property" in which the daughter had no interest, and that portion qualified for the marital deduction. The Court, affirming the Second Circuit in a 6 to 3 opinion, held that each policy constituted only one property, and since the daughter may enjoy a part of the proceeds after the wife's death, a person other than the surviving spouse may possess or enjoy a part of the property after the termination of the spouse's interest. Thus the wife's interest in the entire proceeds of each policy is disqualified for the marital deduction under the express provisions of the statute. The Court also ruled that the actuarial allocations of the policy proceeds by the insurers were no more than bookkeeping entries made for their own convenience, and that it was the terms of the policies and not these entries which created the rights involved.

Staff: I. Henry Kutz (Tax Division).

Deduction of Ordinary and Necessary Business or Nonbusiness Expenses; Expenditures to Obtain Signatures for Referendum Not Deductible. Washburn v. Commissioner (C.A.8, November 15, 1960). Taxpayer was the sole salaried officer, publisher, and editor of the Hope Star, and owner of fifty per cent of the stock of the Star Publishing Company, and Arkansas corporation. In 1955 the Arkansas Legislature passed an act exempting livestock and poultry feeds from the then existing two per cent sales tax. During the same year, taxpayer expended $6,024.96 to obtain the required number of signatures for the purpose of referring this exempting act to popular vote at a general election. Taxpayer felt that if the exemption of livestock and poultry feeds from the sales tax should continue, an increase in the general sales tax rate would be necessary; that such an increase would cause many people to buy in a neighboring Texas town rather than in Hope, Arkansas; that

such loss of business by the merchants of Hope would reduce the income of the Star Publishing Company, particularly from advertising; and that the taxpayer's personal income from dividends paid by the company would be reduced. Taxpayer claimed the deduction as an ordinary and necessary business expense under Section 162(a) of the Internal Revenue Code of 1954, or an ordinary and necessary nonbusiness expense under Section 212(1) or (2) of the Code.

The Court of Appeals affirmed the Tax Court's disallowance of the claimed deduction on the authority of the same regulation which the Supreme Court had construed in Cammarano v. United States, 358 U.S. 498, forbidding the deduction of sums spent, inter alia, for the promotion or defeat of legislation. The Court held that sums spent for the purpose of promoting a referendum were spent for the promotion or defeat of legislation, and were not deductible either as ordinary and necessary business or nonbusiness expenses. The Court further affirmed the Tax Court's conclusion that any possible benefit to the taxpayer which might result from the legislation for which he made the expenditures was too remote and uncertain to justify the claimed deduction.

Staff: Kenneth E. Levin and C. Guy Tadlock (Tax Division).

District Court Decisions

Liens: Jurisdiction: Requirement That Interest of United States Be Set Forth With Particularity in Complaint, Pursuant to 28 U.S.C. 2410, Given Effect and Complaint Dismissed. Newman & Selby v. Stubbings, United States of America, et al., (S. Ct., Rockland Cty., N.Y., May 31, 1960). The Government was made a party to this quiet title action by virtue of an allegation in the complaint that the United States claims or may claim a lien upon the premises due to unpaid inheritance taxes owned by any of the estates of the six named defendants. The Government moved to dismiss on the grounds that 28 U.S.C. 2410, which gives the court jurisdiction over the United States in such cases, expressly required that the interest of the United States be set forth with particularity. Plaintiff contended that this requirement of particularity only required plaintiffs to execute diligent title searches and that once a plaintiff alleged all the information that he possessed, the requirement was satisfied. The Government contended that this requirement is more than a procedural, pleading requirement; that it is a jurisdictional requirement designed, in part, to condition the obtaining of jurisdiction over the United States of America to situations where specified liens actually exist, and to thus prevent such cases as the one at bar where the title company attempts to shift its burden to the Government. The Court upheld the Government's contention on the ground that plaintiffs joined the United States as a defendant out of "an abundance of caution" and thus placed an undue burden on the United States to ascertain whether or not it had any liens or interest upon the involved property. The Court dismissed the complaint, with leave to amend, and plaintiff having failed to do so, the United States was dismissed from the action.

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

Injunction--Denied Against Selling of Automobile Levied Upon to Satisfy Tax Liability of Taxpayer, Who Had transferred Registered Title to Wife Where Wife Did Not Sustain Burden of Proof Under State Law on Fairness of Transaction. Spiegel v. Ross, (N.D. Ga.), 1960-2 USTC par. 9749. Plaintiff, wife of the taxpayer, sued to enjoin the District Director from selling a certain automobile registered in her name which was levied upon to satisfy the alleged tax liability of her husband. Stipulated facts were that formerly the registered title to the automobile was in the name of the taxpayer-husband, that shortly after receiving notice of a proposed penalty assessment the taxpayer transferred registered title to the automobile to his wife, and that one month later assessments were made on the taxpayer. Plaintiff, taxpayer's wife, did not come forward with evidence to demonstrate that the transfer of the property was in good faith.

The Court, in directing summary judgment for defendant, held that the plaintiff, by not coming forward with evidence to demonstrate the fairness of the transfer, failed to sustain her burden of proof under Georgia law.

The propriety of levying on property held in the name of the wife for the tax liability of the taxpayer-husband, instead of asserting transferee liability, was not brought into issue.

Staff: United States Attorney Charles D. Read, Jr. and Assistant United States Attorney Slaton Clemmons (N.D. Ga.); Norman E. Bayles (Tax Division).

CRIMINAL TAX MATTERS

Appellate Decision

Lesser Included Offense; Refusal of Requested Instruction in Tax Evasion Case on Ground of Limitations. Chaifetz v. United States (C.A. D.C. November 10, 1960). Appellant was convicted of the wilfully attempted evasion of his 1953 and 1954 income taxes by filing false and fraudulent returns in violation of Section 145(b) of the 1939 Code and Section 7201 of the 1954 Code. On appeal he contended, inter alia, that the trial judge should have charged the jury--in accordance with an instruction requested by appellant--that it might find him not guilty of tax evasion but guilty of having wilfully failed to supply information--a misdemeanor--in violation of Section 145(a) of the 1939 Code and Section 7302 of the 1954 Code. The Court of Appeals, affirming the conviction, found it unnecessary to reach the question of whether the misdemeanor is indeed a lesser offense necessarily included within an allegation of tax evasion by filing a false return. (We are clearly of the opinion that it is not.) The Court held that since the statute of limitations had barred prosecution for the misdemeanors at the time the indictment was returned the trial court correctly refused to give the requested instruction. The Court stated:

> The rule is well established that, when an accused is on trial for a felony (not barred by limitations), he cannot be convicted of a lesser included offense if the latter offense is barred.

* * *

There are many cases on the point. References to a few, with their citations, will suffice.

The Court then cited a number of state cases (there is a dearth of federal authority on the subject), including State v. King, 140 W. Va. 362, 84 S.E. 2d 313; People v. DiPasquale, 161 App. Div. 196, 146 N.Y. Supp. 523; Letcher v. State, 159 Ala. 59, 48 So. 805; Perry v. State, 103 Fla. 589, 137 So. 798; and Spears v. State, 230 Ala. 316, 160 So. 727.

Staff: United States Attorney Oliver Gasch; Assistant United States Attorneys John D. Land and Carl W. Belcher (D. C.)

District Court Decision

Wilfulness; Failure to file. U. S. v. Hugh Fullerton (D. Md.). Defendant, an attorney who had not filed income tax returns since one for 1941, was convicted after trial before the Court for his failure to file returns for the years 1955/57.

In its opinion, filed November 18, 1960, the Court construed the underlined words in the following portion of the approved charge in Yarborough v. United States, C. A. 4, 1956, 230 F. 2d 56, cert.den. 1956, 251 U. S. 969, as they appear in 230 F. 2d, at p. 61:

"I instruct you that the only bad purpose or bad motive, which it is necessary for the Government to prove in this case is the deliberate intention not to file returns which the defendant knew ought to have been filed so that the Government would not know the extent of the liability."

Noting that the above underlined words constituted the critical language in the above passage the Court stated:

"'So that' may mean either 'with the result that' or 'in order that'. The former would seem to be the appropriate construction in a misdemeanor case of failing to file."

Defendant urged the latter construction, which, the Court observed, would have the Court conclude:

"Thus, if a taxpayer is to be convicted for a wilful failure to file a return, the government must prove *** that the taxpayer failed to make a return with criminal intent to conceal from the government the extent of his income, and, thus, his tax liability."

This, the Court rejected as "an apparent attempt to equate the requirements of the misdemeanor of wilful failure to file a return (U.S.C. 26 Sec. 7203) with those of the felony of a wilful attempt to evade or defeat a tax, or the payment thereof. (26 U.S.C. 7201)."

Staff: United States Attorney Leon H. A. Pierson (D. Md.)

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