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UNITED STATES ATTORNEYS

BULLETIN

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MONTHLY TOTALS

As of November 30, 1960, total filings of both civil and criminal cases had decreased over the same period in fiscal 1959. Total terminations of criminal cases also decreased in the first five months. The rate of cumulative increase in the pending caseload remained approximately the same as for the preceeding months, with the rise in the number of civil cases pending continuing to be especially marked. Set out below is a comparison of the work accomplished during the first five months of fiscal years 1959 and 1960.

	1st 5 Months F. Y. 1960	1st 5 Months F. Y. 1961	Increase or Decrease Number	%
Filed				
Criminal	12,664	12,286	- 378	- 3.0
Civil	10,108	9,943	- 165	- 1.6
Total	22,772	22,229	- 543	- 2.4
Terminated				
Criminal	11,626	11,409	- 217	- 1.9
Civil	8,752	8,799	+ 47	+ .5
Total	20,378	20,208	- 170	- .8
Pending				
Criminal	8,529	8,498	- 31	- .4
Civil	19,633	20,383	+ 750	+ 3.8
Total	28,162	28,881	+ 719	+ 2.6

	July	August	September	October	November
Filed					
Criminal	1,709	2,346	3,201	2,551	2,479
Civil	1,863	2,304	1,897	1,990	1,889
Total	3,572	4,650	5,098	4,541	4,368
Terminated					
Criminal	1,600	1,772	2,328	2,977	2,832
Civil	1,463	1,906	1,798	2,005	1,627
Total	3,063	3,678	4,126	4,982	4,459

Collections for November rose appreciably over those for October and aggregate collections are still well ahead of those for the prior fiscal year. For the month of November 1960, United States Attorneys reported collections of $2,840,762. This brings the total for the first three months of this fiscal year to $12,811,827. This is $1,744,311 or 15.8 per cent more than the $11,067,516 collected in the first five months of fiscal year 1960.

During November $3,276,326 was saved in 83 suits in which the Government as defendant was sued for $4,510,940. 42 of them involving $1,720,117 were closed by compromise amounting to $423,304 and 22 of them involving $1,676,444 were closed by judgment against the United States amounting to $811,310. The remaining 19 suits involving $1,114,379 were won by the government. The amount saved for the first five months of the current year was $11,346,356 and is a decrease of $86,111 from the $11,432,467 saved in the first five months of fiscal year 1960.

DISTRICTS IN CURRENT STATUS

As of November 30, 1960, the districts meeting the standards of currency were:

CASES

Criminal

Ala., N.	Ill., E.	Minn.	N.C., W.	Tex., E.
Ala., M.	Ind., N.	Miss., N.	N.D.	Tex., S.
Ala., S.	Ind., S.	Mo., E.	Ohio, N.	Utah
Alaska	Iowa, N.	Mo., W.	Ohio, S.	Vt.
Ariz.	Iowa, S.	Neb.	Okla., N.	Wash., E.
Ark., E.	Kan.	Nev.	Okla., W.	Wash., W.
Calif., N.	Ky., E.	N. H.	Ore.	W. Va., N.
Calif., S.	Ky., W.	N. J.	Pa., E.	W. Va., S.
Colo.	La., E.	N. M.	Pa., W.	Wis., E.
Del.	La., W.	N. Y., N.	P. R.	Wis., W.
Dist. of Col.	Maine	N. Y., S.	S. D.	Wyo.
Fla., N.	Md.	N. Y., W.	Tenn., E.	C. Z.
Hawaii	Mass.	N. C., E.	Tenn., W.	Guam
Idaho	Mich., E.	N. C., M.	Tex., N.	V. I.
Ill., N.				

CASES

Civil

Ala., N.	Ark., W.	Hawaii	La., W.	Minn.
Ala., S.	Calif., N.	Ind., S.	Me.	Miss., N.
Alaska	Conn.	Iowa., S.	Md.	Mo., E.
Ariz.	Dist.of Col.	Kan.	Mass.	Mo., W.
Ark., E.	Fla., N.	Ky., W.	Mich., E.	Neb.

CASES

Civil (Cont'd.)

N. J.	Ohio, N.	R. I.	Utah	W. Va., N.
N. M.	Okla., E.	S. D.	Vt.	W. Va., S.
N. Y., N.	Okla., W.	Tenn., W.	Va., E.	Wyo.
N. C., M.	Ore.	Tex., E.	Wash., E.	C. Z.
N. C., W.	Pa., M.	Tex., W.	Wash., W.	V. I.
N. D.	P. R.			

MATTERS

Criminal

Ala., N.	Ga., S.	Me.	N. C., W.	Tex., W.
Ala., M.	Hawaii	Md.	N. D.	Utah
Ala., S.	Idaho	Mass.	Ohio, S.	Wash., E.
Ariz.	Ill., E.	Miss., N.	Okla., N.	W. Va., N.
Ark., E.	Ind., N.	Miss., S.	Okla., W.	W. Va., S.
Ark., W.	Ind., S.	Mont.	Pa., E.	Wis., E.
Calif., N.	Iowa, S.	Neb.	P. R.,	Wyo.
Calif., S.	Kansas	N. J.	R. I.	C. Z.
Conn.	Ky., E.	N. M.	S. D.	Guam
Del.	Ky., W.	N. Y., E.	Tenn., W.	V. I.
Fla., N.	La., W.	N. C., M.	Tex., E.	

Civil

Ala., N.	Hawaii	Md.	N. C., E.	Texas, W.
Ala., M.	Idaho	Mass.	N. C., M.	Utah
Ala., S.	Ill., N.	Mich., E.	N. C., W.	Vt.
Ariz.	Ill., E.	Mich., W.	Ohio, N.	Va., E.
Ark., E.	Ill., S.	Minn.	Ohio, S.	Va., W.
Ark., W.	Ind., N.	Miss., N.	Okla., N.	Wash., E.
Calif., N.	Ind., S.	Miss., S.	Okla., E.	Wash., W.
Calif., S.	Iowa, N.	Mo., E.	Okla., W.	W. Va., N.
Colo.	Iowa, S.	Mont.	Pa., E.	W. Va., S.
Conn.	Kan.	Neb.	Pa., W.	Wis., E.
Dist. of Col.	Ky., E.	Nev.	R. I.	Wis., W.
Fla., N.	Ky., W.	N. J.	S. D.	Wyo.
Ga., N.	La., E.	N. Y., E.	Tenn., M.	C. Z.
Ga., M.	La., W.	N. Y., S.	Texas, N.	Guam
Ga., S.	Me.	N. Y., W.	Texas, S.	V. I.

JOB WELL DONE

The Chief Postal Inspector has expressed to United States Attorney Wilbur G. Leonard, District of Kansas, appreciation for his prompt action against an advance fee mail fraud scheme operating in his District. The letter observed that, with the national total of indictments and convictions rapidly rising, the indictment returned against the operator of the swindle and three of his salesmen represents another accomplishment in the joint program of the Department of Justice and the Post Office Department aimed at eradication of this mail fraud scheme.

Assistant United States Attorney Daniel H. Honemann, District of Maryland, has been commended by the ICC Regional Attorney, for the masterful manner in which a recent trial was handled. The letter observed that at the conclusion of the first day there was no doubt in the minds of the court and the jury as to the guilt of the defendant. The letter further stated that Mr. Honemann's opening statement was a masterpiece in explaining the case to the jury in terms readily understandable, for a rate case of this kind is unusually complicated. The final disposition of the case on a plea of nolo contendere was entirely satisfactory to the Commission.

The FBI Special Agent in Charge has commended Assistant United States Attorney Charles W. Eggart, Jr., Northern District of Florida, for the advice, counsel, and legal knowledge he extended to that agency in a recent lengthy and complicated case. The letter stated that it is extremely difficult to obtain successful prosecution when the defendants are of good repute, and that the other agents along with Mr. Eggart made an excellent team in the presentation of this case.

United States Attorney Paul W. Cress and Assistant United States Attorney Erwin A. Cook, Western District of Oklahoma, have been congratulated by the SEC General Counsel, for their splendid work in a recent investment corporation case which was brought to a successful conclusion.

The FBI Special Agent in Charge has commended Assistant United States Attorney Averill M. Williams, Eastern District of New York, for the high degree of sustained interest and cooperation demonstrated in a recent case which resulted in a successful conclusion.

Assistant United States Attorney James M. FitzSimons, Eastern District of New York, has been commended by the FAA Associate General Counsel, for his efforts in the settlement of $12,000 which represents the largest amount ever collected by a United States Attorney's office, for violation of the Civil Air Regulations. The letter stated that Mr. FitzSimons displayed his ability to analyze and understand the technical questions of aviation law involved in this matter, and that he applied his legal skills with the energy, efficiency and attention to detail, which resulted in the expeditious and successful completion of the case.

ANTITRUST DIVISION

Acting Assistant Attorney General W. Wallace Kirkpatrick

Complaint Filed Under Sherman Act, Clayton Act and Robinson-Patman Act. United States v. Greater Buffalo Press, Incorporated, et al., (W.D. N.Y.). A civil complaint was filed on January 6, 1961 at Buffalo, New York against six corporate defendants engaged in the sale of color printing or color printing services to newspapers for the color comic supplements which they distribute with their Saturday or Sunday editions. Defendants are charged with violations of Sections 1 and 2 of the Sherman Act and Sections 3 and 7 of the Clayton Act. The defendants named are Greater Buffalo Press, Incorporated (Greater Buffalo), the largest printer of color comic supplements in the United States, and its three subsidiaries, The International Color Printing Company (International), Southwest Color Printing Corporation and Dixie Color Printing Corporation. Also named as defendants are The Hearst Corporation (Hearst) and Newspaper Enterprise Association, Inc., (NEA), a subsidiary of E. W. Scripps Company, Inc. Defendants Hearst, through its King Features Syndicate Division, and NEA are two of the foremost syndicates in the country engaged in the business of licensing copyrighted newspaper features, including color comic features, to newspapers. Neither operates color printing facilities but each sells color comic supplement printing services, not only for the printing of its own copyrighted features, but for the features of competing comic feature syndicates as well. Named as a co-conspirator is Eastern Color Printing Company (Eastern), which is engaged in the business of printing color comic supplements.

The filing of the complaint followed a grand jury investigation in Buffalo, New York in which the grand jury, at the completion of its term, reported to the court its conclusion that the interests of justice would best be served by the immediate filing of an action under Section 4 of the Sherman Act for civil relief to prevent and restrain violations of law, as disclosed by the evidence before it.

The complaint alleges that defendants Greater Buffalo and Hearst have been engaged in a conspiracy since about January 1954, joined about November 1955 by defendant NEA and co-conspirator Eastern, whereby the parties agreed to refrain from soliciting color comic supplement printing business from each other's newspaper customers and agreed to maintain and stabilize the price of color comic supplement printing in the United States, in violation of Section 1 of the Sherman Act. It further alleges that the foregoing conspiracy was carried out by specific meetings held in New York City. The complaint sets forth that, as a result of the foregoing conspiracy, defendants submitted artificially high and non-competitive prices and refused to submit price quotations for color comic supplement printing to named newspapers located in Mississippi and Georgia.

In addition, defendants Greater Buffalo, Hearst and NEA and the co-conspirator Eastern are charged with violating Section 2 of the Sherman Act in that they conspired to monopolize and that defendant Greater Buffalo has monopolized the printing and sale of color comic supplements to newspapers in the United States. It is alleged that Greater Buffalo acquired its monopoly position through the sales organizations of defendants Hearst and NEA and that Greater Buffalo increased its share of the market for printing of color comic supplements from approximately 42% to approximately 80% by its purchase, in or about June 1955, of all the outstanding stock of The International Color Printing Company. In addition, Greater Buffalo enhanced its monopoly position by erecting in 1956 a subsidiary color printing plant, defendant Southwest Color Printing Corporation, at Lufkin, Texas, and the erection in 1957 of a subsidiary color printing plant, defendant Dixie Color Printing Corporation, at Sylacauga, Alabama.

Defendants Greater Buffalo and International are charged with violating Section 7 of the Clayton Act in that the purchase of The International Color Printing Company by Greater Buffalo in June 1955 gave to Greater Buffalo an 80% share of the color comic supplement printing market.

The two syndicate defendants, Hearst and NEA, are further charged in the complaint with having violated Section 3 of the Clayton Act in that they severally sold and presently sell comic features to newspapers at discounts, rebates or reduced prices on the condition, agreement or understanding that the newspaper purchasers shall not deal in the color comic printing services offered or sold by any of the defendant syndicates' competitors.

The complaint asserts that the effects of the violations have been that: (1) newspapers in many parts of the United States have been denied the advantages of competitive bidding for the printing of their color comic newspaper supplements; (2) newspapers not desiring color comic supplement printing services offered by defendants have been compelled to pay arbitrary prices for comic features; (3) price competition among defendants and the co-conspirator for the sale of color comic supplement printing has been eliminated; (4) defendant Greater Buffalo has obtained a monopoly of the printing color comic supplements in the United States; and (5) color comic supplement printers were restrained by the acts of defendants from selling their services to newspaper customers.

The complaint requests, among other things, that the court adjudge the acquisition of International by Greater Buffalo to be a violation of Section 7 of the Clayton Act, and that Greater Buffalo be directed to divest itself not only of The International Color Printing Company but of the printing plants it has erected at Lufkin, Texas and Sylacauga, Alabama.

Staff: Raymond M. Carlson, Elliott H. Feldman and John W. Poole, Jr., (Antitrust Division)

Jury Finds Oil Companies Guilty of Price Fixing. United States v. Standard Oil Co., et al., (N.D. Ind.). On December 30, the petit jury at South Bend returned verdicts of guilty against all remaining defendants in this case, after 62 hours of actual deliberation. Those defendants include eight major and four non-major oil companies. One other defendant, Sun Oil Company, was acquitted on directed verdict, on December 13, 1960.

Involved in this case was a combination and conspiracy to raise retail prices on gasoline in the South Bend area, on or about May 1, 1957, in violation of Section 1 of the Sherman Act. The first indictment returned in this case was invalidated for faulty composition of the grand jury. A second indictment was returned in October, 1958. Trial began on November 1, 1960, and lasted two months.

Upon return of the guilty verdicts, defense counsel filed motions for a new trial and in arrest of judgment. Some indicated the intention to appeal. Judge Swygert gave defendants until February 3, 1961 to file briefs in support of their motions. He also set January 23, 1961 as date for a hearing on whether time for filing of those briefs should be extended.

During the trial, the Court permitted jurors to take their own notes, some in shorthand. After the trial, the Court impounded those notes and declared that they will not be made available to anyone except by order of a higher court.

This is the first case in which retail price fixing by major oil companies has been proven to the satisfaction of a petit jury.

Staff: Earl A. Jinkinson, Raymond P. Hernacki, Theodore T. Peck, Robert L. Eisen, Samuel J. Betar, Jr., and Ned Robertson (Antitrust Division)

Court Upholds Government Subpoena. In the Matter of Grand Jury Investigation (General Motors) Southern District of New York. On January 9, 1961 Judge Edmund L. Palmieri denied the motion of General Motors Corporation to quash a grand jury subpoena duces tecum calling for financial data of the Electro-Motive Division of General Motors.

General Motors, in moving to quash the subpoena, contended that (1) the subpoena was burdensome and oppressive (2) the information sought was highly confidential (3) the data sought was irrelevant to a criminal violation of the antitrust laws (4) the data sought was unreliable and not subject to comparison with that of other manufacturers and (5) the Government was abusing process by attempting to gain evidence for a civil suit through grand jury process. The Court, in denying the motion, overruled each of General Motors' contentions.

Judge Palmieri pointed out that the subpoena called for specific information relating to only one division of General Motors and was not

burdensome in its demands. The Court also went on to state that the confidentiality of the information could be protected by limiting access to the documents to those persons under an obligation of secrecy.

Judge Palmieri also held that the information sought was relevant to an investigation of a violation of Section 2 of the Sherman Act. The opinion also points out that any objection based upon the lack of comparability of the data with that of other manufacturers is premature with respect to a grand jury subpoena but could be renewed if the Government attempted to introduce the data at trial.

The Court also held that it could not find any abuse of process based upon General Motors' "unsupported assertion".

This opinion marks the first decision since the Cellophane case involving the relevancy of cost and profit information to a Section 2 Sherman Act violation.

Staff: George D. Reycraft, Sanford M. Litvack, James J. Murphy and Alfred I. Jacobs. (Antitrust Division)

* * *

CIVIL DIVISION

Acting Assistant Attorney General George S. Leonard

SUPREME COURT

BANKRUPTCY: GOVERNMENT PRIORITY IN DEBTS

Small Business Administration Entitled to Debt Priority Accorded U.S. by R.S. § 3466 and § 64 of Bankruptcy Act; Priority for Agency's Portion of Loan Made in Participation With Private Bank Upheld Since Agency Had Beneficial Ownership Thereof Before Bankruptcy; Priority Right Not Defeated by Agency Contract With Participating Bank to Share All Proceeds and Losses on Loan Transaction. Small Business Administration v. G. M. McClellan, Trustee. (Sup. Ct., December 5, 1960). A loan of $20,000 was made by the Small Business Administration in participation with a private bank, pursuant to the provisions of the Small Business Act, 72 Stat. 387, 15 U.S.C. 636(a)(2). $15,000 was advanced to the borrower by the SBA, $5,000 by the private bank. The participation agreement between the SBA and the bank provided that the two would share ratably all proceeds and losses resulting from the loan transaction.

The entire loan was evidenced by a note payable to the order of the bank. Subsequent to the borrower's bankruptcy, the bank assigned the note to the SBA. In the bankruptcy proceedings, the SBA asserted the debt and claimed the priority provided for debts due to the United States in R.S. § 3466, 31 U.S.C. 191, and § 64 of the Bankruptcy Act, 11 U.S.C. 104, in the amount of $12,266.75, the extent to which the SBA's $15,000 participation remained unpaid.

The referee in bankruptcy denied the SBA's claim to priority on the ground that SBA is a "legal entity" not entitled to the debt priority accorded to the United States. The district court, on review, affirmed on the ground that, as the note evidencing the debt had not been assigned to SBA until after the date of bankruptcy, priority on the debt could not be asserted. The Court of Appeals for the Tenth Circuit affirmed, but on a third ground. It ruled that SBA could not assert a priority because, in its participation agreement with the bank, it had agreed to share ratably the proceeds and losses resulting from the transaction with the borrower. Relying on Nathanson v. National Labor Relations Board, 344 U.S. 25, the Court reasoned that the United States could not assert its priority because doing so would permit the bank, a private party, to share in the priority which was intended to benefit the United States alone.

The Supreme Court reversed, holding that SBA's priority claim should have been allowed. It ruled, first, that SBA, as an "integral part of the governmental mechanism", is entitled to the debt priority of the United States. Second, it held that SBA possessed a claim prior

to the date of bankruptcy since it had beneficial ownership of three-fourths of the debt from the date of the loan. Third, the Court rejected the Tenth Circuit's suggestion that SBA's contract to pay the participating bank one-fourth of all money collected on the loan justified a denial of priority to the claim. The Court pointed out that here, unlike the Nathanson case, a Government agency was seeking to collect money which it had itself loaned, and that funds acquired through the statutory priority of the United States, like other moneys, "may be disbursed in any way the Government sees fit, including the satisfaction of obligations already incurred, so long as the purpose is lawful." Finally, the Court rejected the contention of the trustee in bankruptcy that to accord the SBA a priority would be inconsistent with the basic purposes and provisions of the Small Business Act.

Staff: Morton Hollander and Mark R. Joelson (Civil Division)

COURTS OF APPEAL AND STATE APPELLATE COURTS

AGRICULTURAL ADJUSTMENT ACT

Regulations Pertaining to Acreage Allotments Do Not Confer Vested Rights Upon Farmer. Balkcolm, et al. v. Cross, et al., (Sup. Ct., Ga., January 5, 1961). Plaintiffs were farmers who had combined two farms into one in 1957. Pursuant to the allotment regulations then in force, they had a right to divide the farm back into two farms at any time within the following three years on a contribution basis, rather than on a crop land basis. In 1958, the Secretary of Agriculture adopted regulations for the 1959 crop allotments, which deprived them of that right. Plaintiffs then sought to reconstitute the farm into two in accordance with prior regulations. The County Committee made allotments on the basis of the Secretary's 1958 regulations, the State Review Committee affirmed, and the Superior Court of Lee County upheld the administrative decision. The Georgia Court of Appeals reversed, holding that the 1958 regulations deprived the plaintiffs of vested rights. 102 Ga. App. 81.

The Supreme Court of Georgia granted certiorari on the question of whether or not the regulations conferred vested rights upon plaintiffs. Finding that the Secretary of Agriculture's regulations are and must be transitory in nature, the Court held that they were not intended to and did not confer vested rights upon farmers. The Court noted that to hold that the rights are vested would tend to defeat the very purpose of the underlying legislation.

Staff: United States Attorney Frank O. Evans, Assistant United States Attorney Earle B. May (M.D. Ga.)

FEDERAL TORT CLAIMS ACT

Feres v. United States, 340 U.S. 135, Bars Wrongful Death Actions Against Government Predicated on Recovering for Death Occurring Incident to Military Service; Provisions of Local Wrongful Death Statute Irrelevant. Patricia Van Sickel, et al. v. United States, (C.A. 9, December 15, 1960). Plaintiffs, the widow and children of a serviceman, brought suit against the United States under the Tort Claims Act, 28 U.S.C. 1346(b), 2671, et seq., to recover for his death which was alleged to have been caused by negligent diagnosis and treatment accorded him at a Government hospital while he was on active duty at Camp Pendleton, California.

The Government, relying on Feres v. United States, 340 U.S. 135, moved to dismiss the action on the ground that plaintiffs could not maintain a suit under the Tort Claims Act because decedent's death had occurred in the course of activity incident to his military service. Plaintiffs conceded that the death has been a service-connected one within the meaning of the Feres decision, but argued that the doctrine in that case bars only suits brought by the serviceman, himself, or his representatives, and does not preclude suits for damages sustained by other parties. In this connection, plaintiffs pointed out that Section 377 of the California Code of Civil Procedure grants a decedent's family a claim for wrongful death which is independent and distinct from whatever claim the decedent might have had had he lived.

The district court dismissed the action on the basis of the Feres decision. On plaintiffs' appeal, the Court of Appeals affirmed. The Court pointed out that two of the claims denied in the Feres decision itself were wrongful death claims, and concluded that, "* * * the plain holding of the Supreme Court is that, regardless of the provisions of the local wrongful death statute, a wrongful death suit may not be brought against the United States by a serviceman's family where the death complained of occurred while the serviceman was on active duty and not on furlough * * *." The Court also emphasized that, to make the provisions of the local wrongful death statute determinative, as urged by plaintiffs, would make recovery for service-connected injuries depend upon "the accident of geography."

Staff: Mark R. Joelson (Civil Division)

JUDICIAL PRIVILEGE

Actions of Circuit Judge in Official Capacity Held Absolutely Privileged. Meredith v. Van Oosterhout, (C.A. 8, December 12, 1960). Plaintiff, an Iowa farm implement dealer and member of that State's Bar, subjected the John Deere Plow Company to a series of law suits, beginning in 1950, based on the theory that he had been deprived of alleged contractual rights to represent the Company in Iowa. In three separate actions the district court held against him, the Court of Appeals for the Eighth Circuit affirmed, and the Supreme Court denied certiorari. In a fourth suit the Company obtained an injunction against

him restraining him from commencing or prosecuting further suits on the same cause of action. Again, judgment was entered for the company by the district court, was affirmed by the Eighth Circuit, and certiorari was denied. Defendant was one of three judges on the court of appeals who decided the last two of the appeals.

Plaintiff brought this action in an Iowa state court against defendant, an Iowa resident, alleging that defendant made the two decisions in bad faith and in an intentionally dishonest manner, and that he thereby "wantonly and maliciously violated the obligations he had assumed when he took his oath of office." The United States Attorney acting for defendant, removed the action to a federal district court. Upon motion for summary judgment, the district court dismissed plaintiff's complaint with prejudice.

The Court of Appeals affirmed, holding that the complaint failed to state a claim upon which relief could be granted, since it showed on its face that defendant's actions were taken in his official capacity, citing, inter alia, Bradley v. Fisher, 13 Wall. 335, and Barr v. Matteo, 360 U.S. 564, 569. The Court also rejected plaintiff's contentions that the removal was improper, and that the United States Attorney had no authority to appear for and represent the defendant.

Staff: United States Attorney Roy W. Meadows (S.D. Iowa).

SOCIAL SECURITY ACT

Elderly Doctor Held "Employee" for Social Security Purposes as Result of Transfer of Practice to and Working With Younger Doctor. Huycke v. Flemming (C.A. 9, November 30, 1960). Plaintiff's deceased spouse, Dr. Huycke, transferred his practice to Dr. Devoe, a younger doctor who had previously been his employee. The agreement, in addition to transferring the practice, provided that Dr. Huycke would continue to work with Dr. Devoe, for which he would be paid a "salary." The salary was to decrease for three years, at which time the agreement was to terminate. Provision was also made that if Dr. Huycke were no longer able to work, he would nonetheless continue to be paid at a lesser rate. Dr. Huycke died 18 months after the transfer, and his widow claimed benefits for the "wages" earned during that period under Section 202 of the Social Security Act (42 U.S.C. 405(g).

Dr. Devoe submitted affidavits showing that he had the right to control what Dr. Huycke did, not only as to the result but the means by which that result was accomplished. Patients were not advised of the change, neither the telephone listings nor the names on the office door were changed, and no social security deductions were taken from Dr. Huycke's "salary." Various administrative changes were made, minor surgery at the office was discontinued, and Dr. Huycke's bank account was segregated.

The Secretary of HEW's referee ruled that the evidence did not establish a common-law employment relationship as is required to obtain benefits under the Act. The district court held his decision was not supported by substantial evidence and it reversed. The Court of Appeals affirmed, reciting the above facts and holding that there was uncontradicted evidence showing that Dr. Huycke was an employee subject to the control of Dr. Devoe. His salary, though conditional, was specific and the sale of his practice was consonant with his intention to become an employee. There was held to be no support for the referee's inferences to the contrary.

Staff: Alan S. Rosenthal and Donald Hugh Green (Civil Division)

Old Age Insurance Benefits - Definition of "Employee" - Wholesale Salesman Under 210 (k)(3)(D). Amidon v. Flemming; Flemming v. Amidon (C.A. 1, December 19, 1960). The Social Security Act provides for payment of old-age insurance benefits to individuals who earn $1,200 or less in the year in which they receive benefits. During the years in question, Amidon, a salesman for a wholesale food company, had gross sales earnings in excess of this amount. Consequently, his benefits were reduced to offset the excess. In the hearing before the referee, he contended that he had been self-employed during the period in question and that he should be allowed to deduct his sales expenses from gross commissions, leaving a net sales income of less than the statutory maximum.

The referee found that Amidon was self-employed under the Act because his working arrangement did not satisfy the traditional common-law test set forth in 210(k)(2), 42 U.S.C. 410(k)(2). The Appeals Council overruled the referee on the ground that Amidon was an "employee" within the meaning of another provision - 210(k)(3)(D), 42 U.S.C. 410(k)(3)(D) - which specifically applies to salesmen. The district court held that the Appeals Council's application of the statute was supported by substantial evidence but reversed on the ground that within the terms of 204(b), 404(b) it would be against "equity and good conscience" to allow the Secretary to reduce Amidon's benefits by recovering amounts equal to his excess income. See, 42 U.S.C. 404(b).

The parties took cross-appeals. The Government argued that the district court had no jurisdiction to determine whether or not recovery would be against "equity and good conscience," without first remanding the case to the agency for an initial decision on the issue. Amidon sought to overturn the district court's holding that the decision of the Appeals Council under 210(k)(2) was supported by substantial evidence. The First Circuit noted that the Government's primary jurisdiction argument had merit but agreed with Amidon that the Secretary's decision was not supported by substantial evidence. The Court therefore indicated that the Appeals Council should either affirm the referee's decision or return the case to him for further evidence on the question of whether

Amidon was an "employee" within the meaning of a 210(k)(3)(D). The case has now been remanded to HEW for further proceedings. The effect of this ruling was to moot the Secretary's cross-appeal.

Staff: John G. Laughlin, Jr. and Ronald A. Jacks (Civil Division)

* * *

CIVIL RIGHTS DIVISION

Acting Assistant Attorney General John Doar

Vote Buying in November 8, 1960, General Election, Cook County, Illinois. United States v. Crown, et al. (N.D. Ill.) On December 29, 1960, a grand jury in Chicago, Illinois, returned an indictment in five counts charging Bernard Joseph Crown, Jr., and Leonard Gibbs, Jr., Democratic precinct party workers with offering to buy votes for the National Democratic Party candidates in violation of 18 U.S.C. 597 (expenditures to influence voting) and with conspiring to buy votes in violation of 18 U.S.C. 371. The law makes it a federal offense to offer or to make an expenditure to any person, either to vote or to withhold his vote, or to vote for or against any federal candidate.

Investigation shows that on November 8, 1960, Crown and Gibbs had offered to buy dinners and in one case to buy a pair of stockings in exchange for votes for the Democratic Party ticket in the 18th Precinct, 29th Ward, of the City of Chicago. The investigation also revealed a general conspiracy to buy votes and money payments to others. The trial date has not been fixed.

Staff: United States Attorney Robert Tieken, Assistant United States Attorney Donald F. Manion (N.D. Illinois)

* * *

CRIMINAL DIVISION

Acting Assistant Attorney General William E. Foley

IMMIGRATION CRIMES

Important Notice Re Indictments for Illegal Reentry

Illegal Entry After Deportation; Sufficiency of Indictment; Mens Rea as Element of Crime of Being "Found" in United States after deportation. United States v. Miranda-Curenta (S.D. Calif. Nov. 7, 1960). Defendant was indicted under Section 276 of the Immigration and Nationality Act (8 U.S.C. 1326). The indictment, following the language of the statute, charged, in substance, that defendant was an alien who had previously been arrested and deported from the United States to Mexico and who thereafter was "found" in Los Angeles, California, the Attorney General not theretofore having consented to any reapplication by defendant for admission to the United States. Jury trial was waived, and the case was submitted to Judge Mathes on an agreed stipulation of fact. He found defendant guilty as charged, but granted defendant's motion to arrest judgment of conviction for insufficiency of the indictment because the indictment did not allege criminal intent to violate the statute and such intent is an element of the crime notwithstanding that the statute does not expressly make it so. The Solicitor General declined to authorize an appeal.

Henceforth, all indictments charging a violation of Section 276 should include an allegation of criminal intent. Although other evidence of such intent may exist in individual cases, a deportable alien generally receives Immigration and Naturalization Service Form I-294 at the time of his deportation. The Form clearly warns the deportee that if he enters, attempts to enter, or is at any time found in the United States subsequent to deportation without having obtained the Attorney General's consent to reapply for admission, he will be subject to criminal prosecution. Introduction of this Form would be evidence of criminal intent in a prosecution under Section 276, especially if accompanied by evidence that the alien was warned in the deportation proceeding against illegal reentry.

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

NATURALIZATION

Good Moral Character. Marie Posusta v. United States (C.A. 2, January 6, 1961). Appellant met Vladimir Posusta in Czechoslovakia in 1936. They entered into an illicit sexual relationship shortly thereafter and, except for brief periods, maintained this relationship in Europe and the United States over a 23 year span. Appellant bore her paramour two children. In 1939, Vladimir Posusta married another woman, by whom he had previously

had a son. This marriage ended in a divorce in March 1954. In October 1954, appellant and Vladimir Posusta took out a marriage license and thereafter lived together, although they did not marry, until January 24, 1959. The marriage was delayed, they explained, so that Vladimir could retain custody of his son by his first wife and provide for his education.

On April 20, 1959, appellant Marie Posusta filed a petition for naturalization. The district court dismissed the petition on the ground that she had not proved that she was a person of "good moral character" for the 5-year period immediately preceding the filing of her petition. The Court of Appeals for the Second Circuit, in reversing the order of the district court and granting the petition, stated that "a person may have a 'good moral character'though he has been delinquent upon occasion in the past; it is enough if he shows that he does not transgress the accepted canons more often than is usual. . . .Obviously it is a test incapable of exact definition; the best we can do is to improvise the response that the 'ordinary' man or woman would make, if the question were put whether the conduct was consistent with a 'good moral character.'" The Court continued, "in the case at bar we think it enough that during the five years before she filed her petition the petitioner on the whole did what, as things stood, was consonant with 'good moral character.'" The Court found that she had done so, taking into consideration that her marriage to Posusta would have resulted in his loss of control over his son to the son's great disadvantage and her separation from Posusta would have left her own children "fatherless in substance as they already were in law." The Court noted Section 316(e) of the Immigration and Nationality Act (8 U.S.C. 1427(e)) provides "that in determining 'good moral character' the court is not 'limited' to the probationary period, but should consider 'as a basis . . .conduct and acts at any time prior to that period.'" But this, according to the Court, meant only that "such evidence may be considered in so far as it throws light upon the character of the applicant in the probationary period"; "by April 1954 she was over the age of 35 and it was to the last degree unlikely that after the experience she had had, she was still likely to engage in new illicit amatory adventures"; and "'Good character' we measure by the probable responses to provocations." The Court concluded: "The statute is not penal; it does not mean to punish for past conduct, but to admit as citizens those who are likely to prove law-abiding and useful. Their past is of course some index of what is permanent in their make-up, but the test is what they will be, if they become citizens. We hold that the petitioner was a person of as 'good moral character' as is necessary in order to become a citizen."

Staff: Former Assistant Attorney General Malcolm Richard Wilkey
Michael S. Fawer, and
Kenneth C. Shelver (Criminal Division)

FINGERPRINTS

Authority of U. S. Marshals to Take Fingerprints. United States v. Howard Krapf, d/b/a Krapf Trucking Service (C.A. 3, December 29, 1960). This item was previously mentioned in the March 11, 1960, issue of the

Bulletin, Vol. 8, No. 6, p. 173. The facts and the district court's decision are reported in 180 F. Supp. 886.

Defendant had pleaded guilty to certain violations of Section 222(a) of the Interstate Commerce Act (49 U.S.C. 322(a)) but refused to submit to fingerprinting procedure. The district court based its decision that the defendant was subject to fingerprinting primarily on its interpretation of 28 U.S.C. 549 which provides "A United States marshal and his deputies, in executing the laws of the United States within a state, may exercise the same powers which a sheriff of such state may exercise in executing the laws thereof." New Jersey Sheriffs have the power, among others, to fingerprint persons arrested for indictable offenses. The Court therefore concluded that the United States Marshal had the power to fingerprint Krapf because the violations were federal offenses and, under Rule 7(a) of the Federal Rules of Criminal Procedure, the commission of any federal offense is indictable. The Court of Appeals said it was unnecessary to reach the questions relating to the interpretation of the law of New Jersey and the construction of Section 549, because the power of United States Marshals to take fingerprints does not rest solely on the authority conferred by section 549.

The Appeals Court pointed out that under 28 U.S.C. 547(c) Congress has provided that the Attorney General shall supervise and direct Marshals in the performance of public duties. United States Marshals when acting pursuant to directions of the Attorney General, who as a delegate of the President exercises a part of the power vested in the executive branch of the Federal Government, are, themselves, vested with the executive power necessary to comply with the Attorney General's directions. Congress, the Court stated, has provided the Attorney General with the means necessary to effect a central identification system by the provisions of Title 5, Sections 300, 340. Thus, the Attorney General, through his delegate, the United States Marshal, has the power to require offenders against federal law to submit to reasonable identification procedures, such as fingerprinting, where necessary and proper to facilitate the enforcement and execution of federal law. The Court found that the Attorney General, by Part 702.01 of the United States Marshals Manual, has directed that every person taken into the custody of a Marshal in connection with a violation of federal law be fingerprinted. Krapf being in custody by reason of having violated the Interstate Commerce Act was therefore subject to fingerprinting.

Staff: United States Attorney Chester A. Weidenburner; Assistant United States Attorneys Frederic C. Ritger, Jr., and John Jay Mangini (D. N.J.).

MAIL FRAUD

Knitting Machine Swindles. United States v. Morris Baren et al. (E.D. N.Y.); United States v. David H. Tuthill et al. (D. Colo.). These major mail fraud prosecutions in knitting machine promotions have been

concluded with convictions of all major defendants.

In Brooklyn, New York after a 7 1/2 week trial a jury returned verdicts of guilty against Morris Baren, Samuel Stein, Strick-Matador Corporation, Marjay Sales Corporation and Strick-Matador Corporation of Ohio. Baren and Stein, convicted on ten counts, received sentences of 18 months on each count, to run concurrently. Max Jealicki, who had entered a guilty plea, received a suspended sentence. Fines totalling $22,000 were imposed upon the three corporations. The New York Strick Matador operation was not only one of the largest in the country but reportedly was progenitor of numerous similar swindles throughout the nation.

At Denver, Colorado, David R. Tuthill, George Beck and Charles E. Conklin were convicted of mail fraud in a similar knit-at-home promotion styled California Sportswear of Colorado. Sentencing in this case will be reported in a later edition of the Bulletin.

The basic scheme in both cases followed the typical knitting machine promotion. Advertisements were inserted in newspaper classified columns offering housewives opportunity for attractive home earnings, followed up on receipt of replies by high-pressure sales of vastly overpriced knitting machines on the representation that the company would purchase the production of the victim. Lessons in operation of the machine were promised but the victims soon discovered that the machines were incapable of profitable production of knitted garments as represented, being mere "hobby" machines; that there was no ready market for such garments as could be produced; and that their piecework efforts were incapable even of meeting payments on the installment contracts under which they bought the machines. The promoters of course discouraged attempts by the victims to sell them their products. Women of low income families, in need of additional funds but unable to seek outside employment because of children or invalid relatives at home, constituted a major percentage of the victims.

The success achieved in these convictions represents a major accomplishment in the program to eradicate this racket.

Staff: United States Attorney Cornelius W. Wickersham;
Chief Assistant United States Attorney
Elliott Kahaner (E. D. N.Y.);
United States Attorney Donald G. Brotzman;
First Assistant United States Attorney Richard P. Matsen;
Former Assistant United States Attorney Jack K. Anderson
(D. Colo.).

MAIL FRAUD

Lonely Heart Matrimonial Scheme. United States v. Hilmer E. Barnes (S.D. Iowa). On December 9, 1960, defendant pleaded guilty to two counts of an eight-count mail fraud indictment charging him with a scheme to defraud four women through a lonely hearts club. Barnes obtained lonely heart club lists and then through correspondence and personal visits

ascertained the financial condition of his intended victims. After ingratiating himself, he would borrow money for alleged investments. In one instance he even married his victim. Barnes defrauded the women of more than $16,000 of their savings. On January 4, 1961, he received a sentence of 5 years on each of the two counts to run consecutively. Defendant has a previous record of similar violations.

Staff: Assistant United States Attorney Richard J. Wells (S.D. Iowa).

FRAUD

False Statements re Employment. United States v. Ulysses Hunt (E.D. Mich.). Hunt, an employee of the United States Corps of Engineers, was assigned for one month on temporary duty status as an inspector aboard a dredge. His duties consisted of supervising the dumping of waste material and he was paid on a per diem basis. He claimed salary for two days during the period of employment which he spent in a county jail on charges of reckless driving and driving without a license, and for hours of overtime work not actually performed.

A one-count information was filed charging him with a violation of 18 U.S.C. 1001, to which he has pleaded guilty. Sentence has not yet been imposed. Hunt has made complete restitution of the $303 falsely claimed.

Staff: United States Attorney George E. Woods, Jr.; Chief Assistant United States Attorney Orrin C. Jones (E. D. Mich.).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Habeas Corpus; Right to Deportation Hearing and Administrative Bail; Deserter from Foreign Naval Vessel; Adjustment of Status. U. S. ex rel. Juan Perez-Varela v. Esperdy (C. A. 2, December 22, 1960). Relator appealed from an order dismissing his petition for habeas corpus seeking his release from the custody of the service. (See digest of District Court opinion - Bulletin, Vol. 8, No. 22, p. 668, October 21, 1960).

After discussing the Treaty of 1903 between the United States and Spain, its amendment by Congress in 1915 (Chap. 153, Laws of 1915; 38 Stat. 1184), and its impact on the immigration law, the Court of Appeals concluded that the action of the Service in proceeding against the relator under the Treaty rather than under the I & N Act of 1952 was proper. It likened the situation of a seaman on a ship of war in a foreign port to that of a soldier in troops that have been given leave to pass through the territory of another friendly state. He remains subject to the same controls that apply while the regiment is in its own territory.

In commenting on relator's contention that he deserted from a training ship and not a ship of war the Court said, "It is plain that a ship used to train seamen to serve on ships of war should be equally immune from local jurisdiction. It would obviously be an absurd distinction to protect only that part of the military establishment of another state which is already qualified, but to deny protection to those who are in process of preparation."

Order affirmed.

Judicial Review of Deportation Order; Country of Deportation - Hong Kong. Chan Chuen v. Esperdy (C. A., 2, Dec. 30, 1960). Plaintiff appealed from a district court order granting summary judgment to defendant in his action to review an order directing his deportation to Hong Kong. The appeal was based on the assertion that Hong Kong, a colony of the United Kingdom, is not a "country" within the meaning of section 243(a)(7) of the Immigration and Nationality Act (8 U.S.C. 1253(a)(7)).

The word "country", having no fixed meaning, should be construed in accordance with the purpose of the particular legislation the Court of Appeals said. In line with the general Congressional policy of facilitating the deportation of deportable aliens, the Court said, "We think that any place possessing a government with authority to accept an alien deported from the United States can qualify as a 'country' under the statute. Whatever the distribution of power between Hong

Kong's local, partially autonomous government and Great Britain, Hong Kong is a 'country' under the above definition."

Affirmed.

Judicial Review of Deportation Order; Estoppel; Interrogatories; Cross-examination of Witness; Blood Tests. Wong Kwok Sui v. Boyd (C.A., 9, December 14, 1960). This is an appeal from a district court order sustaining an administrative order of deportation against the appellant, Wong Kwok Sui.

In 1951 Wong, as the son of a citizen father (Quong) and an alien mother (Fung) came to the United States from China and was admitted as a citizen. In December of that year the Service issued him a citizen's identification card. Some months later his alleged brother in Hong Kong applied for a travel document to come to the United States. He, Quong and Fung submitted to blood tests which showed his and Quong's blood to be compatible but his and his alleged mother's (Fung's) to be incompatible.

Deportation proceedings were then instituted against him and he was ordered deported because, as an alien, he had no visa when he entered in 1951. He sought judicial review in the district court and was partially successful in that the court held that there should have been some evidence as to the qualifications of the doctor (Vio) in Hong Kong who took the blood sample from Fung. Upon remand interrogatories and cross-interrogatories of two doctors concerned in Hong Kong were taken and Wong was again ordered deported. Once more Wong sought judicial review and the court, in dismissing the complaint, found the record adequate to sustain the deportation order. From the dismissal he appealed.

He contended that the charge that he was an alien without a visa was not permissible because he had already been admitted as a citizen. The Court of Appeals held that his admission as a citizen and the issuance of the identification card was not a final adjudication of his citizenship nor did they act as an estoppel of the Government to present clear, cogent and convincing evidence of his alienage as it did in this case.

Wong also attacked the adequacy of that evidence but the court said, after examining the depositions of Dr. Vio, that his competence was adequately established. It said also the fact that Wong's blood was compatible with Quong's does not raise a presumption that he was Quong's son when he claims to be the son of Quong and Fung, where an impossibility of the three blood types exists. At that point the burden shifted to Wong (as a minimum of finding another mother).

As to his claim to a right to be present and cross examine the witness (Dr. Vio) the Court said that he had the right to be

given the same opportunity to examine that the Government had and he was given that right. There is no authority which denies the use of a deposition with interrogatories and cross-interrogatories in this type of proceeding.

Affirmed.

Judicial Review of Deportation Order; Denial of Due Process Right to Counsel; Admission as Basis for Deportation. Savoie v. Sahli (E. D. Mich., Dec. 27, 1960). Plaintiff, a resident alien, last entered the United States on August 15, 1958, after a short visit to Canada. Later he was charged with being deportable on the grounds that he was inadmissible at the time of his last entry under 8 U.S.C. 1251(a)(1) because he was afflicted with a psychopathic personality. At his deportation hearing a second ground of deportability under the same section was lodged against him in that he had, on or prior to August 15, 1958, admitted the commission of crimes involving moral turpitude (gross indecency and sodomy). The Special Inquiry Officer found him deportable on the second charge and dismissed the first.

Plaintiff appealed to the Board of Immigration Appeals and the Service cross-appealed. The Board found that both charges were sustained by the evidence. Plaintiff then sought judicial review and, there being no factual issues involved, defendant moved for summary judgment.

The evidence upon which the second, or lodged, charge was based was a statement taken from the plaintiff by an investigator of the Service on June 19, 1958 in which the investigator warned him that "any statement you make must be of your own free will and may be used as evidence in any deportation or other proceeding." There was no argument that the crimes admitted to involve moral turpitude or that they subject the plaintiff, on the basis of his admission alone, to deportation since the admission was made prior to his last entry. But plaintiff objected to the procedure by which those admissions were obtained. He argued that the procedure deprived him of due process and a fair hearing, that the admissions were forced from him, that he was not advised his statement alone would justify deportation, and that he was not advised of his right to counsel.

The Court found no evidence to indicate that the statement was in any way "forced" and the warning given to him was sufficient to apprise him of the possible use of the statement. The mere fact that he was not advised he could have counsel at the taking of the statement in this case does not deprive plaintiff of the due process of law for he became deportable only when he subsequently left the United States and returned. The statement was then not such an integral part of the deportation hearing as to require advising him of any right to counsel.

The Court said that the use of merely the statement as the basis for deportation is unique, but if all the safeguards in obtaining the statements are observed, there can be no complaint. It found it unnecessary to reach the first charge.

Summary judgment for defendant.

* * *

INTERNAL SECURITY DIVISION

Army Discharge. Daniel O. Honaker v. Wilber M. Brucker, Secretary of the Army (D.D.C.) Plaintiff, an enlisted man stationed with the Army in Washington, D. C., filed a complaint for injunction against the Secretary of the Army on December 19, 1960. The complaint was accompanied by an affidavit and motion for temporary restraining order and prayed that the defendant be perpetually enjoined from honorably discharging plaintiff from the Army for the convenience of the Government. Plaintiff claimed he has a property right of which he cannot be deprived until his enlistment expires or he voluntarily relinquishes it. The District Court granted a temporary restraining order on December 19, 1960 to expire December 29, 1960. At the time of argument before the Court on December 28, 1960, on plaintiff's application for a preliminary injunction, defendant filed a motion to dismiss on the ground that the complaint failed to state a claim upon which relief can be granted in that the Army has statutory and inherent authority to honorably discharge a soldier at any time and for any reason. By order dated January 3, 1961, the District Court granted defendant's motion to dismiss and denied plaintiff's application for a preliminary injunction.

Staff: Oran H. Waterman and Samuel L. Strother
(Internal Security Division)

Atomic Energy Act of 1954. Reynolds v. United States (C.A. 9). In connection with the Eniwetok nuclear tests held in the Pacific in 1958, the Atomic Energy Commission promulgated a regulation barring United States citizens from entering a 30,000 square mile "Danger Area" surrounding the proving grounds. The authority for the regulation was based on section 161(i) of the Atomic Energy Act of 1954, 42 U.S.C. 2201(i). Appellant sailed his yacht into the prohibited area after notifying the Coast Guard that he was entering the area as a protest against nuclear testing. He was arrested and charged with violating 42 U.S.C. 2273 (section 223 of the Atomic Energy Act of 1954), which prohibits willful violations of any regulation prescribed under 161(i) of the Act. Appellant was tried and convicted in August of 1958 and sentenced to two years' imprisonment with suspension of the last eighteen months on probation. The Court of Appeals reversed the conviction on the ground suggested as error by the Government, that Reynolds should have been permitted to represent himself at the trial, and remanded the case for new trial. Reynolds was retried and found guilty in August 1959. He was sentenced to two years' imprisonment with a confinement of six months, the execution of the remainder of the sentence being suspended, with the defendant placed on probation for five years. The Court of Appeals (Orr, Baines and Hamlin, Circuit Judges), in an opinion written by Judge Orr, reversed. The Court said that section 161(i) of the Atomic Energy Act of 1954 did not authorize the Atomic Energy Commission to issue the regulation. "The 1954 Act

was designed to increase private participation in this nation's atomic energy program, and section 161(i) was designed to allow Commission regulation of that private activity."

Staff: United States Attorney Louis B. Blissard,
Assistant United States Attorney Rex S. Kuwasaki
(D. Hawaii)

Espionage; Unlawful Retention of and Failure to Deliver Documents Relating to National Defense (18 U.S.C. 793(d) and (e)); False Statements: False Certificates of "Cannibalization" Relating to Disposal of Classified Documents and False Security Termination Statement (18 U.S.C. 1001); Conversion of Government Property (18 U.S.C. 641) and Removal of Documents from Public Office (18 U.S.C. 2071(a)). United States v. Arthur Rogers Roddey (E.D. Va.) On January 10, 1961, a Federal Grand Jury in Alexandria, Virginia, returned a twelve-count indictment against Arthur Rogers Roddey, a former employee of the Institute for Defense Analyses assigned to duty with the Weapons Systems Evaluation Group of the Department of Defense. The indictment included six counts charging violations of the Espionage Act, four counts charging violation of the False Statement Statute, one count charging conversion of government property and one charging the removal from a public office of classified documents and papers relating to defense projects.

Roddey had previously been arrested on December 29, 1960 by FBI agents pursuant to a warrant issued the same day by the United States Commissioner at Alexandria, Virginia, on a complaint alleging that he had removed from his former place of employment at the Pentagon approximately 200 documents, many of which bore classifications ranging from Confidential to Top Secret. The complaint further alleged that there was probable cause to believe that Roddey had committed the following offenses against the United States: (1) that he had filed three false certificates of "cannibalization" certifying to the disposal of documents which were later found in his possession, in violation of 18 U.S.C. 1001; (2) that he had converted to his own use Government property consisting of a tape recorder having a value in excess of $100, in violation of 18 U.S.C 641; and (3) that he removed documents from a public office, in violation of Section 2071(a). All of the above charges, together with the charges relating to espionage, were incorporated in the grand jury's indictment. On January 10, 1961, Roddey was arraigned before Federal District Judge Albert Bryan and entered a plea of not guilty. Trial has been set for March 13, 1961.

Staff: United States Attorney Joseph Bambacus,
Assistant United States Attorney Plato Cacheris (E.D. Va.);
John H. Davitt, James L. Weldon, Clinton B. D. Brown,
(Internal Security Division).

False Non-Communist Affidavit - Venue. Travis v. United States (S. Ct., January 16, 1961). Travis was indicted and convicted in the District of Colorado under 18 U.S.C. 1001 for making and causing to be

filed with the National Labor Relations Board false affidavits of non-Communist union officer. Section 9(h) of the Taft-Hartley Act provided that a union could not avail itself of the facilities of the Board "unless there is on file with the Board" an affidavit by each responsible officer of the union that he was not a member of the Communist Party or affiliated with it. Under the Board's regulation, affidavits of the officers of a national union had to be filed with the Board in Washington. Travis was Secretary-Treasurer of the International Union of Mine, Mill and Smelter Workers. His affidavits were executed in Denver and mailed to the Board in Washington for filing. Under 18 U.S.C. 3237(a) an offense begun in one district and completed in another may be prosecuted in either. The Court in an opinion by Douglas, J., held that the offense under the False Statement Act (18 U.S.C. 1001), which was made applicable to Section 9(h) affidavits, consisted of a single act, the having on file at the specified place, the Board's office in Washington, D. C., a false statement; that the crime did not consist of distinct parts or a continuously moving act; and that the filing must be completed before there is a "matter within the jurisdiction of the Board." Accordingly it held that the only place where venue could be properly laid was the District of Columbia, and it reversed the judgment of the Tenth Circuit. Justices Harlan, Frankfurter and Clark dissented in an opinion by Harlan, J. The dissent distinguished cases of failure to file documents required by law (see United States v. Lombardo, 241 U.S. 73), and said that the Act should be construed to permit venue in the district where the affidavit was executed as being more in accordance with the policy of the Sixth Amendment. The dissent pointed out that the offense consists of making or using a false statement or document, so it could be considered as begun at the place of execution of the affidavit.

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

False Statement - Industrial Security Program. United States v. Billy Maurice Ogden (S.D. Calif.) On September 26, 1960, the trial judge set aside the jury's verdict of guilty returned against Ogden on July 22, 1960 and granted a motion for a new trial. The Court was of the view that it had erred in not granting the defendant's pretrial motions demanding the following information: (a) the period of time during which defendant was alleged to have been a member of the Communist Party, (b) the names and addresses of Government witnesses and (c) the dates and places of Communist Party meetings which witnesses would testify that defendant attended and the identity of the other persons present. The Court further indicated its belief that it had erred in its instructions to the jury as a matter of law that the Department of the Air Force is an agency or department of the United States Government and that the Personnel Security Questionnaire constituted a material matter within its jurisdiction.

On October 3, 1960, defendant made a motion for acquittal and a motion in arrest of judgment before the trial judge. Upon denial of

these motions by the trial judge, defendant took an appeal and on December 9, 1960, the Government moved to dismiss the appeal in this case on the basis that defendant failed to comply with Rule 39(c) of the Federal Rules of Criminal Procedure. The Government filed a supplemental memorandum to its motion and stated as further grounds for dismissing the appeal that defendant was attempting to appeal from orders which were not "final decisions" within the purview of 28 U.S.C. 1291. Arguments were heard before the Court of Appeals for the Ninth Circuit in San Francisco on December 27, 1960 and on the same day the Court granted the Government's motion to dismiss the appeal. Trial began on January 4, 1961 before Judge John F. Kilkanny, and on January 12, 1961 the jury returned a verdict of guilty as to both counts. Sentencing is scheduled for January 30, 1961.

Staff: Assistant United States Attorney Timothy M. Thornton (S. D. Calif.)

Industrial Personnel Security. Harold J. and Evelyn B. Silver v. Thomas S. Gates and A. Tyler Port (D.D.C.) Plaintiffs were the owners and principal officers of a manufacturing company engaged in classified aircraft procurement. In 1953 their secret clearances were suspended and in 1954 revoked. Thereafter plaintiffs sought a new hearing, which the Government agreed to provide on the condition that plaintiffs furnish certain documents, which they did not do until 1960. In the meantime the Supreme Court decided the case of Greene v. McElroy, 360 U.S. 474 (1959). However, before the Department of Defense could proceed with the hearing, defendants considered that they were required to await the promulgation of Executive Order 10865 and the Industrial Access Authorization Review Regulation of July 26, 1960. Before the Regulations could be promulgated, plaintiffs filed suit alleging that under the Greene case they were entitled to immediate relief from the Court in the form of a declaration that all action previously taken against them, including the emergency revocation (initial suspension) of their clearances, was invalid at the time it was made and of no force and effect. They also claimed that they were entitled to the issuance of an order which would grant them immediately (without further administrative proceedings regarding their eligibility for access to classified defense information) monetary restitution under paragraph 26 of the 1955 Industrial Personnel Security Regulations, which provides that in cases where a final determination under the program is favorable to a contractor employee, the Government will reimburse the contractor employee in an equitable amount for any loss of earnings during the interim resulting directly from a suspension of his clearance. Plaintiffs also alleged in their complaint, which was filed on March 31, 1960, that as a result of their suspension from and subsequent denial of access to classified defense information in 1953, plaintiffs were denied approval in 1958 by the New York Stock Exchange to install wire connections for use in buying and selling municipal bonds and corporate securities. The Government denied that there was any causal connection between the two events. In August of 1960 defendants expunged the Government's records of the result of the prior

hearing and in November issued a new statement of reasons with opportunity to plaintiffs to answer and have a hearing thereon. The cause came before the Court, Hart, Judge, on December 7, 1960 on plaintiffs' motion for summary judgment and defendants' motion to dismiss. Defendants contended that under the Greene case the most plaintiffs were entitled to was a new administrative proceeding which provided a hearing wherein lack of confrontation and cross-examination, if it occurred, would be specifically authorized. Defendants asserted that the emergency revocation of plaintiffs' clearances (taken back in 1953) was still valid and effective and would remain so until the completion of the pending administrative proceedings. In denying plaintiffs' motion for summary judgment and in granting defendants' motion to dismiss, Judge Hart made it clear that he considered plaintiffs obligated to pursue the administrative relief which has been tendered them and that they were not entitled to relief from the Court at this time. The Court entered an order on December 22, 1960 dismissing the complaint and on December 29, 1960 entered an order denying plaintiffs' motion for reconsideration of decisions. Plaintiffs filed a notice of appeal on January 5, 1961.

Staff: Oran H. Waterman, Benjamin C. Flannagan (Internal Security Division) and Robert H. Purl (formerly of the Internal Security Division, now of the Tax Division)

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LANDS DIVISION

Acting Assistant Attorney General J. Edward Williams

Sale of Minerals Reserved by Government in Lands Previously Sold Which Had Been Acquired by It Under Farm Resettlement Program. United States v. George W. Edwards (C.A. 5, December 19, 1960.) Edwards brought suit under a special jurisdictional statute for specific performance of an alleged contract for the sale of minerals reserved by the Government in land previously sold to him, and for an accounting for royalties from a gas well on the land which had been received by the Government. The land had been acquired by the Government in connection with the Farm Resettlement Program. When it was later sold, the Government had reserved three-fourths of the mineral interest therein. In 1950, a statute was passed authorizing the sale of the reserved minerals at their fair market value to the surface owners of the lands. Walter T. McKay, State Director of the Farmers Home Administration in Dallas, Texas, was authorized to fix the fair market value of, and to convey, the minerals in the lands in Texas.

In February 1955, Edwards submitted to McKay an application and offer to purchase the reserved minerals in his land for $1,465.37. On April 10, 1955, McKay notified Edwards that his application was accepted but that his offer was rejected, since it had been determined that the fair market value of the reserved minerals was $2,930.84. The notice also stated: "If you desire to submit an offer in that amount the same will be acceptable if it reaches this office by May 10, 1955." On April 25, 1955, Edwards executed a form furnished by McKay entitled "Subsequent Offer to Purchase Reserved Mineral Interests in Fair Market Value Areas," in which he agreed to purchase the minerals for $2,930.84. He tendered the form with a bank draft in that amount to McKay, who refused to accept them. McKay had learned that a gas well 3,700 feet from the Edwards property had been completed and was a commercial producer, and he realized he had made an error in fixing the fair market value of the minerals. The following day Edwards forwarded the form and draft to McKay by registered mail. McKay returned them and advised Edwards that his offer had been rejected, because it was not the fair market value of the minerals. This action resulted.

The district court held that McKay's original statement to Edwards amounted to a counterproposal, and that Edwards' execution of the subsequent form and tender of the amount stated by McKay to be the fair market value was an acceptance of the counterproposal, resulting in a contract. The court ordered the Government to execute a quit-claim deed to Edwards conveying the reserved minerals for $2,930.84, and to pay to him the amount which had been received in royalties from a producing gas well on Edwards' land which had been drilled during the negotiations, and of which McKay had no knowledge.

The Government appealed on the grounds that the negotiations did not result in a contract, that Edwards made a subsequent offer of $2,930.84 which required acceptance by McKay, as the Government never makes offers and McKay was without authority to make one, and further that he was without authority to sell the minerals at less than the fair market value, that being the direction of the statute. The Court of Appeals affirmed the judgment of the district court, reasoning as did the district court.

Staff: Elizabeth Dudley (Lands Division)

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TAX DIVISION

Acting Assistant Attorney General Abbott M. Sellers

CIVIL TAX MATTERS
Appellate Decision

Jurisdiction of District Court Recognized in Lien Foreclosure Suit Despite Fact That Suits for Refund for Some of Years Involved Were Pending: Appointment of Receiver Under Section 7403 (d), Internal Revenue Code of 1954 Upheld: Court's Order Vesting Receiver of Individuals With Control Over Inactive Insurance Company in Which Individuals Owned All Stock Was Non-appealable Interlocutory Order. Thomas P. Florida, et al. v. United States, Andrew J. Florida, et al. v. United States (C. A. 8th, 7 A. F. T. R. 2d 320, December 22, 1960). The United States filed suit under Section 7403, Internal Revenue Code of 1954, to foreclose income tax liens against Andrew J. Florida, George H. Florida, their wives and over 20 wholly owned corporations, the tax claims amounting to over eleven million dollars. On the application of the United States, the District Court (E.D. Ark.), pursuant to Section 7403 (d), Internal Revenue Code of 1954, appointed a receiver for the individual and corporate defendants with the exception of Reserve Estate Life Insurance Company. Reserve Estate had no outstanding tax liabilities. It was concededly wholly owned by Andrew J. and George H. Florida. At one time it had been actively engaged in the life insurance business but was presently inactive. It held title to the bulk of the assets of the individual defendants a large part of which consisted of large tracts of land in Cross and Poinsett Counties, Arkansas, which were profitably leased. The Court entered an order directing the receiver for the individuals to take charge of the stock, books, records and assets of the inactive insurance company and clothed the receiver with power to vote the stock. The receiver thereupon seized the books, records and assets and called a stockholders' meeting at which he voted the stock and substituted new officers and directors in place of the old ones.

The defendants questioned the jurisdiction of the District Court to entertain the suit under Section 7403 and to appoint the receiver under the statute. Their principal contention was that suits for refund had been filed to recover taxes for some of the same years in the District Court in Arkansas and Tennessee and petitions have been filed with the Tax Court for redetermination of other years. After these petitions and suits were filed the Commissioner made jeopardy assessments. The Government attempted to intervene in the various refund suits to set up the deficiencies under Section 7422 (e), Internal Revenue Code of 1954. The petitions for intervention in Tennessee have not been acted upon and those in Arkansas were denied partly for the reason they were not timely filed and partly because all of the questions could be presented in the lien foreclosure suit under Section 7403.

The Court of Appeals held (affirming the District Court) that Section 7422 (e) did not deprive the District Court of jurisdiction to entertain the suit under Section 7403. Section 7403 was a broad statute designed to afford maximum protection and fairness to taxpayers, lienholders, and the Government and there was nothing in Section 7422 (e) which takes away any of the rights of the Government conferred under Section 7403. The denial of the right to intervene in the Arkansas cases was not res judicata as it was not a decision on the merits. The Court indicated that it would be equitable and proper for the District Court to consolidate the lien foreclosure action with the various refund suits pending in its District and try them all together.

The order directing the receiver to take charge of Reserve Estate was not an appealable order. It was not a final order and was not the type of order listed in 28 U.S.C. 1292, under which an appeal could be taken as an interlocutory order.

Staff: United States Attorney Osro Cobb, Assistant United States Attorney James Gallman (E.D. Ark.); Homer R. Miller, Douglas A. Kahn (Tax Division)

District Court Decisions

Summons - Administrative; Attorney May Not Refuse to Produce Client's Records or Testify Re Records When Ordered to Do so Pursuant to Sections 7402(b) and 7604, Int. Rev. Code, 1954. In the Matter of Sidney Blumenberg (S.D. N.Y. October 10, 1960). A motion was made under Sections 7402(b) and 7604 of the Internal Revenue Code of 1954, seeking to require an attorney to appear before an Internal Revenue Agent to testify regarding the tax liability of one of his clients and bring with him the client's books and records.

The motion was resisted on the attorney's claim of self-incrimination and attorney-client privilege. The Court held the self-incrimination claim to be personal to the client and unavailable to the attorney. The attorney-client privilege, it was ruled, might be invoked as to oral questions, when asked, but was of no value insofar as the books and records were concerned, since they did not constitute privileged communications between client and counsel.

Staff: United States Attorney S. Hazard Gillespie, Jr., Assistant United States Attorney Anthony H. Atlas (S.D. N.Y.)

Liens; Where Federal Tax Liens Attached Only to One-sixth Undivided Interest Owned by Taxpayer in Real Properties, Held That Federal Court Has Power to Order Sale of Entire Properties, Free and Clear, and Distribute One-sixth of Proceeds to Government. United States v. Fred Folsom, et al. (M.D. Ala., Nov. 16, 1960) The taxpayer was liable for

income taxes in the amount of $26,146.90, plus interest to the date of trial in the amount of $8,009.34. He was the owner of a one-sixth undivided interest in certain real properties, and federal tax liens attached to this interest. Five members of the taxpayer's family each owned a one-sixth undivided interest in most of the properties, and J. H. Flack owned a five-sixth undivided interest in the remainder of the properties. The Government brought this action to enforce the federal tax liens, joining as defendants the taxpayer and each of the other persons owning an interest in the properties. The Government prayed that the Court decree a sale of the properties, and distribution of one-sixth of the proceeds to the Government.

Defendants argued that the Court lacked power to order a sale of the entire properties, because under Alabama law, only a co-tenant of real property owned as a tenancy in common could have the property partitioned, and could have the property sold for division only on proof that it could not be equitably partitioned, but a mere lien holder could not have the property partitioned or sold for division. The Government argued that this rule of Alabama law is a rule of procedure and not a rule of property, and is therefore not applicable in the federal courts, and that under the provision of Section 7402 and 7403, Internal Revenue Code, 1954, the Court has power to order the entire properties sold, free and clear of the interests of all parties and a distribution of the proceeds in respect of the interests of all parties.

The Court held that the federal statutes, rather than state law, determine its power to enforce federal tax liens, and that it has power under such statutes to decree a sale and distribution of the kind requested by the Government, even in the absence of proof that the properties cannot be equitably partitioned. Accordingly, the Court ordered such sale and distribution.

Staff: United States Attorney Hartwell Davis, Assistant United States Attorney Albert E. Byrne (M.D. Ala.); Robert L. Handros (Tax Division).

Liens; Government Denied Interest on Fund Held by Disinterested Stakeholder; Stakeholder Entitled to Costs Out of Fund. United States v. Henry's Bay View Inn, Inc., et al., (S.D. N.Y., December 13, 1960). Taxpayer's inn was damaged by fire while certain insurance policies were in force, and the United States sought to enforce its tax liens against the proceeds of these policies, naming as defendants the taxpayer, the insurance companies, and the various claimants to the proceeds.

The insurance companies, by cross-claim, interpled the adverse claimants other than the United States and moved to be allowed to pay the sum due into court, to be discharged, and to recover their costs.

In granting the motion, the Court denied the Government's contention that the insurance companies pay interest on the amounts due on the grounds that there was no contractual provision requiring them to do so and that there was no federal or state statute governing interest in a case such as this.

The insurance companies were also allowed their costs over the objections of the Government. The Court recognized that where the lien priority has been decided in favor of the United States and the fund is not sufficient to leave a balance after the lien has been satisfied it is clear that costs will not be allowed to the stakeholder, United States v. R. F. Ball Construction Co., 355 U. S. 587. But the Court, in accordance with the general rule applicable when the United States is not claiming a tax lien, found no reason to deny costs and attorneys' fees to the disinterested stakeholders where, as here, the tax lien priority had not been adjudicated and the fund exceeded the amount claimed by the Government.

Staff: United States Attorney S. Hazard Gillespie, Jr., Assistant United States Attorney, Robert E. Scher (S.D. N.Y.).

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