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UNITED STATES ATTORNEYS
BULLETIN

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MONTHLY TOTALS

Both filings and terminations continue to drop as the fiscal year progresses. The greatest lag is in civil case filings which are down almost 4 per cent from the previous year. Criminal filings are down also, as are civil and criminal terminations. The decrease in filings has offset the decrease in terminations with the result that the increase in the pending caseload has been kept to a little over two percent. As we go into the last half of the fiscal year, we begin to think of year-end figures. Since the beginning of the backlog drive in 1954, the pending workload has registered a decrease at the end of every fiscal year. This is a very remarkable and commendable record and we are anxious that it not be broken. The increase of 634 cases in the pending caseload averages out to about 7 cases per district. With a little extra effort on the part of each district, not only can this increase be wiped out, but a very satisfactory year-end decrease can be achieved. Set out below is a comparison of the work accomplished during the first 7 months of fiscal years 1960 and 1961, as well as a breakdown of the work done in each of the first 7 months of 1961.

	1st 7 Months F. Y. 1960	1st 7 Months F. Y. 1961	Increase or Decrease Number	%
Filed				
Criminal	17,649	17,394	- 255	- 1.45
Civil	14,156	13,610	- 546	- 3.86
Total	31,805	31,004	- 801	- 2.52
Terminated				
Criminal	16,654	16,539	- 115	- 0.69
Civil	12,530	12,412	- 118	- 0.94
Total	29,184	28,951	- 233	- 0.80
Pending				
Criminal	8,459	8,458	- 1	- 0.01
Civil	19,784	20,419	+ 635	+ 3.21
Total	28,243	28,877	+ 634	+ 2.24

	July	Aug.	Sept.	Oct.	Nov.	Dec.	Jan.
Filed							
Criminal	1,709	2,346	3,201	2,551	2,479	2,534	2,574
Civil	1,863	2,304	1,897	1,990	1,889	1,753	1,914
Total	3,572	4,650	5,098	4,541	4,368	4,287	4,488
Terminated							
Criminal	1,600	1,772	2,328	2,977	2,832	2,617	2,513
Civil	1,463	1,906	1,798	2,005	1,627	1,816	1,797
Total	3,063	3,678	4,126	4,982	4,459	4,433	4,310

Collections during January amounted to one of the highest totals ever achieved by United States Attorneys during a single month. Total collections amounted to $6,298,562, which brings the total for the first 7 months of fiscal 1961 to $22,054,775. This represents an increase of $5,336,737, or 31.9 per cent over the $16,718,038 collected during the first 7 months of fiscal 1960. This highly gratifying record augurs well for the final year-end collection figures. If this phenomenal rate of increase is continued to the end of the year, collections will hit the highest mark in the history of the Department.

During January $1,564,135 was saved in 74 suits in which the government as defendant was sued for $2,016,862. 37 of them involving $870,629 were closed by compromises amounting to $218,243 and 23 of them involving $552,523 were closed by judgments against the United States amounting to $234,484. The remaining 14 suits involving $593,710 were won by the government. The total saved for the first seven months of the fiscal year amounted to $15,793,970. This is a decrease of $3,082,690 or 16.3 per cent from the $18,876,660 saved during the first seven months of fiscal year 1960.

DISTRICTS IN CURRENT STATUS

As of January 31, 1961, the districts meeting the standards of currency were:

CASES

Criminal

Ala., N.	Colo.	Ill., N.	La., E.	Miss., N.
Ala., M.	Del.	Ill., E.	La., W.	Mo., E.
Ala., S.	Dist. of Col.	Ind., N.	Maine	Mo., W.
Alaska	Fla., N.	Ind., S.	Md.	Mont.
Ariz.	Ga., M.	Iowa, N.	Mass.	Neb.
Ark., E.	Ga., S.	Iowa, S.	Mich., E.	Nev.
Ark., W.	Hawaii	Kan.	Mich., W.	N. J.
Calif., S.	Idaho	Ky., E.	Minn.	N. M.

CASES

Criminal (Con't.)

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

Civil

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

MATTERS

Criminal

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

Civil

Ala., N.	Ark., W.	Fla., N.	Hawaii	Ind., N.
Ala., M.	Calif., N.	Fla., S.	Idaho	Ind., S.
Ala., S.	Calif., S.	Ga., N.	Ill., N.	Iowa, N.
Ariz.	Colo.	Ga., M.	Ill., E.	Iowa, S.
Ark., E.	Dist. of Col.	Ga., S.	Ill., S.	Kan.

MATTERS

Civil (Con't.)

Ky., E.	Miss., S.	N. C., E.	Pa., W.	Va., W.
Ky., W.	Mo., E.	N. C., M.	P. R.	Wash., E.
La., W.	Mont.	N. C., W.	R. I.	Wash., W.
Me.	Neb.	N. D.	S. C., W.	W. Va., N.
Md.	Nev.	Ohio, N.	S. D.	Wis., E.
Mass.	N. J.	Ohio, S.	Texas, N.	Wis., W.
Mich., E.	N. M.	Okla., N.	Texas, S.	Wyo.
Mich., W.	N. Y., E.	Okla., E.	Texas, W.	C. Z.
Minn.	N. Y., S.	Okla., W.	Utah	V. I.
Miss., N.	N. Y., W.	Pa., E.	Vt.	

CLERICAL APPOINTMENTS

When a clerical appointment is limited to three months, pending completion of the FBI investigation, it will be appreciated if the United States Attorneys will have their administrative assistants forward to the Executive Office for United States Attorneys Standard Forms 52 requesting the conversion of such appointments to career status at least ten days prior to their expiration date. This Form is not prepared in the Department but in the field in order to give the United States Attorney the opportunity to indicate whether, after having had time to observe the individual's performance, he wishes the appointment to be made permanent. Cooperation in this matter will facilitate the conversion of the appointments and lessen the paperwork necessary to obtain the Forms.

LEAVE RECORDS OF UNITED STATES ATTORNEYS

In order to assist the United States Attorneys in expediting their final papers, they are reminded that it is necessary for them to submit, in addition to Standard Form 1150, their complete set of leave records (Standard Forms 1130) for audit purposes. As soon as the audit is completed, the leave records will be returned.

JOB WELL DONE

The Supervisor in Charge, Alcohol and Tobacco Tax Unit, has commended Assistant United States Attorney George E. Peabody, District of Kansas, for the very able manner in which he prosecuted several cases for the Division. In extending sincere thanks for a job well done, the Supervisor stated that Mr. Peabody has given wholehearted support and cooperation at all times to such cases, and that the investigators feel free to seek his advice and guidance at all times.

Assistant United States Attorney Edward L. Stahley, Northern District of Florida, has been commended by the Supervisor in Charge, Alcohol and Tobacco Tax Unit, for the manner in which he handled the prosecution of a recent case, and for his fine cooperation at all times in Alcohol and

Tobacco Tax cases. In the specific case, which involved a charge of attempted bribery of a petit juror, the defendant was convicted and immediately sentenced to three years. As there have been two or three instances of attempts to influence jurors recently, the conviction and sentence in this case should have, in the opinion of the United States Attorney, a most salutary effect upon persons making similar attempts.

The Regional Administrator, SEC, has expressed appreciation to United States Attorney George E. Rapp, Western District of Wisconsin, for the successful prosecution of a recent case involving violations of the fraud and registration provisions of the Securities Act of 1933. The trial lasted over a week and the defendant was found guilty on 6 out of 10 counts. The letter stated that this difficult case, in which the amount of the fraud exceeded $300,000, was handled in an outstanding manner regarding its preparation, analysis, and presentation.

Assistant United States Attorney Robert Ward and members of the staff of the United States Attorney's office for the Southern District of New York, have been commended by the Assistant General Counsel, F.C.C., for their valuable assistance in the successful termination of a recent case. After a special appearance by the Commission and the United States as amici curiae, and after hearing argument, the State Supreme Court dismissed the action as requested by the Commission.

The presiding judge has commended the handling of a recent criminal case which was tried by United States Attorney C. E. Luckey, and Assistant United States Attorney David W. Robinson, Jr., District of Oregon. The judge observed that while he had tried a lot of criminal cases he had never seen one more vigorously and better handled.

United States Attorney Paul W. Cress and Assistant United States Attorney Jack R. Parr, Western District of Oklahoma, have been commended by the FBI Special Agent in Charge, for the excellent way in which they handled a recent case. The letter stated that many laudatory remarks were received from citizens of the community concerning the investigation, and the outstanding way in which Mr. Parr handled the case in the court room and the summation to the jury.

The Assistant Director, ICC, has congratulated United States Attorney William H. Webster, Eastern District of Missouri, for the successful prosecution of two recent criminal cases which involved Elkins Act violations, and has expressed the Commission's pleasure at the favorable outcome.

The Director Bureau of Safety and Service, ICC, has expressed appreciation for the interest and splendid cooperation shown in the disposition of several recent cases by United States Attorney George E. Rapp and Assistant United States Attorney Robert J. Kay, Western District of Wisconsin. The letter stated that the practical problems which developed during the course of the trial not only justified Mr. Rapp's early concern as to the court's reaction to these cases, but also pointed up the need to review

procedures and instructions in order to avoid or minimize such problems in the future. The letter further stated that Mr. Kay's keen interest and understanding of the enforcement problem was greatly appreciated, and that he ably and effectively represented the Government.

The Acting General Counsel, Department of Commerce, in a letter to the Attorney General has expressed appreciation of the efforts of United States Attorney Laughlin E. Waters and Assistant United States Attorney Gary B. Fleischman, Southern District of California, culminating in the eminently satisfactory outcome of a case involving priorities and allocations violations under the Defense Production Act, as amended.

* * *

ANTITRUST DIVISION

Acting Assistant Attorney General W. Wallace Kirkpatrick

BANK MERGER

Settlement of First Case Attacking Bank Merger Under Antitrust Laws. United States v. Firstamerica Corporation (N.D. Calif.) On February 17, 1961, on motion of the Government, the Court issued an order dismissing this action.

The motion reads as follows:

"Whereas approvals under the appropriate banking laws have been obtained so that defendant Firstamerica Corporation is now in a position to carry out substantially the program outlined in the letter dated September 27, 1960, from Robert A. Bicks to defendant Firstamerica Corporation, filed herein as part of the record in this case on September 30, 1960;

Therefore, pursuant to said letter plaintiff, by its attorneys acting under the direction of the Attorney General of the United States, moves the court to dismiss this action against defendant Firstamerica Corporation."

The letter of September 27, 1960 sets forth "in substance the terms of a consent settlement of the pending litigation" but "recognized that action by the Federal Reserve Board under Public Law 86-463, as well as under the Bank Holding Company Act would be required to carry out the various banking steps contemplated."

The principal steps which the program outlined and which have now been taken with required approval of the various banking authorities are:

1. Approval has been granted to merge California Bank and First Western Bank and Trust Company.

2. A new bank has been created, using the name of the old First Western Bank and Trust Company, to which has been transferred out of the old First Western Bank and Trust Company, title and interest in 65 banking offices (and 10 additional offices approved but not activated), together with all of the deposits, loans and other banking business of such offices. The deposits totaled about $500,000,000.

3. The remaining offices, deposits, etc. of old First Western have been merged into California Bank under the title of United California Bank.

4. After New Bank has been in operation for two years, Firstamerica is to take such steps as may be necessary to divest itself of

its stock or the assets of New Bank. Before so doing, Firstamerica must establish to the satisfaction of the appropriate federal and state banking authorities that the financial condition of New Bank, its prospects and its management will be such as will reasonably insure its continued successful operation after the required divestiture. If divestiture has not been made effective pursuant to the above, then within a six-year period Firstamerica will distribute the stock of New Bank to its stockholders.

This action was commenced with the filing of a complaint on March 30, 1959, which alleged that the acquisition by Firstamerica of the stock of California Bank violated Section 7 of the Clayton Act, and that an agreement whereby Firstamerica agreed to acquire 80% or more of the stock of California Bank for the purpose of merging Firstamerica's California subsidiary, First Western Bank and Trust Company, with California Bank constituted a violation of Section 1 of the Sherman Act.

Firstamerica is the nation's largest bank holding company. At the time of suit it controlled 23 subsidiary banks in an eleven-state area. As of June 1958, its subsidiary banks accounted for 322 banking offices which had combined deposits of over $2,950,000,000. Its California subsidiary, First Western, operated 100 offices in California, including 27 in the metropolitan Los Angeles area. As of June 1958 it had deposits of over $900,000,000. At the same time California Bank had 65 offices all but one of which were also located in the metropolitan Los Angeles area. California Bank had deposits of over $1,000,000,000.

Shortly after the complaint was filed, Firstamerica moved to dismiss it on the ground that the prior approval by the Federal Reserve Board of the transaction complained of under the Bank Holding Company Act of 1956 barred the United States from subsequently maintaining its suit. The motion to dismiss was denied by the District Court on May 12, 1959. Firstamerica thereafter moved in the Supreme Court for leave to file a petition for a writ of certiorari to review the effect of the Federal Reserve Board's prior action on the Government suit. That application was denied.

The principal effect of the settlement which led to the Government's motion to dismiss is to create a new state-wide banking system in California made up of offices of the old First Western Bank. Included in such offices are all 35 of First Western's offices located in and near the metropolitan Los Angeles area, the area in which all of California Bank's offices were located. Thus, the principal anti-competitive effect of the original stock acquisition will be removed by the reestablishment of two competitive banking systems in that area. State-wide, three banking chains will exist, new First Western Bank, United California Bank and Bank of America, instead of Bank of America and old First Western being the only state-wide bank chains in a state where there is a high degree of banking concentration in the hands of a few very large banks.

Staff: George D. Reycraft, Lyle L. Jones and Larry L. Williams (Antitrust Division)

CLAYTON ACT

Monopoly-Flexible Couplings; Complaint Under Section 7. U. S. v. Koppers Company, Inc., et al., (W.D. Pa.). On February 17, 1961 a civil suit was filed against Koppers Company, Inc. and Thomas Flexible Coupling Company alleging a violation of Section 7 of the Clayton Act.

Acquisition of Thomas by Koppers, the suit alleged, may lessen competition and tend to create a monopoly in the manufacture and sale of flexible couplings, a metal device for transmitting power between industrial machines, in these ways: competition between Koppers and Thomas has been eliminated; Thomas has been eliminated as a substantial factor in competition; and Koppers' competitive advantage over other flexible coupling manufactures may be enhanced to the detriment of actual and potential competition.

Koppers, which manufactures and sells a variety of products, had sales in 1959 of $240,281,000. It is the country's largest producer of flexible couplings. Thomas, although small in relation to Koppers, is the largest exclusive manufacturer of metal flexible couplings in the United States.

The Government's suit asked the Court to adjudge the acquisition to be in violation of the Clayton Act and to require Koppers to divest itself of all stock interest in Thomas.

Staff: William H. McManus and Zachary Shimer
(Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General William H. Orrick, Jr.

COURTS OF APPEAL

ADMINISTRATIVE LAW

Cross-examination of FAA Administrator With Respect to Basis for Policy Decision Improper. Air Line Pilots Association, et al. v. Quesada (C.A. 2, February 9, 1961). The Administrator of FAA adopted a resolution prohibiting the use of pilots 60 years of age or more in air carrier operations. Plaintiffs brought suit to restrain enforcement of the regulation, and to have it declared null and void. Plaintiffs' motion for a preliminary injunction was denied by the district court. The Second Circuit affirmed in an opinion which held that the regulation was within the rule making powers of the Administrator under Section 4 of the A.P.A., and that a hearing was not required. 276 F. 2d 892. Thereafter, on the same record, the district court entered summary judgment for defendant, and plaintiffs appealed.

The Court of Appeals affirmed. It held that the second appeal raised no issues not previously considered, except for the vacation of a notice of deposition, and the staying of the taking of the deposition of defendant Administrator. It also held, following United States v. Morgan, 313 U.S. 409, 422, that cross-examination of the Administrator as to the basis of his policy decision would be improper, and that the district court committed no error in refusing such an examination.

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

Suit to Have Customs Collector Label Brandy as "Brandy Imported from France" Dismissed for Want of Jurisdiction and Failure to Join Indispensable Party. Glencoe Distilling Company v. White (C.A. 9, February 1, 1961). Glencoe brought suit to have the defendant customs collector release "as brandy imported from France" brandy which he held, although Glencoe had tendered all taxes and duties payable. The authority to control the labeling of imported alcoholic beverages is vested in the Internal Revenue Service, and not in the customs collector. The district court granted defendant's motion to dismiss.

The Court of Appeals affirmed. It held that the suit was one asking for a change in labeling, and that defendant had no authority to grant the relief requested. It also held that appellant had failed to exhaust his administrative remedies. The Court also noted that the complaint was defective in that an indispensable party (the Secretary of the Treasury, or the Director of the Alcohol and Tobacco Tax Division of the Internal Revenue Service) was not joined as a party defendant.

Staff: United States Attorney Laughlin E. Waters; Assistant United States Attorneys Richard A. LaVine and Ralph F. Bagley (S.D. Calif.)

AGRICULTURAL ADJUSTMENT ACT

Alleged Failure of County Committee to Comply With Provisions of Tobacco Marketing Committee Handbook Irrelevant if Farmer Given Fair Opportunity to Present Case. Graham v. Lawrimore, et al. (C.A. 4, February 10, 1961). Graham's acreage allotments for tobacco were reduced for his 1959 crop year on the ground that he concealed overplanting on his allotted acreage in 1958. Plaintiff's attempt to seek judicial review of this decision was dismissed for procedural reasons. The County Committee again reduced his allotment for the 1960 crop year on the same ground. The State Review Committee upheld the findings of fact and the allotment reduction made by the County Committee. Upon petition for a review, the district court found in favor of the County Committee.

The Court of Appeals affirmed. It held that the de novo hearing before the Review Committee cured any procedural irregularities at the County Committee level, and that appellant was given ample opportunity to present his case under the review procedure. It also agreed with the district court that the findings of the Review Committee were supported by competent evidence.

Staff: United States Attorney N. Welch Morrisette; Assistant United States Attorney Thomas P. Simpson (E.D. S.C.)

BANKRUPTCY

United States Held Entitled to Fifth Priority in Bankruptcy for Claims Based on Defense Production Act Loans. In the Matter of Peoria Consolidated Manufacturers, Inc., Bankrupt. (C.A. 7, January 31, 1961). Peoria had entered into a contract with the Army and, in order to complete this contract, borrowed $814,169 from the RFC, which made the loan under the authority of Section 302 of the Defense Production Act of 1950, as amended, 50 U.S.C.A. App. 2092. In September of 1953, all RFC assets arising under the Defense Production Act were assigned to the United States. In December of 1953, Peoria was adjudicated a bankrupt. By its claim in the bankruptcy, the United States sought to recover the unpaid balance of the 1953 loan to Peoria.

Section 64 of the Bankruptcy Act of 1898, as amended, 11 U.S.C. 104, provides a fifth priority for "debts owing to persons, including the United States, who by the laws of the United States /is/ entitled to priority * * *." and priority is established for "debts due to the United States" by Section 3466 of the Revised Statutes, 31 U.S.C. 191. The referee denied the fifth priority to the United States, and the district court agreed, without opinion.

The Court of Appeals reversed. It noted that the Defense Production Act was enacted to provide emergency mobilization powers, including defense lending authority, to meet the threat to national security as a

result of the hostilities in Korea. The funds for such loans, when made by the RFC or other agencies, were obtained from the Treasury of the United States and not from the assets of the agencies. The Court held that, in such circumstances, RFC was acting as an agent of the United States in making the defense loan to Peoria and such loans create "debts due the United States."

Although Section 3(a) of the Reconstruction Finance Corporation Act provides that "debts due the Corporation shall not be entitled to the priority available to the United States", war lending activities of RFC were expressly excepted from this waiver of priority. The Defense Production Act was enacted subsequent to Section 3(a) and, consequently, could not have been itemized as one of the exceptions but the Court ruled that to include it clearly is consistent with the spirit of the exceptions. The cause was remanded to the district court with instructions to give effect to the statutory priority afforded the debt due the United States.

Staff: Donald Hugh Green (Civil Division)

FEDERAL RULES OF CIVIL PROCEDURE

Summary Judgment Precluded Where Necessary to Resort to Extrinsic Evidence on Question of Intent in Interpreting Contract. United States v. Kansas Gas and Elec. Co., (C.A. 10, February 8, 1961). A contract was executed in 1942 between the Public Housing Administration and Kansas Gas and Electric Co. containing a schedule of prices for electric service, and an additional clause providing that if the utility made either a general reduction in rates or a reduction in "this general class of service", the rates to the Government were to be reduced accordingly.

In 1946 the utility made a reduction in rates for service supplied to a group of municipalities, but did not offer a similar reduction to the Government, which continued to pay under the original price until a new contract was negotiated in 1952.

The Government subsequently brought suit for the difference between the amount which it actually paid for service from 1947 to 1952, and the amount which it asserted it should have paid during that period if the utility had offered it the same reduction made to the municipalities. The critical question under the contract was whether the Government had been in the same "general class of service" as the municipalities.

Defendant filed a motion for summary judgment, with three accompanying affidavits. The Government did not introduce opposing affidavits, but relied upon the proposition that the interpretation of the phrase in question could not be resolved without a trial on the merits. The district court granted defendant's motion for summary judgment.

The Court of Appeals reversed and remanded for a full trial on the merits. It held that the interpretation of the critical phrase was a question of fact, since the intention of the parties could be determined

only by extrinsic evidence of the circumstances surrounding the negotiations, and expert evidence on the usage of the phrase in the utility industry. The Court held that the Government was under no obligation to introduce opposing affidavits where it had effectively controverted them in its pleadings and answers to interrogatories.

Judge Bratton concurred in the court's reasoning, but dissented as to the result. In his opinion, the district court should have resolved all ambiguities in the contract in favor of the Government under a "favored nations" theory of interpreting governmental contracts, and thus should have entered summary judgment for the Government without resort to extrinsic evidence.

Staff: Ronald A. Jacks (Civil Division)

GOVERNMENT EMPLOYEES

Discharge to Promote Efficiency of Service Upheld Although Employee Had Received Satisfactory Performance Rating. De Fino v. McNamara, et al., (C.A. D.C., February 23, 1961). Plaintiff sought restoration to Government employment as an electrician at an Air Force base. He was subject to the Veterans' Preference Act, and had been dismissed to "promote the efficiency of the service." The district court dismissed his complaint.

The Court of Appeals affirmed. Appellant contended that a "satisfactory" performance rating, received after the acts of insubordination which were the basis of his dismissal, demonstrated that the discharge did not satisfy the statutory requirement of dismissal to promote the efficiency of the service. The Court of Appeals rejected this argument upon the authority of Thomas v. Ward, 255 F. 2d 953, certiorari denied, 350 U.S. 958.

Staff: United States Attorney Oliver Gasch and Assistant United States Attorney Arnold T. Aikens (D.C.)

SOCIAL SECURITY ACT

Prior Marriage Precludes Recovery for Woman Claiming to Be Widow. Di Giovanni, et al. v. Ribicoff, (C.A. D.C., February 23, 1961). Beulah Countiss was divorced from Pearson in Virginia on January 17, 1944. At that time a Virginia statute prohibited remarriage of either party for six months. On June 24, 1944, the period was reduced to four months. Thereafter, on July 1, 1944, Beulah Countiss entered into a ceremonial marriage with Di Giovanni. She lived with him for several years. In 1950 plaintiff began living with Di Giovanni. A child was born to them in 1951 and Di Giovanni died in 1952. Beulah was still alive. Plaintiff and the child sued for review of Social Security's denial of widows' and children's benefits for Di Giovanni's death. The district court upheld the administrative determination.

The Court of Appeals affirmed. It held that Beulah's marriage to Di Giovanni was valid because the reduction in the suspension period from six months to four months had freed Beulah to marry him. Since the marriage of Beulah and Di Giovanni had never been dissolved, Di Giovanni was incapable of marrying plaintiff. Plaintiff was therefore not his widow and the child was not his child within the meaning of the Act.

Staff: United States Attorney Oliver Gasch and Assistant United States Attorney Donald S. Smith (D.C.)

DISTRICT COURTS

ADMIRALTY

Injunction Proceedings; Fishermen and Restaurant Tenants Attempt to Halt Demolition of Army Pier; Fishing Rights and Tenancy Held Not Effected by Demolition. Groome, et al. v. United States (2 cases) (E.D. Virginia, January 30, 1961). Having determined that it was no longer necessary, the Army decided to demolish a wharf located at Fort Monroe, Virginia, to avoid further maintenance costs. A class action by local fishermen sought to prevent the demolition on the grounds that the deed of the property from the State of Virginia to the United States in 1838 reserved the right of fishing from the lands and shoals theretofore enjoyed by the citizens of Virginia. A second, similar action, was brought by the holdover tenants of a restaurant and fishing supply store adjoining the wharf. An ex parte restraining order was issued, but on the hearing for a preliminary injunction, both actions were dismissed. It was held that the lease of the holdover tenants had expired and that proper notice had been given to them to quit the premises. The class action was dismissed on the grounds that the destruction of the wharf in no way infringed or impaired fishing rights or privileges of the citizens of Virginia which existed prior to the deeding of the property to the Government.

Staff: Alan Raywid (Civil Division)

FEDERAL TORT CLAIMS ACT

Medical Malpractice; Diagnosis of Gastroenteritis Not Negligent, Even Though Subsequent Operation Revealed Acute Appendicitis With Rupture. Andres Figueroa v. United States, (S.D. N.Y., January 19, 1961). At approximately 4:00 a.m. plaintiff entered a Veterans Administration hospital in New York complaining of abdominal pains. Upon examination the doctor diagnosed plaintiff's condition as gastroenteritis and did not recommend hospitalization. At approximately 8:00 a.m. of the same day plaintiff sought admission to a private hospital. He was admitted thereto at about 11:00 a.m. At the time of admission plaintiff's condition was diagnosed as acute enterocolytis. An original entry of gastroenteritis was scratched through. At 8:00 p.m. on the following day an operation upon the plaintiff revealed acute appendicitis

with rupture. The Court found that the V.A.'s examination was exercised with due care and that the diagnosis which followed was a proper exercise of medical judgment. The Court also found that at the time of admission to the private hospital it could not reasonably have been concluded that plaintiff was suffering from appendicitis or any other condition requiring surgical intervention.

Staff: United States Attorney S. Hazard Gillespie, Jr. and Assistant United States Attorney Myron J. Wiess (S.D. N.Y.)

* * *

CIVIL RIGHTS DIVISION

Acting Assistant Attorney General John Doar

Civil Rights Act of 1957. United States of America v. Deal, et al. (W.D. La.). This suit charged eleven individuals and eleven corporations with using economic coercion against a Negro farmer who testified at the hearings of the Commission on Civil Rights held in New Orleans on September 27-28, 1960 about his unsuccessful efforts to register to vote. Subsequently, he was unable to have his cotton and soy beans processed and to obtain credit from some local merchants. The legal bases of the suit were: (1) the Civil Rights Act of 1957 (42 U.S.C. 1971(b), (c), (d)) which prohibits economic pressure against a citizen attempting to exercise his voting rights; (2) the right of the Government to protect federal agencies from conduct which interferes with and obstructs their activities.

After the suit was filed, the defendants agreed to process the farmer's cotton and soy beans and otherwise to resume normal business relations with him. The defendants also agreed not to interfere with the farmer's right to vote by threats, intimidation or coercion. In view of the agreement, further action in the case has been indefinitely postponed, pending good faith performance by the defendants of their agreement.

Staff: Acting Assistant Attorney General John Doar, Arthur B. Caldwell, D. Robert Owen, Frank Dunbaugh, and Howard A. Glickstein (Civil Rights Division)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

FEDERAL FOOD, DRUG, AND COSMETIC ACT

Criminal Prosecutions for Unauthorized Sales of Amphetamine Sulfate and Similar Pills and Tablets. (N.D. Ala.; M.D. Ala.) On February 13, 1961, the United States Attorney for the Northern District of Alabama and the United States Attorney for the Middle District of Alabama filed a total of 13 criminal informations, charging 28 individuals and one partnership with illegal sales of amphetamine sulfate, desoxyephedrine hydrochloride, and similar drugs, often referred to as "co-pilots," "wide awake pills," "bennies," etc., in violation of the Federal Food, Drug and Cosmetic Act. Eight of the informations were filed in Birmingham and five in Montgomery, against persons owning or operating highway truck stops, gasoline stations, and restuarants.

In view of the dangerous effects of the indiscriminate sales of these drugs, vigorous action by the United States Attorneys is urged.

Staff: United States Attorney William L. Longshore (N.D. Ala.); United States Attorney Hartwell Davis (M.D. Ala.).

DEFENSE PRODUCTION ACT

Priorities and Allocations Violations; Nickel Salesman Sentenced as Aider and Abettor. United States v. Fred J. Raymond (S.D. Calif.). Raymond, a salesman for the Harshaw Chemical Company, one of the large nickel distributors, pleaded nolo contendere to two counts of a 12-count information filed August 1, 1960, charging him with aiding and abetting his customers in acquiring nickel for non-defense purposes through the illegal use of governmental priorities when this material was scarce because of defense demands. The pleas related to offenses in 1955 under the Defense Production Act of 1950, as amended, 50 U.S.C. App. 2073, and Business and Defense Services Administration Regulation No. 2, secs. 8(f), 17, and 27, for aiding and abetting J. S. Lane & Company and one William Corbett, Sr., in securing nickel from Harshaw Chemical Company, the supplier-distributor, by the extension of priority ratings in falsely certified purchase orders. On January 31, 1961, following a favorable presentence investigation report, the Court placed Raymond on probation for one year and dismissed the other counts.

The case marks the close of the enforcement program under the act by the Department of Commerce that resulted in the stamping out of the black market in nickel. It is regarded as an important victory by that Department because it was the first and only case in which the Government was able to get at the real instigator who induced the ultimate consumer to disregard the law.

Staff: United States Attorney Laughlin E. Waters; Assistant United States Attorney Gary B. Fleischman, (S.D. Calif.).

BRIBERY

Conspiracy; Offenses Committed Abroad. United States v. James W. Harlow, et al. (W.D. Texas). As reported in the July 1, 1960 issue of the Bulletin (Vol. 8, No. 14, p. 441), all defendants in this case were convicted at San Antonio, Texas, on June 16, 1960. On February 14, 1961, sentences were imposed as follows: Harlow, an aggregate of eleven years and a fine of $10,000; Wilson, an aggregate of eight years and a fine of $5,000; Addy, five years. The fourth defendant was deceased.

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

DENATURALIZATION

Misrepresentation of Occupation; Wiretapping; Laches; Construction of Rule 41(b), F.R. Civ. Proc. Frank Costello v. United States (U.S. Sup. Ct., February 20, 1961). The facts and the decisions of the courts below are discussed in the March 27, 1959 and March 25, 1960 issues of the Bulletin, Vol. 7, No. 7, p. 181; Vol. 8, No. 7, p. 196. The district court had held that Costello's naturalization had been procured by wilful misrepresentation and concealment of material facts because, among other things, he had stated in his naturalization proceedings that his occupation was "real estate", whereas his principal occupation was bootlegging. The court of appeals affirmed. In the Supreme Court, Costello contended that (1) the evidence failed to establish that he had wilfully misrepresented his occupation, since he had in fact engaged in some real estate transactions; (2) the dismissal of prior denaturalization proceedings for want of the statutory "good cause" affidavit was an adjudication on the merits under Rule 41(b), Federal Rules of Civil Procedure; (3) the evidence was tainted by wiretapping; and (4) the action was barred by laches.

The Supreme Court affirmed. Reviewing the evidence in detail, the Court concluded that it established clearly, convincingly and unequivocally that real estate was not Costello's occupation and that he was in fact a large-scale bootlegger. It rejected as absurd his contention that, on the basis of his real estate dabblings, he could reasonably have thought he was answering the question truthfully. The Court felt that the misrepresentation was material because in 1925 a known bootlegger would probably not have been admitted to citizenship. Since the district court had drawn no adverse inference from Costello's failure to testify, the Court found it unnecessary to decide whether such an inference may be drawn in a denaturalization proceeding.

Costello contended that his earlier admissions of bootlegging, made before various investigating bodies and later admitted in evidence against him at the denaturalization trial with telling effect, were the result of wiretapped telephone conversations in 1943 and therefore should have been excluded from evidence as "fruits of the poisonous tree." He claimed that his admissions of Prohibition era bootlegging in 1943 were impelled by the

belief that his interrogator had learned of his bootlegging from the tapped conversations. Reviewing the evidence, the Court pointed out that Costello had made admissions of bootlegging when interrogated in 1938 and 1939, that the 1943 wiretapped conversations did not concern his bootlegging activities and that his 1943 admissions were prompted by his confrontation with the earlier admissions. Granting that the 1943 inquiry had been precipitated by the wiretaps, the Court was satisfied that the admissions in question came from independent sources, and that any connection between the wiretaps and the admissions was too attenuated to require exclusion of the admissions from evidence.

The laches argument was based on the allegation that the 27-year delay in bringing denaturalization proceedings denied Costello due process of law in the circumstances of the case. The Court held that, even assuming that laches is available as a defense in a denaturalization case, it required proof of (1) lack of diligence by the party against whom the defense is asserted and (2) prejudice to the party asserting the defense. The delay had not prejudiced Costello, but had actually harmed the Government's case. Congress has not provided a statute of limitations in denaturalization cases based on fraud, and depriving the naturalized person of his fraudulently acquired privilege, even after the lapse of many years, is not so unreasonable as to constitute a denial of due process.

As for the dismissal of the earlier denaturalization suit, the Court held that the order of dismissal did not constitute an adjudication on the merits within the meaning of Rule 41(b). The Court construed that rule as not designed to change the common law principle with respect to dismissals in which the merits could not be reached for failure of the plaintiff to satisfy a precondition. Pointing out that the term "jurisdiction" is not one of fixed content, the Court held that dismissal for failure to file the "good cause" affidavit is a dismissal "for lack of jurisdiction" within the meaning of the exception in Rule 41(b).

Staff: Ralph S. Spritzer and Wayne Barnett, (Office of the Solicitor General);
Beatrice Rosenburg and Eugene L. Grimm, (Criminal Division).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Judicial Review of Deportation Order; Constitutionality of Deportation Statute; Alienage. Wolf v. Boyd and Rogers (C.A. 9, Feb. 1, 1961). This was an appeal from the district court order granting appellees' motion for summary judgment and denying appellant's motion for convocation of a three-judge court after a ruling that no substantial constitutional question was presented (See: Bulletin, Vol. 8, No. 16, p. 527). The appeal asserted that the court below was in error in both respects, but the Court of Appeals considered only the substantiality of the constitutional question.

When Canada, where she was born, refused to accept appellant as a deportee England consented to accept her. She contends that England's consent was sought under Section 243(a)(7) of the 1952 Act - 8 U.S.C. 1253(a)(7) - which provides that if deportation cannot be accomplished to any of specified countries it may be effected to any country which is willing to accept the alien into its territory.

Appellees contend that her proposed deportation to England is in accord with section 243(a) - 8 U.S.C. 1253(a) - which provides for deportation to any country of which the alien is a subject, national or citizen, if such country is willing to accept him, and that reliance was not had on the provisions of 8 U.S.C. 1253(a)(7).

The Court of Appeals said that the record suggests that although she had lost her Canadian citizenship by marriage to an American citizen in 1926, she had retained her citizenship in the United Kingdom under the British Nationality Act, and this may have been the reason for England's acceptance of deportation. But it added that the record "is not sufficient to establish the fact of appellant's English citizenship. We have no official acknowledgment to this effect by England nor any evidence of English and Canadian law upon the subject. The question of the substantiality of the constitutional question presented by this proposition is, therefore, not before us on appeal".

The Court further said that, for the first time, it was faced with an attempt to deport permanently a long term resident (since 1922) to a country in which she has never lived and with which she has had no personal tie or connection whatsoever; the issues presented by these circumstances have not been settled by existing precedent; and the constitutional question which they present is not an insubstantial one. "The case, then, is one for a three-judge District Court".

Accordingly, the Court of Appeals held, the district court was without jurisdiction to proceed to judgment upon the question of citizenship raised there and the Court of Appeals is likewise without jurisdiction to pass upon that issue.

Reversed and remanded to set aside summary judgment and for convocation of a three-judge court.

Judicial Review of Denial of Stay of Deportation; Fairness of Proceedings; Official Notice of Facts; Summary Judgment. Radic v. Fullilove (N.D. Calif., Feb. 15, 1961). After being ordered deported to Yugoslavia, plaintiff applied for a stay of deportation under 8 U.S.C. 1253(h) and was accorded an interrogation by a Special Inquiry Officer at which he offered evidence in support of his application. The application was denied on the grounds that he would not be in danger of physical persecution if he should be deported to Yugoslavia.

He then sought judicial review of the denial, alleging that the Special Inquiry Officer was biased, prejudiced and otherwise disqualified from granting a fair interrogation by reason of instructions given him by his superiors, and that he took official notice of facts which were required to be the subject of proof.

Defendant moved for summary judgment on the ground that there was no dispute as to any issue of fact and that he was entitled to judgment as a matter of law under Rule 56, FRCP.

The Court noted that defendant had not so much as offered an affidavit from the Special Inquiry Officer in order to attempt to show a lack of any substantial dispute as to the facts. It also said that the issue as to the taking of official notice of certain facts must be resolved.

The Court said that it behooves a trial judge when considering a motion for summary judgment, to be very chary of concluding that there is no genuine issue as to a material fact, particularly so, as in this case, when a man's very life well may be involved. It concluded that this case is not one in which a summary judgment can, with propriety, be granted in part or in whole.

Defendant's motion denied.

Habeas Corpus; Administrative Arrest Following Release on Judicial Bail. Mpelakis v. Hamilton (D.C., Mass., February 15, 1961). Petitioner applied for a writ of habeas corpus on the ground that he is illegally detained by defendant, a District Director of the Service.

While under an outstanding order of deportation, from which he did not appeal, petitioner was arraigned on an information charging him with overstaying his shore leave as an alien crewman and failing to register and to be fingerprinted as an alien, criminal violations of 8 U.S.C. 1282(c) and 1306(a), respectively. On his plea of not guilty he was released under a judicial bond of $2000. Thereupon he was arrested and detained by Immigration officers pursuant to the warrant of deportation.

The petition for habeas corpus did not attack the validity of the order or warrant of deportation and the Court held that the granting of bail in

criminal proceedings did not supersede the authority of the Service to hold petitioner pursuant to the deportation order. He gained no rights, as a result of the filing of the criminal charges against him, to which he was not previously entitled.

Since petitioner's arrest was pursuant to a valid warrant of deportation and he had not applied for administrative bail in the deportation proceedings, the application for habeas corpus was denied.

NATURALIZATION

Petition of Parent in Behalf of Child; Definition of Child; Naturalization Jurisdiction of State Courts. Petition of Joaquina Gonsalves Marques (Sup. Jud. Ct., Mass.; (1961)). Petitioner, a citizen, filed a petition for naturalization in behalf of her minor daughter (Adelaide) in the Superior Court (Mass.) under the provisions of section 322 of the 1952 Act (8 U.S.C. 1433) which provides in part: "A child born outside of the United States, one or both of whose parents is at the time of petitioning for the naturalization of the child a citizen of the United States . . . may be naturalized if under the age of eighteen years . . ."

When the petition was filed Adelaide was under eighteen years of age. At the time of her final hearing she was still under the age of eighteen years, but she was married. The Court held that the word "child" in 8 U.S.C. 1433 is defined in section 101(c)(1) of the 1952 Act (8 U.S.C. 1101(c)(1)) as "an unmarried person under twenty-one years of age. . ." and it denied the petition on the authority of Petition of Apilado (C.A. 5, Hawaii, July 17, 1958) a case with identical facts, and certified its decision to the Supreme Judicial Court (Mass.).

The Supreme Judicial Court, on appellate review, decided that a careful reading of those statutory provisions demonstrates the correctness of the decision in the court below. It said that the purpose of the petition is the naturalization of a child, something which is not conferred by the mere filing of the petition. The one upon whom nationality is conferred under 8 U.S.C. 1433 must at the moment nationality is conferred be a "child" as defined in 8 U.S.C. 1101(c)(1). The plain language of Congress precludes any contention that the decision below engrafted an exception upon the Act. The Court added that if there be support for the suggestion in the petitioner's brief that the statute, as interpreted, derogates from the institution of marriage, the appropriate forum for complaint is Congress.

(The Superior Court's jurisdiction to naturalize is derived from 8 U.S.C. 1421(a). By state statute this includes appellate jurisdiction of the Supreme Judicial Court).

Petition dismissed.

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Conspiracy to File False Non-Communist Affidavit; Sufficiency of Proof; Charge to Jury; 17 U.S.C. 3500. West et al. v. United States (S. Ct. Feb. 20, 1961). James West, Marie Haug, Eric Reinthaler, and four other defendants were convicted in the Northern District of Ohio of conspiracy to violate 18 U.S.C. 1001 by filing and procuring to be filed false non-Communist affidavits under the Taft-Hartley Act. The convictions were affirmed by the Court of Appeals for the Sixth Circuit. (8 U.S. Attys. Bull. No. 5, p. 146). West, Andrew Remes, Hyman Lumer, and Sam Reed filed a petition for certiorari; Marie Haug and her husband, Fred Haug, filed another; and Eric Reinthaler filed a third. The petitions raised a wide range of questions; the sufficiency and competency of the evidence; the veracity of Government witness, Fred Leonard Gardner, who was attacked on the grounds that at the trial he had lied about his military service and his marital history, as well as the dates of his giving information to the F.B.I.; whether the Court should have given a "precautionary instruction" about accomplices' testimony and should have charged that the "two witness" perjury rule applied; whether the Court properly charged the jury as to the definition of "membership" in the Communist Party; the handling of the production of documents for impeachment purposes under 18 U.S.C. 3500. The opinion of the District Court (denying motion for new trial) is reported at 170 F. Supp. 200 (N.D. Ohio); the opinion of the Sixth Circuit is reported at 274 F. 2d 885. The Supreme Court denied certiorari on all three petitions.

Staff: In addition to the Solicitor General and the Assistant Attorney General, counsel on the brief in opposition were George B. Searls and Jack D. Samuels (Internal Security).

Contempt of Congress; Wilful Refusal to Testify Before House Committee on Un-American Activities - Frank Wilkinson v. United States. The Supreme Court, on February 27, 1961, in a 5-4 decision, upheld the conviction of petitioner under 2 U.S.C. 192 for wilful refusal to answer a question pertinent to matter under inquiry by the House Un-American Activities Committee. The Committee was conducting an inquiry into Communist infiltration into basic industry in the South and Communist Party propaganda in the South. Petitioner was subpoenaed and appeared before the Subcommittee on July 30, 1958, at Atlanta, Georgia. After being sworn and stating his name, he declined to give his residence and occupation. Then he was asked, "Mr. Wilkinson, are you now a member of the Communist Party?" Petitioner replied that he refused to answer any questions of the Committee "as a matter of conscience and personal responsibility." The Committee's Staff Director explained the pertinency and relevancy of the question, whereupon petitioner reiterated his refusal to answer. He was then directed by the Subcommittee Chairman to answer the question, and his response to this was a challenge to

the legality of the Committee under the First Amendment. He was indicted and convicted for refusal to answer the question as to his Communist Party membership. The Court of Appeals for the Fifth Circuit affirmed, 272 F. 2d 783. Wilkinson's principal contentions in the Supreme Court were that the Subcommittee was without authority to interrogate him, because its purpose in doing so was to investigate public opposition to the Committee itself and to harass and expose him; that the question he refused to answer was not pertinent to a question under inquiry by the Subcommittee; that he was denied due process because the pertinency of the question was not made clear to him at the time he was directed to answer it; and, that the Subcommittee's questioning violated his rights under the First Amendment. The Supreme Court first determined the subject matter of the Subcommittee's inquiry as Communist propaganda activities and infiltration into basic industry in the South, finding the requisite concreteness for such a determination in the resolution authorizing the Subcommittee hearing, the pattern of interrogation of prior witnesses, and the Staff Director's remarks. The Court then held that the basic congressional authorization for this inquiry was clearly decided in Barenblatt v. United States, 360 U.S. 109, 120-21, where it was said that "it can hardly be seriously agreed that the investigation of Communist activities generally -- was beyond the purview of the Committee's intended authority . . ." This particular investigation was likewise in pursuit of a valid legislative purpose, since Barenblatt determined that the Congressional power to legislate in the field of Communist activity in this country and to investigate in aid thereof is unassailably valid. It was consistent with the purpose of investigating Communist propaganda activities to call petitioner who, the Subcommittee had reason to believe, was an active Communist leader engaged primarily in propaganda activities. Even if petitioner's activities against the Committee necessarily implied, which they did not, that its intent in calling him was his personal persecution, the Court disclaimed for itself the function of speculating on the motives of individual Committee members when they pursue a valid investigation. As to pertinency, the Court found it "difficult to imagine a preliminary question more pertinent to the topics under investigation than whether petitioner was in fact a member of the Communist Party," and held the contention that the pertinency was not made clear to him equally without foundation. Further, the First Amendment claims pressed by Wilkinson were undistinguishable from those considered in Barenblatt.

Staff: The case was argued by Kevin T. Maroney (Internal Security Division). Also on the brief were the Solicitor General, Assistant Attorney General Yeagley, Bruce J. Terris (Assistant to the Solicitor General) and Lee B. Anderson (Internal Security Division).

Contempt of Congress; Wilful Refusal to Testify Before House Committee on Un-American Activities. Carl Braden v. United States. The Supreme Court, in a companion case to Wilkinson v. United States, with the same majority and minority comprising a 5-4 decision, upheld the conviction of petitioner for wilful refusal to answer questions pertinent

to the subject under inquiry by the House Un-American Activities Committee. Petitioner was the witness immediately preceding Wilkinson at the hearing of the Subcommittee in Atlanta on July 30, 1958. Refusing to answer many questions on the grounds that the questions were not pertinent to a question under inquiry by the Subcommittee and that the interrogation invaded his First Amendment rights, petitioner was tried and convicted for having refused to answer six specific questions concerning his connections with the Communist Party, the Southern Conference Educational Fund, the Emergency Civil Liberties Union, and the Southern Newsletter. The Court of Appeals for the Fifth Circuit affirmed the conviction, 272 F. 2d 653. Based on the same record brought before it in Wilkinson, the Supreme Court concluded for the reasons stated in that opinion that the Subcommittee's investigation of the subjects under inquiry were authorized by Congress, that the interrogation was pertinent to a question under Subcommittee inquiry, and that petitioner was fully apprised of its pertinency. Petitioner contended that the question as to whether he belonged to the Communist Party at "the instant /he/ affixed /his/ signature to that letter" went beyond the lawful scope of inquiry and into the constitutionally protected area of his legitimate private conduct. The Court cited Barenblatt in upholding the pervasive authority of the Committee to investigate Communist activity. Braden raised two additional issues not considered in Barenblatt or Wilkinson. He claimed that the trial court should have allowed the jury to determine the pertinency of the questions to the subject under inquiry; also, that his reliance on his understanding of the meaning of prior case law precluded conviction for his refusal to answer. The Court refuted these contentions by reaffirming its 1929 decision in Sinclair v. United States, 279 U.S. 263: the pertinency of questions to the subject under inquiry is a matter of law for the court; and, a mistaken view of law is no defense to a deliberate and intentional refusal to answer.

Staff: The case was argued by Assistant Attorney General Yeagley. With him on the brief were the Solicitor General; Bruce J. Terris (Assistant to the Solicitor General); and George B. Searls and Joseph C. Weixel (Internal Security Division).

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.) Arthur Rogers Roddey, a former employee of the Institute for Defense Analyses assigned for duty to the Weapons Systems Evaluation Group of the Department of Defense, was indicted by a Federal Grand Jury in Alexandria, Virginia on January 10, 1961. The indictment, which was in 12 counts, charged Roddey with the unlawful retention of national defense information in violation of the Espionage Statute, making false statements regarding the destruction of certain classified documents, the unlawful removal from a public office of

classified documents and papers relating to defense projects and the unlawful conversion of Government property. Previously, on December 29, 1960, Roddey had been arrested by special agents of the FBI pursuant to a warrant issued by the United States Commissioner in Alexandria, Virginia. On February 17, 1961, prior to the scheduled argument on his pre-trial motions, Roddey entered a plea of guilty to count five of the indictment. This count charged a violation of the Espionage Statute (18 U.S.C., 793(e)) in that he had unauthorized possession of a document relating to the national defense entitled "The Application of Satellites for Meteorological Reconnaissance" and failed to deliver it to the employee of the United States Government entitled to receive it. Subsequently, the Government dismissed the remaining counts of the indictment. Sentencing has been deferred pending the completion of a pre-sentence probation report.

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

False Non-Communist Affidavit; Definition of Party Membership; Production of Receipts for Payments to Informant Witnesses. Killian v. United States (S. Ct. Feb. 20, 1961). Killian was convicted on a second trial of filing a false non-Communist affidavit with the National Labor Relations Board and the Court of Appeals for the Seventh Circuit affirmed, 275 F. 2d 561. (8 U.S. Attys. Bull. No. 3, p. 73). A petition for certiorari raised questions as to the sufficiency of the evidence, whether the violation was "wilfull"; whether the district court correctly charged the jury as to the meaning of "membership" in or "affiliation" with the Communist Party; whether the prosecution produced all "statements" required by 18 U.S.C. 3500, including the receipts given by the F.B.I. to two Government witnesses for payments received; and whether there was an improper summation by the prosecution. The Supreme Court granted certiorari on February 20, 1961 limited to two questions: whether the charge properly defined membership in and affiliation to the Communist Party; and, whether it was error not to require production of "statements which report payments" to Government witnesses.

Staff: In addition to the Solicitor General and the Assistant Attorney General, were George B. Searls and Jack D. Samuels (Internal Security).

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LANDS DIVISION

Assistant Attorney General Ramsay Clark

Navigable Streams; Obstructions; Discharge of Industrial Waste; Evidence to Support Injunctive Relief. United States v. Republic Steel (C.A. 7, February 17, 1961.) Acting under Sections 10 and 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403 and 407, the United States sued to enjoin three iron and steel companies with plants on the banks of the Calumet River in Chicago from depositing industrial wastes in the river without a permit from the Chief of Engineers and to compel them to restore the full navigable capacity of the channel by removing past deposits. The district court enjoined further deposits and ordered defendants to remove 81.5% of the deposits in the vicinity of their plants, assigning a specific share of this 81.5% to each defendant. The Seventh Circuit reversed and directed dismissal of the action on the grounds that defendants' acts did not violate the statute and that the relief granted was not authorized by the statute (U.S. Attys. Bull., Vol. 7, p. 219). The Supreme Court reversed, holding that the injunctions were proper if supported by substantial evidence, and remanded the case for consideration of that question. The Court held that courts can fashion injunctive remedies to carry out the purpose of Congress even though the particular circumstances are not within the precise injunctive remedies provided in the statute.

On the remand, the Seventh Circuit ruled that both prohibitory and mandatory injunctions were justified by undisputed evidence that defendants were discharging sizeable quantities of industrial solids into the river, but it further ruled that the allocations of responsibility in the particular mandatory injunction issued were not supported by credible evidence and that a new trial was therefore necessary. The Court rejected the trial court's allocation of responsibility because it was based in the main on the testimony of the Government's expert witnesses, "much of which is unadulterated conjecture, guess and speculation." The Court was particularly critical of the theory of the main Government expert that defendants' deposits "flocculated," that is, formed into porous structures in the river which arrest the normal progress of other materials through the river, causing obstruction exceeding their own deposits. The trial court "attached much weight to the verity of the theory," but the Court of Appeals found that it was without any evidentiary support. The theory was also inconsistent with what the Court of Appeals considered the sole method for determining responsibility, that of sampling what comes out of defendants' sewers.

The Lands Division is considering recommending that the Government petition for certiorari because the standards of proof required by the Seventh Circuit are impossible to meet and, therefore, effectively destroy any sanction for past violations of the 1899 Act. The Court seemingly requires assignment of each particle of a fungible material to a

particular source, a scientific impossibility. The Court has also limited the liability of each defendant to what it deposited, whereas the statute prohibits obstruction of navigable capacity and the Supreme Court has held the defendants liable to restore navigable capacity.

Staff: Roger P. Marquis and Hugh Nugent (Lands Division).

Judicial Review; Administrative Interpretation of Oil and Gas Leasing Regulations. Stewart L. Udall, Secretary of the Interior v. Paine, (C.A. D.C., February 23, 1961). On March 31, 1953, appellee Paine filed an offer pursuant to the Mineral Leasing Act, for an oil and gas lease to certain public lands in New Mexico. The Secretary of the Interior rejected his offer on the ground that, under the applicable regulation, the land was not available for leasing at the time the offer was filed. The land had been under a previous lease which was due to expire by its terms on the day before Paine's offer was filed. However, four days prior to the expiration date, the former lessees had filed a relinquishment of their lease. The Secretary's regulation provided that where a lease has been relinquished, immediately upon the notation of the relinquishment on the Department of Interior land records, the lands shall be open to further oil and gas lease offers. The relinquishment was not noted until the following September, long after Paine's offer had been filed. One month after the notation, appellant Wright filed an offer and was subsequently issued an oil and gas lease to the land.

Paine sought relief in the form of declaratory judgment in the district court which granted summary judgment, without opinion, in his favor. The Secretary appealed along with Wright, the successful offeror in the administrative proceeding. Holding that the Secretary's interpretation of his regulation is entitled to controlling weight, the Court of Appeals reversed the district court. The Court held, in answer to Paine's argument that the leasing regulation was not applicable to this situation, that it had long been the Secretary's practice to reject lease offers filed prior to notation of relinquishment of a former lease. The failure to afford an exception to that practice, as formulated in the regulation, to meet the situation presented here was not unreasonable. The Court went on to hold that the 1946 Amendment to the Mineral Leasing Act was applicable and made the relinquishment effective when filed rather than when accepted by the Secretary as they have been under earlier statutes. Thus, the relinquishment terminated the existence of the lease so that it did not expire by its own terms before the relinquishment would have become effective. The 1946 Act was held applicable, despite the fact that the former lessees had not filed an election as required therein to bring their lease under its terms, on the basis that they had earlier obtained the advantages of the Act's provisions, and were accordingly bound by its terms.

Staff: Robert S. Griswold, Jr. (Lands Division).

Condemnation; Set-off of Former Owner's Alleged Debt to United States Against Deficiency Award in Court Registry Improper Where Record is Deficient as to Fact of Debt. United States v. Prakelt, 284 F. 2d 56 (C.A. 2, 1960). Approximately 65.1 acres of appellants' 86-acre tract were condemned for flood control and other purposes. Judgment was entered on a stipulation of just compensation. Pursuant to that judgment, the United States deposited the deficiency in the court registry. Without apprising their counsel or the United States Attorney, appellants had requested that the Army Corps of Engineers construct an access ramp from the remainder of their property to the new road. The ramp was constructed at a cost of $1,500. That amount was retained in the court registry, pending further order as to liability for the cost of the ramp. After two hearings, the district court concluded that the $1,500 held in its registry should be paid to the United States to reimburse it for the cost of the construction of the ramp. There was evidence that construction of such ramps is customary at the landowners' expense and that there was a misunderstanding concerning liability for the cost of the ramp. The district court found that any misunderstanding was the result of appellants' own doing.

The former owners appealed, attacking the district court's distribution of the remainder of the deficiency award upon the ground that the Government failed to move for a new trial or to appeal from, or to amend or to set aside, the judgment determining just compensation, which judgment was binding upon the Government and the district court. Rejecting the necessity of that procedure and conclusion, the Government contended as follows: (1) A condemnation proceeding is divided into phases (here, valuation and distribution), the court retaining control until all phases are terminated; (2) claims against the award or the former owner may be asserted in the distribution phase; and (3) the United States is entitled to share in the distribution as its rights may appear and may set off amounts owing to it against a judgment obtained against it.

On appeal, the Second Circuit decided that neither party's argument was properly dispositive of the appeal, the United States being entitled to recover or to set off the cost of the ramp "only on proof that the circumstances were such that the appellants are liable for the cost." The record was held to be deficient in this respect and the case was reversed and remanded to afford the presentation of the requisite proof. No petition for certiorari will be filed because the decree of the appellate court is not a final decree and because construction of the record is not a proper subject of review by certiorari for the Supreme Court.

Staff: Raymond N. Zagone (Lands Division)

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

IMPORTANT NOTICE

All United States Attorneys are urged to check to be sure that indictments have been returned or complaints filed in all criminal tax cases pending in their offices which have counts which may be barred by the statute of limitations on or before April 15, 1961. Please notify the Tax Division immediately upon the return of indictments or the filing of complaints in all such cases.

CIVIL TAX MATTERS

Appellate Decision

Capital Gains Versus Ordinary Income. Workmen's Mutual Fire Insurance Society v. A'Hearn (C.A. 2, February 6, 1961). The Second Circuit, reversing the district court on the Government's appeal, held that parcels of improved real estate acquired by a mutual fire insurance company through mortgage foreclosures were depreciable properties "used in the trade or business" of the company, within the meaning of 1939 Code Section 117(a), and therefore constituted non-capital assets, the sales of which gave rise to ordinary rather than capital losses. The district court had held that the parcels were properties "held for the production of income", rather than "used in the trade or business", and accordingly allowed the taxpayer's claim for capital loss carry-forward treatment. In reversing, the Court of Appeals pointed out that taxpayer's mortgage investment program, coupled with the management and rental of properties acquired through foreclosures, represented an "integral part" of its insurance "business". A state law prohibiting an insurance company from engaging in the real estate management business was regarded by the Court as immaterial, not only because the state insurance commissioner had waived the statutory ban, but also because "the presence of a state regulatory statute, not truly reflective of the tax realities, should not serve to thwart the uniform application of federal taxing laws".

Staff: United States Attorney S. Hazard Gillespie, Jr., and Assistant United States Attorney James McKinley Rose, Jr. (S.D. N.Y.)

District Court Decisions

Bankruptcy; Denial of Petition for Injunction by Nondischarged Bankrupt Against Collection of Post-Petition Interest. In re Leland H. Cameron, Bankrupt, (S.D. Cal., Jan. 23, 1961). The District Court, on a petition for review, affirmed a decision of the Referee in Bankruptcy holding that the bankrupt was not entitled to injunctive relief against

the collection from him individually of post-petition interest which had accrued on taxes which had been completely satisfied from the bankruptcy estate. The decision of both the Referee and the District Court was based on the fact that the bankrupt had been denied a discharge from bankruptcy and the question of whether post-petition interest may be collected from the bankrupt individually was not decided. The latter question concerning the effect of a discharge on subsequent efforts to collect both post-petition interest and penalties from the bankrupt individually has arisen with increasing frequency and this decision represents an inroad upon those decisions holding the discharge constitutes a bar to collection from the bankrupt individually.

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

Liens; Federal Tax Lien v. Attorney's Lien. United States v. Harry F. Grubert, et al., (S.D. Tex., 61-1 USTC Par. 9209.) This action was commenced to foreclose a federal tax lien against a fund due the taxpayer in the possession of a disinterested stakeholder. In July of 1957 taxpayer retained an attorney to seek to have a judgment entered against him set aside. Taxpayer at that time made an oral promise to partially reimburse the attorney for his services from the fund in question. In May of 1958 an assessment was made against taxpayer and a notice of lien duly filed.

The attorney contended a "contract lien" arose in his favor against the fund at the time the promise was given which was prior in time to the Government's lien. The Court found no authority, statutory or otherwise, to support this contention. The attorney further contended that an equitable lien arose in his favor because but for his efforts in having the judgment set aside, the judgment creditor would have executed on the fund held by the stakeholder. The Court found this was not a fund "created" by the attorney and therefore no equitable lien was ever created since at most the fund was only "protected" by the attorney's efforts. The Court further found the Texas statutes did not create an attorney's lien and that no common law "retaining" lien existed because the attorney never had possession of the fund. Nor was a "charging" lien created since the attorney had recovered no judgment in favor of his client. In summary, the Court relying on Section 6323 of the Internal Revenue Code of 1954 and United States v. City of New Britain, 347 U.S. 81, found no prior choate lien, contractual, statutory or equitable, existed in favor of the attorney.

Staff: United States Attorney William B. Butler and Assistant United States Attorney Scott T. Cook (S.D. Tex.);
Norman E. Bayles (Tax Division)

Injunction to Restrain Collection of Tax Denied; Permission to Amend Complaint Granted. Debra Bellah v. United States (N.D. Ala., December 1, 1960.) This action originated as an injunction suit to restrain collection of penalties assessed under Section 6672 of the Internal Revenue Code of 1954 for wilful failure of a responsible officer to collect and pay over employee withholding and F.I.C.A. taxes. By this injunction suit, taxpayer sought a determination of her liability for the penalty. A motion to dismiss was filed by the Government on the ground that Congress has prohibited injunction suits to prevent collection of taxes. The District Court sustained the motion to dismiss but, in a somewhat unusual order, directed that the action be kept open so that plaintiff could pay a portion of the taxes (see Steele v. United States, 280 F. 2d 89), file a claim for refund, have the Internal Revenue Service disallow the claim, and file an amended complaint seeking a refund of such taxes, all within a period of sixty days. This was designed to save plaintiff the filing fees which would be required by a new action.

Taxpayer followed the steps outlined by the Court in its order and on December 1, 1960, filed an amendment to the original bill of complaint which, in effect, abandoned the injunction suit and stated a new cause of action seeking a refund.

This unusual use of the amendment process is one method of saving a filing fee for an impecunious plaintiff but it is subject to abuse and results in definite disadvantages to the Government, notably the requirement that an answer be filed within ten days from the date of amendment. (See Federal Rule 15(a).)

Staff: Thomas A. Frazier, Jr. (Tax Division)

State Court Decision

Right of Redemption; Use of Summary Proceeding Under State Law to Enforce Government's Right to Redeem Under 28 U.S.C. 2410; Extension of One Year Redemption Period by State Law. Havenhurst Investment Company v. Maddux (Los Angeles Superior Court, August 10, 1960). Plaintiff, a beneficiary of a trust deed recorded prior to the filing of federal tax liens, secured a decree in the State court foreclosing the trust deed as a mortgage on June 24, 1959, which ordered the sale of the real property with the proceeds to be paid, first, to plaintiff in satisfaction of its loan and, second, to the United States in satisfaction of its tax liens. The decree further provided that, in accordance with 28 U.S.C. 2410, the United States had one year within which to redeem the property. On August 18, 1959, plaintiff purchased the property at the foreclosure sale for $5,832.07, the amount of its judgment plus cost of sale.

The Internal Revenue Service determined that the real property had a value substantially in excess of plaintiff's judgment and found

interested persons who were willing to guarantee to purchase the property if the United States redeemed. On June 21, 1960, the Government notified plaintiff of its intent to redeem the property and, in accordance with state law governing real estate redemptions, demanded a statement of the amount required to redeem and a verified statement of the rents and profits received during the period between the judicial sale and the date of accounting. Plaintiff gave only a statement of the amounts it had expended and refused to give a statement of the rents received which, under State law, must be credited against the amount required to redeem.

Thereupon, on July 27, 1960, the Government instituted a summary proceeding in the State court whereby it petitioned the Court for an order compelling plaintiff to make a written verified statement of rents and profits received and to compel an accounting and disclosure of the amount required to redeem. Under State law the filing of this proceeding extended the period of redemption until 15 days after the Court's determination. After the hearing on August 10, 1960, the Court ordered plaintiff to make an accounting and render the requested statements, which plaintiff did. The property was redeemed on August 18, 1960, when the Internal Revenue tendered to plaintiff the amount required to redeem. The property was later resold and the Government realized the additional sum of $4,473.88 to be applied against its tax liens.

Staff: United States Attorney Laughlin E. Waters, Assistant United States Attorneys Edward R. McHale and Lillian W. Stanley (S.D. Calif.)

CRIMINAL TAX MATTERS
District Court Decision

Proof; Wilful Failure to Pay Taxes; Proof of Wilfulness Held Insufficient. United States v. Goodman (N.D. Ill., 57 CR 31). This case involved a one-count charge that taxpayer, a prominent Chicago attorney, had wilfully failed to pay his individual income taxes for 1953. After a trial to the Court, an acquittal was granted in a written opinion. The opinion reviews the proof demonstrating that defendant was in default on tax payments for ten prior years; that he frustrated collection efforts by frivolous offers in compromise; that he utilized his son's bank account to prevent levy by the Revenue Service; that he had resources available to pay taxes but devoted these to high living; and that he divested himself of attachable assets. The Court conceded that taxpayer was "stubborn, obstinate and perverse" and "that he acted upon occasion without justifiable excuse . . . that he acted in careless disregard of his income tax obligations". The Court then reached the surprising conclusion that the facts did not support a conclusion of wilfulness.

The Department considers this decision to be erroneous. Because it is not appealable and because defense counsel will be quick to cite it in similar cases, the following observations are offered: The Court erred in adverting to the Palermo case, 259 F. 2d 872 (C.A. 3), for the evil

motive definition of wilfulness instead of the authoritative definition in U. S. v. Murdock, 290 U.S. 389 at 394-395. The Murdock case clearly defines wilfulness as intentional conduct without justifiable excuse or stubbornly or obstinately or perversely or without ground for believing it is lawful or with careless disregard whether one has the right so to act or with a specific bad purpose. The United States Attorneys should, whenever the Goodman case is cited, be quick to point out that it fails to accept the unmistakably alternative nature of the Supreme Court's binding definitions of the meaning of wilfulness.

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