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UNITED STATES ATTORNEYS

BULLETIN

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NEW EXECUTIVE OFFICE HEAD

On February 17, 1961, Mr. John R. Reilly of Wilmette, Illinois, was appointed as Special Assistant to the Deputy Attorney General to head the Executive Office for United States Attorneys.

A native of Dubuque, Iowa, Mr. Reilly is a graduate of the University of Iowa and the University of Iowa Law School. He served in the Antitrust Division from 1955 to 1958 as a trial attorney in Chicago. Following this he was mid-western representative and counsel for the Council of State Governments.

Mr. Reilly has been associated with the law firm of Aiken, O'Gallagher, McDonald and Schlax in Chicago. During the recent Presidential election campaign, he served as administrative assistant to Lawrence F. O'Brien, director of organization of the Democratic National Committee.

During the Korean war, Mr. Reilly served in the Air Force Judge Advocate General's Office. He is married and has four children.

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CHECK OF CLOSED CASES

The attention of those employees of the United States Attorney's offices responsible for the maintenance of records is invited to the instructions set out on page 19 of the United States Attorneys Docket and Reporting System manual. These instructions direct that lists of new and closed cases and matters received from the Department should be reviewed to insure agreement between the Department's records and those in the United States Attorney's office. Such lists should be reviewed as soon as received so that the Department may be advised of necessary corrections without delay. Such review should not be intermittent but should be conducted regularly each month.

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JOB WELL DONE

United States Attorney Robert Vogel, District of North Dakota, has written an article on "Suing the United States" which has been published in the January 1961 issue of the North Dakota Law Review. The article discusses the more important procedural points of Federal litigation, and should prove valuable to local attorneys unfamiliar with Federal practice.

Miss Louise Agusta, a clerk-typist in the United States Attorney's office, District of Massachusetts, recently volunteered to act as an interpreter in connection with a tax evasion case before the grand jury. Miss Agusta was called upon to interpret in Italian for seven witnesses and was commended for a job well done.

The FBI Special Agent in Charge has commended Assistant United States Attorney Dominick L. Di Carlo, Eastern District of New York, for the successful prosecution of a bankruptcy case, and on his highly competent presentation of the evidence to the court and jury. The United States Attorney states that Mr. Di Carlo has opened up a series of wholesale meat bankruptcy frauds which have caused substantial losses to the meat industry in amounts well over $100,000 per bankruptcy, and that the bankruptcies have occurred at the rate of about two a year for a number of years. He further stated that this prosecution is just the prelude to further investigations of a substantial nature of those who are the ring leaders and make the profit out of the bankruptcies.

United States Attorney Charles D. Read, Jr. and Assistant United States Attorney John W. Stokes, Jr., Northern District of Georgia, have been commended by the Chief Postal Inspector, for their work in a recent mail fraud case involving an "advance fee" scheme. The letter stated that after the Post Office Department conferred with Mr. Stokes, the latter promptly authorized the filing of U. S. Commissioner warrants against a number of persons operating the schemes, and that this action had a tremendous effect in curtailing an operation that may otherwise have gone nationwide.

United States Attorney William B. West, III, Northern District of Texas, has been elected as Secretary of the Advisory Board and Executive Committee of the Southwestern Law Enforcement Institute. The Institute is affiliated with the Southwestern Legal Foundation.

An officer of the United States Junior Chamber of Commerce has commended former United States Attorney Robert S. Rizley, Northern District of Oklahoma, for an outstanding job in a recent series of narcotic cases which resulted in a number of convictions. The letter stated that these narcotic convictions are but a single example of many outstanding cases Mr. Rizley and his staff have pursued, and that more men are needed in federal positions with his dedication and capability.

Assistant United States Attorney Donald C. Lehman, Southern District of Florida, has been congratulated by the Director of the FBI for his successful prosecution of a recent case. The letter stated that the results achieved in this instance are a tribute to the outstanding legal ability of the staff members of the Southern District.

The Deputy General Counsel, Department of Agriculture, has written to the Attorney General commending Assistant United States Attorney William C. Hunt, District of Minnesota, on his excellent handling of the trial of a recent case involving the Commodity Credit Corporation. In expressing his appreciation, the Deputy General Counsel observed that Mr. Hunt was not aware until a few days before the trial that he would have the responsibility of trying the case, and that in order to prepare for the trial it was necessary for him to acquire an extensive knowledge of the technicalities of the sampling and grading of grain in a very limited time.

Assistant United States Attorney Byron E. Kopp, Western District of Pennsylvania, has received expressions of appreciation from the District Supervisor, Agricultural Marketing Service, for the extremely efficient and effective manner in which he represented the Government in a recent case which resulted in a judgment favorable to the Government.

The Regional Administrator, SEC, has expressed thanks for the outstanding job done by United States Attorney William B. West, III and Assistant United States Attorney William Hamilton, Northern District of Texas, in prosecuting a recent involved and legally complicated case. The Regional Administrator stated that in his more than twenty-five years of experience with the Commission, he knew of no Federal criminal case that presented a challenge comparable to this one, or where the defendants so brazenly and publicly defied lawful orders of the Court and all legally constituted authority. The letter further stated that the interest and welfare of the general public required that these defendants be brought to trial and prosecuted. For their success in meeting the challenge of the case, and for their able prosecution of this very difficult and vigorously contested case, the Regional Administrator expressed thanks to Messrs. West and Hamilton.

The Chairman, Civil Aeronautics Board, has written to the Attorney General commending Assistant United States Attorney Robert W. Rust, Southern District of Florida, for his excellent work in the trial of the first litigated criminal prosecution under 49 U.S.C. 1472, for violation of a Board order. The letter stated that the successful prosecution of this matter, which resulted in a verdict of guilty on fourteen counts and a fine of $16,100, was due to the large measure of cooperation, assistance, and hard work rendered by the office of the United States Attorney; that in handling this case from its inception to its successful conclusion Mr. Rust demonstrated a very thorough knowledge of the law; that he was fluent and skillful during the trial; and that in the preparation of the case, he was tireless, working several occasions past midnight, as well as on week-ends and on a legal holiday.

Assistant United States Attorneys Robert B. Fiske, Jr. and Edward Brodsky, Southern District of New York, have been congratulated

by the General Counsel, SEC, for the superb manner in which they handled a recent case. The letter stated that the Commission was most pleased with the disposition of the case which resulted in guilty pleas to five counts, and nolo contendere pleas to the other five counts, and that the collapse of the defense in this landmark case was in a large measure due to Mr. Fiske's skill and perseverance, and the thorough manner in which he developed and prepared the Government's case. The General Counsel stated that the Commission wished to express special commendation to Mr. Brodsky for the able assistance he rendered, and added that the convictions will have a most beneficial impact upon the financial community and the enforcement program of the Commission.

The Postal Inspector in Charge has commended Assistant United States Attorney John L. Briggs, Southern District of Florida, for the outstanding and efficient manner in which he handled the prosecution of a recent case which involved the mailing of obscene matters and related advertising. The letter stated that the case was most difficult to prosecute because of the clever way in which the defendant tried to hide the real purpose of his business; that of claiming to be interested in education rather than in profit from obscenity. The Postal Inspector noted that the diligence with which Mr. Briggs prepared the case for trial and the orderly presentation of the testimony were remarkable and reflect much credit upon his ability. The letter further stated that this case attracted wide attention throughout the country and that complaints were received from a wide variety of sources and states, illustrating the extensive scope of the operation.

United States Attorney Laughlin E. Waters and Assistant United States Attorney Gary B. Fleischman, Southern District of California, have been commended by the Acting General Counsel, Department of Commerce, for their fine work in the handling of a recent case involving the illegal use of governmental priorities to obtain nickel. The letter stated that while the court saw fit to place the defendant on probation, the Department of Commerce nevertheless considers the outcome eminently satisfactory as it represents the first and only case in which it has been possible to get at the real instigator who induced the ultimate consumer to disregard the law. The letter also expressed appreciation of the efforts of Messrs. Waters and Fleischman in connection with the nolo contendere pleas by the defendant because of the difficulties of proof and because of defendant being the personal instigator of substantially every Defense Production Act violation in the Los Angeles area.

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ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

MEMOS AND ORDERS

The following Memoranda and Orders applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 4, Vol. 9, dated February 24, 1961.

ORDERS	DATED	DISTRIBUTION	SUBJECT
233-61	2-27-61	U.S. Attorneys & Marshals	Designating Richard A. Chappell and Gerald E. Murch as Chairman of the Board of Parole and the Youth Correction Division within the Board, respectively, and authorizing members of the Board of Parole to serve as members of the Youth Correction Division.
234-61	3-7-61	U.S. Attorneys & Marshals	Designating members of the Board of Parole to serve as members of the Youth Correction Division.
235-61	3-7-61	U.S. Attorneys & Marshals	Placing Assistant Attorney General Herbert J. Miller, Jr. in charge of the Criminal Division.
236-61	3-7-61	U.S. Attorneys & Marshals	Placing Assistant Attorney General Ramsey Clark in charge of the Lands Division
237-61	3-8-61	U.S. Attorneys & Marshals	Amendment of Section 23(a) of Order No. 175-59 relating to authority to compromise and close civil claims.

MEMOS	DATED	DISTRIBUTION	SUBJECT
274-3	2-15-61	U.S. Marshals	Federal Employees Health Benefits Program, Standard Form 2809-A
290	2-20-61	U.S. Marshals	Transfer of Personnel Records of Separated Employees to Federal Records Center.

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ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

Government files 1st Clayton Act Section 4A action: U.S. and T.V.A. v. General Electric Company, et al. (E.D. Pa.). On March 14, 1961, the Department of Justice and the Tennessee Valley Authority, in a joint action, filed a complaint seeking to recover damages from five manufacturers of heavy electrical equipment, three of which pleaded guilty and two of which pleaded nolo contendere in our corresponding criminal antitrust case. In that criminal case, those five manufacturers and five individuals had been charged with a conspiracy, lasting from 1951 to February 1960, to fix prices on circuit breakers, to allocate the business of supplying circuit breakers to governmental agencies, and to submit rigged bids on circuit breakers to such agencies. The present complaint relates to purchases of large outdoor oil and air circuit breakers from those manufacturers by the Government and by the Tennessee Valley Authority, totalling more than $14,000,000.

The damages alleged in this complaint have been computed under Sections 4 and 4A of the Clayton Act and under the False Claims Act, as specified below. It is contended that TVA is a corporation entitled to sue for treble damages.

The complaint is drawn in five counts summarized as follows:

In Count I, the TVA asks $7,478,691 as treble damages, under Section 4 of the Clayton Act, for purchases from January 1956 to February 1960. It also seeks an undetermined amount of damages based on purchases from the defendants from 1951 to 1956.

In Count II, the Department of Justice seeks under the False Claims Act $4,421,372 as double damages, plus forfeitures on purchases by the other federal agencies from January 1956 to February 1960.

Count III, is an alternative to Count II. In it, the Department sued under Section 4A of the Clayton Act for $2,210,686 as actual damages sustained by the agencies (excluding the TVA) from January 1956 to February 1960.

Count IV is an alternative to Count I in which the Department on behalf of TVA, under the False Claims Act, seeks $4,985,794 as double damages plus forfeitures, on purchases from January 1956 to February 1960.

Count V is a second alternative to Count I in which the Department on behalf of TVA, under Section 4A of the Clayton Act, seeks $2,492,897 as the actual damages sustained on purchases from January 1956 to February 1960.

The complaint also seeks additional damages, not yet determined, based on purchase data which have not been evaluated.

It is the theory of this complaint that the basis for computing damages is the difference between prices actually paid for circuit breakers and the prices which would have obtained under competitive conditions. That difference is calculated upon analysis of procurement and purchase data, which disclosed substantial price declines at a certain time during the period of the conspiracy, when the conspiracy operated apparently least effectively. As set forth in detail in the complaint, it is the Government's theory that the actual bid prices or quotations received from the defendants during that period constitute the best evidence of the prices which would have obtained under competitive conditions.

Staff: Fred Turnage, Robert Halper, Lewis Markus, Floyd C. Holmes and Charles Helpie
(Antitrust Division)

Court holds Section 2 of Sherman Act violated: United States v. Pan American World Airways, Inc. et al. (S.D. N.Y.). This case was filed in the Southern District of New York on January 11, 1954 and charged Pan American World Airways and W. R. Grace and Company with forming, in equal partnership, an airline company named Panagra to exclude the establishment of an independent competitive airline which would compete with Grace's parallel steamship route extending along the west coast of South America or which would compete with the airlines operated in the Latin American area by Pan American. Pan American was also charged with preventing Panagra from extending its routes and operations in competition with Pan American. Grace was charged with preventing any action by Panagra contrary to the interest of its steamship lines. Pan American and Grace were charged with conspiring and attempting to monopolize and monopolization of transportation between the eastern coastal areas of the United States and South America. All three defendants were charged with restrictive practices including a division of territories agreement. The case was tried during May of 1959 and was finally submitted to the Court on July 2, 1959.

On March 8, 1961 Judge Thomas F. Murphy handed down a 70 page opinion in this case. Judge Murphy found that Pan American's restraints against Panagra and its continuing suppression of the extension of Panagra to the United States, in itself, and in combination with other conduct on the part of Pan American constituted a monopolization of commerce that contravenes Section 2 of the Sherman Act and would seem to require divestiture of Pan American's 50 percent stock interest in Panagra. Pan American was ordered to show cause on March 24, 1961 why a decree should not be entered directing it to divest itself of Panagra stock.

Judge Murphy held that neither Grace nor Panagra had violated the Sherman Act. His opinion stated that admittedly there was a division of territories understanding under which the operations of Pan American and Panagra were confined to the east coast and west coast of South America, respectively, but that under the circumstances this division of territories understanding was not unreasonable and not in violation of the Sherman Act. He further ruled that the joinder of Grace and Pan American

to form Panagra was not the result of a conspiracy as charged by the Government, but was a lawful combination with legitimate ends.

As to the charge of the Government that the Sherman Act makes unlawful the mere ownership or control by a steamship company of an airline operating a parallel route, Judge Murphy held that this does not per se violate the Sherman Act and since Grace was not shown to have exercised any restraints on Panagra there was no violation of the law involved. The Court noted the fact that the Government had submitted evidence in support of its charges that there is active passenger competition between Panagra and Grace Line. It also noted that the Government had introduced evidence to prove that at the present time there is an area of competition between Grace and Panagra with respect to cargo and that within the near future this competition will greatly increase. Judge Murphy said that speaking broadly, steamship transportation and air transportation are in some measure competitive although each is distinct and has its own inherent advantages. However, he held that primarily because of the time factor involved a passenger who elects to go via vessel is not interchangeable with a passenger who wishes to fly. He further ruled that the same reasoning applies with respect to cargo traffic.

The Court left certain matters to the primary jurisdiction of the Civil Aeronautics Board, including the legality of Pan American-Panagra joint advertising, sales and offices agreements as well as the question of the Grace control in the management of Panagra.

Staff: Edward R. Kenney, E. Riggs McConnell, Herbert F. Peters and S. Robert Mitchell
(Antitrust Division)

Bakeries indicted under Sherman Act: U.S. v. American Bakeries Company, et al. (S.D. Fla. Jack. Div.). U. S. v. Ward Baking Company, et al. (S.D. Fla. Jack. Div.). On March 6, 1961, a Federal Grand Jury at Jacksonville, Florida returned two indictments against bakeries charging them with violations of Section 1 of the Sherman Act.

Named as defendants in the first indictment were the following:

American Bakeries Company, Chicago, Illinois
Flowers Baking Company, Inc., Thomasville, Georgia
Fuchs Baking Co., Homestead, Florida
Holsum Bakers, Inc., Tampa, Florida
Southern Bakeries Company, Atlanta, Georgia, and
Ward Baking Company, New York City

According to the indictment the defendants engaged in an illegal combination and conspiracy to fix and maintain prices at which bread and rolls will be sold to wholesale accounts in Florida and Southeastern Georgia. The indictment further charges that on or about April 29, 1960, representatives of the defendants met, discussed and agreed on increased prices

to be charged for bread and rolls.

Named as defendants in the second indictment were the following:

Ward Baking Company, New York City
American Bakeries Company, Chicago, Illinois
Derst Baking Company, Savannah, Georgia
Flowers Baking Company, Inc., Thomasville, Georgia, and
Southern Bakeries Company, Atlanta, Georgia

According to the indictment the defendants engaged in an illegal combination and conspiracy to allocate among themselves the business of supplying bakery products to Federal Naval installations and to submit noncompetitive, collusive, and rigged bids and price quotations to said installations in Northern Florida and Southeastern Georgia.

Staff: Henry M. Stuckey
(Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General William H. Orrick, Jr.

COURTS OF APPEAL AND STATE APPELLATE COURTS

ADMINISTRATIVE PROCEDURE ACT

Action Taken Intentionally, Irrespective of Evil Motive, or With Careless Disregard of Statutory Requirements Constitutes Wilful Action Within Section 9 (b). Goodman v. Benson, et al. (C.A. 7, February 16, 1961). Goodman was a dealer in grain futures. In 1956 he held a speculative position in rye futures on the Chicago Board of Exchange in excess of 500,000 bushels. The Commodity Exchange Authority (CEA) called to his attention the fact that he exceeded the 500,000 bushel limit imposed by regulations under Commodity Exchange Act (7 U.S.C. 1, et seq.). Goodman explained he did not know that the limit had been reduced to 500,000 bushels, and within two days brought himself into compliance. As a result of this transaction, Goodman received from CEA a document specifying the speculative limits (500,000 bushels) on trading in positions on rye futures.

In less than 18 months, Goodman again began to deal in rye futures. He inquired of a broker as to the maximum permissible number of bushels of rye futures contracts he could lawfully buy. The broker told him that the limit was two million bushels. The broker obtained this information by a telephone call to the CEA. Goodman then bought futures in an amount approximating two million bushels but failed to report this fact to the CEA as required by regulation.

Based on the facts set forth above, the judicial officer of the Department of Agriculture ordered all contract markets to refuse Goodman trading privileges for a period of 20 days, and required Goodman to divest himself of all existing rye futures.

Goodman petitioned to the Seventh Circuit for review of the order. The court of appeals upheld the administrative action. It found that the administrative decision was based upon substantial and adequate evidence, and that matters of credibility were for the hearing examiner. The court refused to reach the question of whether the suspension of trading privileges amounted to a suspension of a license, and thus subject to the procedural requirements of Section 9 (b) of the A.P.A. The basis of the court's refusal was its holding that Goodman's conduct was wilful within the meaning of that Section, because irrespective of evil motive, he either acted intentionally, or with careless disregard of statutory requirements. The court also held that the unauthorized interpretation of the regulations by the employee of CEA did not estop the Government from bringing the disciplinary action.

Staff: Neil Brooks, Assistant General Counsel; Donald A. Campbell, Attorney (Department of Agriculture)

AGRICULTURAL MARKETING AGREEMENT ACT - MILK ORDERS

Provision in Milk Order Requiring Non-pool Handler to Pay Difference Between Class I and Class III Milk Held Valid. United States v. Lehigh Valley Cooperative Farmers, Inc., et al. (C.A. 3, February 20, 1961). Federal Marketing Order No. 27 covering the New York-New Jersey Milk Marketing Area (7 C.F.R. 927.1 et seq.), requires all non-pool handlers of milk to make a compensatory payment to the Producers Settlement Fund for all non-pool milk distributed by them in the marketing area. The district court, although finding that such compensatory payments were "necessary to effectuate the other provisions" of the Order, invalidated them under the authority of Kass v. Brannan, 196 F. 2d 791 (C.A. 2, Judge Learned Hand dissenting).

The court of appeals reversed, going into explicit conflict with the Second Circuit's decision in Kass. The Second Circuit had held that the mandatory compensatory payments on non-pool handlers resulted in higher costs to such handlers in violation of Section 8 c (5)(R) of the Act. The Third Circuit disagreed on the ground that that Section does not prevent the possibility of a premium price being paid to a producer, and has no application to non-pool handlers. The court also agreed with the district court that the provisions for compensatory payments are necessary to effectuate the other provisions of the order.

Staff: Neil Brooks, Assistant General Counsel; J. Charles Krause, Attorney (Department of Agriculture)

Handler-Producer Accountable for Milk It Produced and "Purchased" From Itself. Ideal Farms, et al. v. Benson (C.A. 3, February 27, 1961). Appellant, Ideal Farms, leases and operates 19 farms in northern New Jersey. All the milk from these farms is collected and shipped to its plant. In addition, Ideal buys milk from other plants. Federal Marketing Order No. 27 provides that milk received at a handler's plant from the handler's own farm is excluded from the net pool obligation of the handler only if no milk is received from any other source at that plant. Ideal contended that in purporting to regulate the handler's "own-produced" milk, the Secretary of Agriculture exceeded the authority conferred upon him by the Act. The district court upheld the provisions of the Order, and found in favor of the Secretary. 181 F. Supp. 62.

The court of appeals affirmed. It found that the word "purchased" as it appears in Section 8 c (5) (a) and (c) covers milk obtained from the handler's own farm. In so doing, the court relied upon United States v. Rock Royal Cooperative, 307 U.S. 532. The court also noted that to accept appellant's construction would be to avoid the intent of the Act to achieve a fair division of the fluid milk market among all producers. The court also pointed to the consistent administrative interpretation of the Act and the legislative history to support the conclusion reached. Judge Hastie dissented on the ground that there can be no "purchase" of milk by a handler from a producer where the handler and producer are the same person.

It is to be noted that the same question is now before the Fifth Circuit on the Government's appeal from a district court holding that the Secretary cannot regulate the handler's "own-produced" milk. Benson v. L. B. Vance, et al. (No. 18731).

Staff: Chester A. Weidenburner, United States Attorney; Charles H. Hoens, Jr., Assistant United States Attorney (D. N.J.); Neil Brooks, Assistant General Counsel (Department of Agriculture)

ESTATES - ADMINISTRATION

Personal Loan of Widow to Husband's Estate Made With Court Approval Held to Be An Expense of Administration, Entitled to Priority Over Claims of United States. United States v. Smith, Administratrix, (Sup. Ct. of Colorado, February 6, 1961). Smith died intestate on August 16, 1954, and his widow was appointed administratrix two days later. Principal assets of the estate were properties connected with a roofing business which the decedent had operated. Although the affairs of the business were in a chaotic state, she applied to the probate court for authority to continue the operation of the business for a time to assist in liquidating it. In October 1954, before the United States had filed claims for taxes and for damages on a roofing contract, she applied for and received authority to borrow for the estate $10,000 from her personal property. The business later failed, and the administratrix claimed the moneys advanced by her, together with interest at 6%, as an expense of the administration. The probate court allowed this classification and the United States appealed.

The Supreme Court of Colorado affirmed. The court held it is not necessary for the probate court to wait until all claims of creditors are filed before authorizing a loan, because to do so would be to destroy any benefit which might possibly accrue to the estate by the making of the loan. The court held that a Colorado statute requiring notice to all interested persons was directory, and not jurisdictional. The court also noted that for the three years after the loan was made during which the administratrix was attempting to conduct the business, no objection to the order authorizing the $10,000 loan had been made.

Staff: Donald G. Brotzman, United States Attorney; Charles W. Stoddard, Assistant United States Attorney (D. Colo.)

FALSE CLAIMS ACT

Use of Quarterly Reports to Federal Agency as "Claims", -- Burden of Proof That Federal Funds Were Properly Accounted For Is On Accused Employee. Smith v. United States (C.A. 5, February 8, 1961). Smith was the Executive Director of the Beaumont Housing Authority in Beaumont, Texas, which as lessee of a project owned by the United States, had agreed to pay rent in the amount by which operating income exceeded approved

expenditures for the preceding quarter. The Government had agreed to advance sufficient funds to cover anticipated operating deficits, upon request of the Housing Authority. The Authority was required to file quarterly reports reflecting the amount due to or to be advanced by the federal Government.

In a suit by the United States under 31 U.S.C. 231, the district court found that Smith had contrived a scheme by which checks were issued to a laborer on the pay roll of the Authority who cashed ten such checks and turned their proceeds over to Smith, and that Smith then caused the Authority to report that these funds were used to pay for clam shell delivered to the Authority, when in fact, shell purchased by the Authority had been paid for by the Authority directly to the seller. Based on these findings the district court entered judgment for double damages and forfeitures.

On appeal by Smith, the court of appeals affirmed. It reviewed the evidence and found that there was ample evidence in the record to support the district court's findings. The court held that the admitted nature of the transaction placed upon Smith "just as it would on any private employee pursued by an employer asserting the servant's breach of fidelity -- the burden of coming forward with a suitable explanation accounting in full for all of the sums improperly handled" and that the absence of evidence that the shell had not been delivered to the Authority was therefore not fatal to the Government's case. The court went on to state that "false claims arose because Smith, as Executive Director, knowing the true facts to be otherwise, filed the quarterly reports which included this disbursement . . .". The costs were ultimately borne by the federal treasury because the Authority, having made the disbursements, got them back from the federal government either as an outright payment or as a deduction from what otherwise would have been remitted as rental. The false reports therefore resulted in actual payment of federal funds and were therefore within the terms of the False Claims Act.

Staff: Anthony L. Mondello (Civil Division)

FEDERAL TORT CLAIMS ACT

United States Not Entitled to Set-off Against Tort Judgment of Civil Service Benefits. United States v. Price (C.A. 4, February 23, 1961). Price, an employee of the United States, was injured in an automobile accident as a result of the negligence of a truck driver who was an employee of the United States. Price was not acting within the scope of his employment, but the truck driver was. As a result of the injury, Price lost his left arm, and received a disability pension of $164 a month under the Civil Service Retirement Act. In a suit by Price, the district court entered judgment in his favor in the amount of $96,800, and refused to set-off any part of the disability payments. The United States appealed on the question of set-off only.

The court of appeals affirmed. It rejected the Government's contention that United States v. Brooks, 176 F. 2d 482 (C.A. 4), required that the disability payments be set-off insofar as they were payments from the United States and not a result of moneys paid by Price into the Civil Service Retirement Fund. The court held that the Civil Service payments, unlike the military benefits in Brooks, were from a "collateral source", because the Retirement Act was not designed to compensate employees for the particular injury suffered, but to provide a comprehensive program for retirement. The court also referred to cases involving retirement benefits under the Railroad Retirement Act, and to the recent Ninth Circuit decision (United States v. Hayashi, 282 F. 2d 599) which held that Social Security benefits should not be off-set against a personal injury award.

Staff: David L. Rose (Civil Division)

Negligence of Plaintiff Bars His Claim Under Alabama Law. Jupiter, et al. v. United States (C.A. 5, February 24, 1961). Jupiter, an employee of a junk company, was sent to an Air Force base to pick up surplus aluminum gasoline tanks. He supervised the loading of the tanks onto his truck by a large crane. While the tanks were being loaded and tamped down by the crane, Jupiter was injured. The district court found that Jupiter was guilty of contributory negligence in placing himself in a position where he could be hit by the crane, which he should have known was dangerous, and denied recovery.

The court of appeals affirmed, holding that the appeal presented only issues of fact. The court noted that although the contributory negligence doctrine may work a hardship on tort claim litigants in Alabama, the court was bound under the Tort Claims Act to apply the law of that state.

Staff: H. Hepburn Many, United States Attorney; Francis Weller, Assistant United States Attorney (E.D. La.)

Limitations: Operation of Two Year Limitation in Federal Tort Claims Act Prevented by the Relation Back of Amended Complaint Under Rule 15 (c), F.R.C.P., Notwithstanding Complete Change in Legal Theory. United States v. G. V. Johnson, et al. (C.A. 5, February 23, 1961). In a complaint filed within the two year limitation in the Federal Tort Claims Act, plaintiffs alleged generally the flight of aircraft from an adjoining Air Force Base over their house and crashes on and in the vicinity of the property leased by them; repeated heart attacks suffered by Mrs. Johnson from fear and anxiety caused by the flights; continuing promises by Air Force representatives to move plaintiffs from the premises and compensate them; inability of plaintiffs to move without such payment; and failure of the Government to consummate the promises. Plaintiffs sued to recover damages for such personal injuries to Mrs. Johnson on the ground of negligence of the Government "in failing to perfect the process of reimbursing or compensating plaintiffs for their property," so that they might move.

More than two years after the crashes occurred, plaintiffs amended their complaint to allege for the first time specific crashes and negligence of the Government in connection therewith. On the amended complaint the district court entered judgment for plaintiffs in the amount of $5,000.

The court of appeals affirmed, rejecting the Government's contention that the action was barred by the two year limitation applicable to Federal tort claims (28 U.S.C. 2401(b)). It held that, although there was "a complete change in the legal theory of plaintiffs' complaint", their claim "continued to arise out of the conduct, transaction or occurrence attempted to be set forth in the original complaint", and under Rule 15 (c), F.R.C.P., the amendment related back to the original complaint. The court also rejected the Government's other defenses, holding that res ipsa loquitur was operative in this case, and that plaintiffs had not assumed the risk under the doctrine of volenti non fit injuria, for the reason that they could not be charged with notice that repeated crashes would occur. Judge Tuttle dissented on the grounds that application of the court's language in its earlier opinion in Barthel v. Stamm, 145 F. 2d 487, 491, to the pleadings here demonstrated "beyond any doubt" that the claimed torts were barred by limitation, and further that there was a failure of proof on the conditions necessary for the application of the doctrine of res ipsa loquitur under the court's earlier ruling in Williams v. United States, 218 F. 2d 473.

Staff: Kathryn H. Baldwin (Civil Division)

Medical Malpractice: Failure of Medical Doctor, After Having Advised Heart Patient On Several Occasions That His Condition Made Him Unfit For Work, To Use Stronger Language To Advise Him Not To Go To Work On Day That His Condition Worsened Held Negligence. Krusilla v. United States, (C.A. 2, February 16, 1961). Plaintiff's intestate, a ferryboat stoker with duties of shoveling coal and cleaning out ashes in extreme heat, was a patient at a Public Health Service outpatient clinic for a heart condition described as "heart failure." He visited the clinic forty-three times between March 17, 1952, and February 8, 1954. At times he was advised that he was "fit for duty," but at other times the advice was that he was "not fit for duty." On several occasions decedent went to work despite a warning not to.

On February 8, 1954, decedent visited the clinic, and for the first time complained of chest pains. In addition, his pulse was more rapid than usual. The doctor whom decedent consulted on this occasion informed him that he was not fit for duty, but decedent returned to work and, as he was shoveling coal, died the same day.

The district court held that it was negligence not to impress upon the decedent the seriousness of his condition on the day of his death and that "it would be expected that if he did return to work, which was arduous labor, he would have such an attack as he did have and would die." This, the district court stated, was especially true since the decedent was an immigrant of limited intelligence and limited command of the English language.

The Second Circuit affirmed, holding that there was sufficient evidence of the danger to decedent of going to work and of the doctor's failure to advise him of this danger in no stronger terms than he had previously used to sustain the findings of the district court. The court rejected the Government's argument that no standard of medical due care had been shown, holding that "an inference * * * may justifiably be drawn from the medical testimony in the record" that this standard would require "something more than the statements made to /decedent/ on previous occasions when his condition was not so serious."

Staff: Alan S. Rosenthal, Sherman L. Cohn (Civil Division)

GOVERNMENT CONTRACTS

Finding That Contractor's Proposal Was Understood Not To Constitute A Firm Bid Upheld. United States v. McShain (C.A.D.C., March 2, 1961). The United States brought suit for breach of a construction contract. At the first trial, United States introduced evidence of the contractor's proposal, and its acceptance by the contracting officer for the government. At the close of the government's case, the district court dismissed on the ground that there was no evidence of a contract. The court of appeals reversed, on the ground that the proposal and the acceptance constituted prima facie evidence of a contract. 258 F. 2d 422, certiorari denied, 358 U.S.C. 832. On remand, the defendant introduced evidence that there was an understanding by both parties that the contractor's proposal was not intended to be a firm bid. The jury returned a verdict for the defendant, finding specially that there was such a mutual understanding. Judgment was entered for the defendant, the United States appealed.

The court of appeals affirmed. It found that the jury's special finding and its general verdict were supported by the record; and found no error in the judge's charge. The court did find error in the district court's award to the defendant of the costs of its defense, and modified the judgment accordingly.

Staff: George S. Leonard, First Assistant (Civil Division)

GOVERNMENT EMPLOYEES

Constitutionality of the Veterans Preference Act Upheld. Hyland, et al. v. Watson, et al. (C.A. 6, February 10, 1961). Plaintiffs, non-veteran employees and former employees at Wright-Patterson Air Force Base, Ohio, who were either separated from the service or suffered a loss in grade through a reduction-in-force, brought suit seeking to enjoin the operation of the Veterans Preference Act (5 U.S.C. 851), to compel restoration to their original positions, and a declaratory judgment that the Act is unconstitutional and void. All of these employees had career civil service status extending over many years, but were outranked on retention registers by veterans with less seniority in service.

A motion by plaintiffs for a three-judge district court to pass on the constitutional question (28 U.S.C. 2282 and 2284) was denied by the single district court judge for lack of "substantiality" of the constitutional question; and the complaint was dismissed on the authority of White, et al. v. Gates, et al., 253 F. 2d 868 (C.A.D.C.), certiorari denied, 356 U.S.C. 973, which upheld the constitutionality of the Veterans Preference Act against a similar attack.

On appeal, plaintiffs challenged the constitutionality of the Act on the grounds that it was unlawfully discriminatory, and deprived them of rights and property without due process of law; that it was vague and indefinite; that it was ex post facto as to them; and that it was an illegal infringement upon the powers of the President over executive employees.

The court of appeals affirmed by order and without opinion on the authority of the White case.

Staff: Kathryn H. Baldwin (Civil Division)

Unexplained Failure to Substitute Indispensable Parties Held to Constitute Laches On New Suit. Carney v. Gates, et al. (C.A.D.C., March 2, 1961). Carney, a non-veteran civilian employee of the Department of the Army, brought suit within two months of the final administrative determination that he was properly discharged. The suit was pending for four years, during which time two Civil Service Commissioners resigned and were replaced. Carney failed to substitute these defendants within six months, and a motion to dismiss by the defendants was granted. Carney promptly instituted a new action. The district court granted summary judgment on the ground that Carney was granted all of the procedural rights to which he was entitled and dismissed the complaint.

The court of appeals affirmed on the ground that the suit was barred by laches. This suit is the first in which the period of laches was made up almost exclusively of the pendency of a prior suit later dismissed for failure to substitute.

Staff: David L. Rose (Civil Division)

PACKERS AND STOCKYARDS ACT

Court Upholds Administrative Determination of Discriminatory Pricing Activities. Wilson & Co. v. Benson (C.A. 7, February 15, 1961). In January 1949, Wilson entered in business of selling meats to hotels, restaurants and shiplines in the San Francisco area by purchasing a hotel supply business from Heuck, who was retained as manager. On February 15, 1956, Heuck resigned and formed his own competing hotel supply business, taking with him many of the personnel who had previously been employed by Wilson. Wilson's sales in the area dropped drastically. By adopting a price cutting policy Wilson was able to

recapture a share of the business, but in so doing incurred substantial losses. The judicial officer of the Department of Agriculture found that Wilson engaged in "discriminatory pricing activities" in violation of the Packers and Stockyards Act. Wilson sought review in the court of appeals.

The court of appeals denied his petition to set aside the order of the Department of Agriculture. The court found that Congress intended to give the Secretary of Agriculture broader powers under the Packers and Stockyards Act than it had given to the Federal Trade Commission. The court found that no "competitive injury" or "lessening of competition" need be shown in order to prove a violation of the statute. The court also rejected a contention by Wilson that the order enjoined a violation of the Clayton Act, holding that any possible violation of that Act is irrelevant in entering an order under the Packers and Stockyards Act. The court also denied Wilson's objection to the fact that the order covered sales of meat and meat products throughout the United States although the complained of practices pertain only to the San Francisco area. The court stated it would have been "better pleased" had the order been more restricted, but that the nature of the sanctions must be left largely to the regulatory agency unless there are serious reasons for a limitation of the scope of the order.

Staff: Assistant General Counsel Neil Brooks;
Attorneys Carl R. Bullock and John S. Griffin
(Department of Agriculture)

DISTRICT COURTS

FEDERAL TORT CLAIMS ACT

Medical Malpractice: Erroneous Diagnosis of Traumatic Brain Injury as Psychosis Within Misrepresentation Exception; and Statute of Limitations Two Years Period Runs from Diagnosis Rather than Discovery of Injury. Hungerford v. United States (N.D. Cal., February 14, 1961). Suit was brought by a former war hero who sustained injury in Korea and subsequently was court martialed and was sentenced to a term of hard labor for writing bad checks and being absent without leave. Subsequent to serving this sentence plaintiff was sentenced to prison by the State of California and during the serving of this sentence was operated on by prison doctors who found evidence of traumatic brain injury, presumably in connection with the plaintiff's Korean wound. After having been discharged from the Army and before having gotten into difficulties in California, the veteran had been examined at a Veterans Administration Hospital in the State of Washington and was told that there was no physical injury evident and that he was suffering from a psychosis. Suit was brought more than two years after the VA examination, but less than two years after the discovery of evidence of the traumatic head injury. The government moved to dismiss on the basis of the statute of limitations and the misrepresentation exception in order to foreclose plaintiff's reliance upon the principle that fraud tolls the running of the statute of limitations. The court dismissed the action as essentially one for misrepresentation and therefore within the exception of 28 U.S.C. 2680(h). The court also held

that under the law of Washington the cause of action had accrued more than two years prior to institution of the suit, so that the action was also barred by 28 U.S.C. 2401(b).

Staff: Assistant United States Attorney Frederick J. Woelflen (N.D. Cal.)
John G. Roberts (Civil Division)

LABOR MANAGEMENT RELATIONS ACT

Jurisdiction Asserted by National Labor Relations Board Over Unfair Labor Practice Proceeding Brought Against American-Owned, Liberian-Registered Vessel Manned by Foreign Crew and Sailing Between Louisiana and Cuba. West India Fruit and Steamship Co., Inc., et al. (NLRB, February 16, 1961). At the request of Departments of State and Defense, the Department of Justice filed an amicus brief in four cases pending before the National Labor Relations Board involving foreign flag vessels registered under Liberian, Panamanian, or Honduran laws. The purpose of the brief was to give the Board the State Department's views upon matters of maritime and international law, and certain defense policy considerations advanced by the Department of Defense.

On February 16, 1961, the Board in a three to two decision, asserted jurisdiction over an unfair labor practice proceeding brought against West India, a Liberian registered vessel owned by an American corporation, manned by a foreign crew, and sailing between Louisiana and Cuba. The board stated that it had concluded that neither the ship's foreign registry nor the non-resident alien status of the crew divested the Board of jurisdiction. The Board found that this was "essentially an American enterprise" operating almost exclusively, if not wholly, in American commerce, as that term is defined in Section 2(6) of the /Taft-Hartley/ Act. The Board relied principally on Lauritzen v. Larsen, 345 U.S. 571, and Romero v. International Term. Co., 358 U.S. 354, and concluded that Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, does not require a different result.

The Board also stated that its decision should allay the fears that application of the Act would cause a flight of Panlibhon vessels to European registry since the result "would be the same whatever her flag."

Staff: Former Assistant Attorney General George Cochran Doub; Attorneys Donald B. MacGuineas and Andrew P. Vance (Civil Division)

POST OFFICE

Educational Material Rate Established by 39 USCA 292a(d)(4) Held Inapplicable to Material Designed For Training or Study Purposes. Radio-Television Training of America, Inc. v. Summerfield, et al. (D. D.C., February 23, 1961). Plaintiff corporation, an educational institution conducting a home study course in the field of radio and television,

brought this action to review a ruling by the Post Office Department that parcels containing, among other things, parts used in the construction, servicing, and repair of radio and television receivers sent in conjunction with "experiment lessons" and to be used in connection with home study courses are not includable in the term "objective test materials and accessories thereto" entitled to the educational material rate established by 39 USCA 292a(d)(4). Under the Post Office ruling, the kits in question are subject to the third or fourth-class (parcel post) zone rates of postage. The Post Office contention that Congress intended the words "printed objective test material" to apply to printed tests both before and after being marked by the pupils and that it intended the word "accessories" to apply to answer sheets, scoring keys, directions, and comparable articles which make it possible mechanically to take and later score an examination, and not to material from which the student might derive knowledge with which to decide upon the correct answer to a test question, was upheld by the court in granting the defendants' motion for summary judgment.

Staff: United States Attorney Oliver Gasch;
Assistant United States Attorney Ellen Lee Park (D. C.)
Donald B. MacGuineas and Andrew P. Vance (Civil Division)

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CIVIL RIGHTS DIVISION

Acting Assistant Attorney General John Doar

Political Contribution by Labor Organization to Candidate for Federal Office. United States v. Taxicab Drivers' Local 405, et al. (E.D. Mo.). On March 13, 1961, defendant union, Taxicab Drivers' Local 405, entered its plea of nolo contendere to Count 1 of an information under 18 U.S.C. 610 charging it with making a $250 political contribution out of general union funds to the "Wayne Morse Committee" in connection with the November 6, 1956, general election. The court entered a finding of guilty and imposed a fine of $1,000 and $50 costs against the union. Count 2 of the information charging the individual defendants, Philip C. Reichardt and Joseph Bommarito, officers of Local 405, with having consented to the contribution was dismissed on defendants' motion without objection by the Government.

This case was originally part of a twenty-two count indictment under 18 U.S.C. 610 returned on February 24, 1960, against Teamsters' Local 688, Taxicab Drivers' Local 405, and consenting officers. The two counts relating to Local 405 were later severed. A superseding information was filed on September 7, 1960, replacing the two counts against Local 405.

Staff: United States Attorney William H. Webster

Department Enters Four Louisiana School Desegregation Cases as Amicus Curiae. (E.D. La.) On March 17, 1961, the United States District Court for the Eastern District of Louisiana granted applications by the Department for the United States to appear as amicus curiae in four school desegregation cases pending before the court. The four cases, each of which had been successfully prosecuted by private litigants and a school desegregation decree obtained, involve the public schools in St. Helena and East Baton Rouge Parishes and public trade schools in Shreveport, Crowley, Natchitoches, Greensburg, Lake Charles, and Opelousas. This is the first time the Department has requested to appear in a school desegregation case pending in district court. The request of the Department and the order of the court in these cases were occasioned by the Louisiana Legislature's enactment of two statutes imposing severe criminal penalties upon persons who assist or encourage others to attend or work in desegregated schools. The statutes provided for informers to be paid from the fines collected and to be granted immunity from prosecution for giving statements under oath against others. The court's order in each of the four cases specifically allowed the United States to file a petition for an injunction against enforcement of these statutes and to submit to the court any further pleadings, evidence, arguments and briefs which may

be necessary in the future to maintain and preserve the due administration of justice and the integrity of the judicial process of the United States.

Staff: United States Attorney M. Hepburn Many (E.D. La.); St. John Barrett (Civil Rights Division).

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

SUBPOENA DUCES TECUM

Motion to Modify Subpoena Duces Tecum Insofar as Subpoena Directs Production of Records Maintained in Bank's Panamanian Branch Denied. In the Matter of the Application of the Chase Manhattan Bank, etc. (S.D. N.Y., February 9, 1961). A subpoena dated January 17, returnable January 27, 1961, directed the Chase Manhattan Bank to produce before the Federal Grand Jury, Southern District of New York, "any and all books, records and documents, wherever held" relating to named parties. The Bank complied except insofar as records maintained by its branch in the Republic of Panama were concerned.

In seeking modification of the subpoena to exclude these records, the Bank argued that compliance would violate Panama's Constitution and laws and subject its Panamanian employees to criminal prosecution. Two Panamanian legal opinions and a translation of a recently enacted statute were offered to support this contention.

Judge Dawson, in denying the petitioner's request for modification of the subpoena, first observed that one of the opinions prepared by Panamanian counsel placed a strained and ingenious interpretation on local statutes when arguing that their terms excused compliance with the subpoena. In the absence of authoritative interpretation the Court refused to accept the conclusions reached. A second opinion cited, in addition to certain code provisions held inapplicable, a Constitutional provision that correspondence and documents were inviolable and could not be seized or examined except by order of competent authority and in accord with legal formalities. But contrary to the opinion's expressed conclusion that "competent authority" meant Panamanian officials, the Court felt a duly constituted United States Court might be encompassed within the phrase.

The final basis for modification offered by the Bank was a translation of a recently enacted statute which was brought to counsel's attention via a telephone conversation. The sections relied upon were offered in vacuo with no background as to the intent from which they sprung. The Court observed that the translated sections, as offered, contained an inherent contradiction. It further stated a party relying on foreign law had the burden of establishing precisely what the law is and how it is interpreted. Accepting the submission of sworn affidavits as the minimal formal requirements, the Court noted even that was not done here. The Bank's counsel were not competent to give expert testimony on foreign law and the Panamanian letters were not sworn to. The Court felt that an informal telephone conversation suggesting that a newly passed law should be considered was an "unacceptable height of informality" by a party with the burden of proof.

The Court admitted that, if compliance with a subpoena would necessitate violation of foreign law, it should be modified but the imminence of violation as a result of compliance must be clearly shown. The interests of parties, said the Court, required that this burden be assumed by the petitioner and it had failed to do so. In a case where good-faith noncompliance is shown, a party may be relieved of the duty to act but as a condition precedent to considering good faith the petitioner has to prove that compliance would violate foreign law.

Staff: United States Attorney Morton S. Robson; Assistant United States Attorney Peter H. Morrison (S.D. N.Y.)

IMMIGRATION

Jurisdiction of Federal Courts over Crimes of Aliens Committed Outside the United States; False Statements in Visa Applications. Jorge Gabriel Rocha et al. v. United States (C.A. 9, March 2, 1961). Appellants, six aliens, were convicted in the Southern District of California of conspiracy to defraud the United States, the alleged object of the conspiracy being to permit them to enter the United States illegally as immigrants in the preferred status of husbands of American citizens through sham marriages. In addition, appellants were convicted on separate counts of the indictment charging each appellant with making a false statement under oath before an American consular officer outside the United States in a visa application in violation of 18 U.S.C. 1546.

In a landmark opinion by Judge Barnes, with Judges Orr and Hamlin concurring, the Ninth Circuit sustained the convictions on the substantive counts. In reaching this result, the Court of Appeals rejected appellants' contention that the trial court lacked jurisdiction because Federal courts do not have extra-territorial jurisdiction over offenses committed by aliens outside the United States. The Court of Appeals reasoned that Section 1546 clearly evidenced an intent that it should be given extra-territorial effect as to visa applications filed by aliens abroad and that the basic question, therefore, was whether the statute, so construed, is constitutional. The constitutional question was answered in the affirmative on the theory that defendants' acts were intended to, and did, produce a detrimental effect on the sovereignty of the United States; that, under the protective theory of jurisdiction, claimed by most nations, a country has the right to protect itself from those who attack its sovereignty; and that it is not necessary to search for specific authorization in the Constitution for the exercise of jurisdiction in such circumstances, since "The powers of the government and the Congress in regard to sovereignty are broader than the powers possessed in relation to internal matters," citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315.

The decision in this respect, which specifically rejects the contrary holding in United States v. Baker, 136 F. Supp. 546 (S.D. N.Y.), is in accord with the position long advocated by the Criminal Division and is expected to have wide application in other areas besides immigration law.

The convictions on the conspiracy count were set aside on the ground that six conspiracies, rather than one as charged in the indictment, had been proven.

Staff: United States Attorney Laughlin E. Waters;
Assistant United States Attorneys Thomas R. Sheridan and George W. Kell (S.D. Calif.).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Country to Which Alien is to Be Deported; Notice. Kokkosis v. Esperdy (S.D. N.Y., February 25, 1961). Without contesting his deportability, the plaintiff in a declaratory judgment action attacked the validity of the deportation warrant because it failed to specify the country to which he was to be deported. He relied on two cases which appear to hold that a deportation warrant which does not set forth the country to which the alien is to be sent is void. Those cases were decided soon after the turn of the century and involved an interpretation of the Immigration Act of March 26, 1910.

The Court found that under the present law an alien's deportation is to be directed to a country designated by him if that country is willing to accept him (8 U.S.C. 1253(a)), otherwise, to anyone of seven alternatives, and to impose upon the authorities issuing the warrant the probable duty of multiple amendment where not required by statute would be unreasonable. It went on to say that there is no requirement in the statute, the regulations, nor in the cases interpreting them that a deportation warrant shall specify the country to which an alien is to be deported. Any notice requirements in that regard are amply satisfied by Form I-294, "Notice to Alien of Country to Which His Deportation Has Been Directed and Penalty for Reentry Without Permission", a copy of which had been served on plaintiff.

Summary judgment for defendant.

Declaratory Judgment - Review of Deportation Order; Passports; Evidence in Deportation Hearing. De Lucia v. Pilliod (N.D. Ill., February 16, 1961). Petitioner brought this declaratory judgment action to set aside a deportation order and to restrain the District Director from deporting him. His naturalization was revoked on June 11, 1957 (aff. 256 F 2d 487, cert. den. 358 U.S. 836) for having perjuriously misrepresented to the court his true identity when he was naturalized. Subsequent deportation proceedings resulted in an administratively final order of deportation on the grounds that he was excludable at the time of his entry in 1920 because he did not present a valid passport and for the further reason that he had prior to that entry, been convicted of a crime involving moral turpitude (8 U.S.C. 1251(a)(1)). It is that order that he sought to set aside.

The Court found, as did the Special Inquiry Officer, that petitioner assumed another's identity and passport to gain admission to the United States in 1920 and by so doing he also concealed his prior criminal record which would have made him excludable (conviction in Italy in 1917 of voluntary homicide). In turning aside petitioner's contention that he did have a passport in 1920, the Court said that one of the basic purposes

of a passport is to identify the person who bears it and one who presents a passport issued in the name of another is not presenting identification of himself - he is presenting no passport at all.

The Court did not agree with a further contention that the Special Inquiry Officer took evidence in the absence of respondent in the deportation hearing and without notice when he obtained and referred to a copy of the Italian statute under which respondent was convicted. After an over-all survey of the record and evidence the Court held that petitioner's deportability was properly established.

Summary judgment for defendant.

IMMIGRATION

Declaratory Judgment - Review of Denial of Application to Create Record of Admission for Permanent Residence; Continuous Residence. Lum Chong v. Esperdy (S.D. N.Y., February 28, 1961). By a declaratory judgment action, plaintiff contended that the Attorney General's denial of his application to have created a record of his lawful admission to this country for permanent residence pursuant to 8 U.S.C. 1259 was erroneous as a matter of law.

A deportation warrant had been issued against him on January 8, 1946 and on March 3rd of that year he left the United States as a crewman on a round trip to Europe on an American flag vessel, returning the end of April 1946. In 1959 he filed the application which was denied. The denial was made as a matter of law on the sole ground that he did not meet the requirement of continuous residence in this country after his original entry (1929) prescribed by 8 U.S.C. 1259(b). While admitting his absence in 1946, plaintiff contended that he was unaware then that a deportation order had been entered against him and that he continued to pay rent on his New York apartment and maintained his bank account here during that absence.

The Court said that to hold that an alien who had been found to be deportable by law from this country "still had here an actual dwelling place in fact while he was out of the country would be nothing but judicial revolt against the legislative. On general principles of fair play one might say that, where the departure was voluntary and without intent to constitute the execution of the deportation order, the United States should be deemed to remain the alien's actual dwelling place in fact. Congress has expressly forbidden that course, however, by eliminating (in 8 U.S.C. 1101(a)(33)) intent as a factor in determining the alien's 'principal, actual dwelling place in fact'."

Summary judgment for defendant.

* * *

LANDS DIVISION

Assistant Attorney General Ramsey Clark

DEPARTMENTAL CLEARANCE OF STIPULATIONS, ETC.

The attention of all United States Attorneys and their Assistants is called to the provisions of Titles 5 and 6 of the United States Attorneys Manual requiring immediate transmission to the Department of pleadings, judgments, notices of appeals, etc., and requiring clearance with the Department before filing documents such as stipulations as to records on appeal and the like. This notice is necessary since recent instances have occurred where the lack of such compliance resulted in the filing of an inadequate record on appeal, etc.

Federal Tort Claims Act; Discretionary Functions Excepted: Exclusive Remedy Against Federal Agencies; Eminent Domain. Charles Goddard, et al. v. District of Columbia Redevelopment Land Agency, (No. 15,868) and Charles Goddard, et al. v. United States, (No. 15,869) C.A. D.C., January 12, 1961. Charles Goddard, et al., former owners of real property located within the southwest urban redevelopment project area, sought recovery in successive suits against the R.L.A. and the United States for damages suffered through alleged negligent delay in instituting condemnation proceedings against their properties and for alleged misrepresentation as to the effect of the R.L.A. program on certain of their business operations. Plaintiffs appealed the dismissal of both suits by the district court.

The court of appeals affirmed holding that plaintiffs were entitled to just compensation for the taking under the Fifth Amendment in condemnation proceedings. The administrative determination as to the time of taking was discretionary; therefore, the action against the United States was an unconsented suit, since the Tort Claims Act expressly excludes from the Act suits based on discretionary action, or those arising out of misrepresentation of Government employees. The court went on to hold that the District of Columbia R.L.A., despite its title, was a federal agency; therefore, under the provisions of the Tort Claims Act, the action against the agency should have been brought in the name of the United States. In this connection the appellants presented the novel argument that since the Tort Claims Act afforded no remedy against the United States on their cause of action, the claims were not "cognizable" under the Act, and, therefore, their suit would lie against the agency in its own name. The court of appeals answered by saying that their claims "were for money damages 'for injury or loss of property * * * /allegedly/ caused by the negligent or wrongful act or omission of any employee of the Government while /allegedly/ acting within the scope of his office or employment' and hence were not 'cognizable' under Section 1346(b)."

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

Eminent Domain; Noncompensability for Damage to Property Resulting from Noise, Vibration, Sound Waves and Fumes Emanating from Military Jet Aircraft Operations. William J. Batten, et al. v. United States (D.C. Kan. February 15, 1961). The plaintiffs in this action are the owners of improved properties which are located adjacent to the Forbes Air Force Base near Topeka, Kansas, from which two wings of B-47 jet bombers have been operating since September 1955. Prior to September 1955, the Department of the Air Force constructed at the air base a parking area and a warm-up apron near the plaintiffs' properties. These two areas connect with the north end of the Northwest-Southeast runway.

The plaintiffs instituted this action against the United States to recover compensation for the alleged taking of an interest in their properties resulting from the vibration, noise, sound waves and fumes, which emanate from the jet engines when the aircraft take-off and land while warming up the engines, and particularly while advancing the engines to near maximum power output on the parking area and warm-up apron. The plaintiffs alleged that the vibrations and sound waves directed over and across their properties caused them to become nervous and ill. They contended that the jet activities at the air base created a servitude upon their properties and that the United States by those activities had appropriated their properties by depriving them of the use and enjoyment of the properties and that this amounted to a taking without payment of just compensation in violation of the Fifth Amendment to the United States Constitution.

The court concluded that in the absence of any flights of aircraft over plaintiffs' lands the jet aircraft activities did not amount to a taking within the meaning of the Fifth Amendment to the Constitution and that the plaintiffs were not entitled to recover damages against the United States based solely on noise, vibration and fumes.

Staff: United States Attorney Wilburn G. Leonard and Assistant United States Attorneys George Thomas VanBebber and Jerry W. Hannah (D. Kan.).

* * *

TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
Appellate Decision

Summons -- Enforcement of Treasury Summons Calling for Production of Corporate Books and Records for Years as to Which Deficiency Assessments are Barred by Limitations in Absence of Fraud--McDermott v. John Baumgarth Co. (C.A. 7th), decided February 21, 1961. Treasury Agent McDermott issued a summons calling for the production of taxpayer's books and records for the years 1951 through 1954. When the taxpayer refused, a petition for enforcement was filed in the district court (under Section 7604 of the 1954 Code) and a hearing was held at which it was shown that (1) the agent had been advised by a former vice-president of the company--who had been employed there in 1951 and 1952--that the corporation had filed false and fraudulent tax returns for those years, that some income was unreported and certain specified expense accounts were padded, and that there had been some manipulation of inventories to produce the desired net income figures; (2) that another former official of the company, who had also worked there in 1951 and 1952, corroborated most of the charges made by the former vice-president; and (3) that the agent's independent investigation had also corroborated some of the allegations made by the two former officials. The district court ordered the records for 1951 and 1952 produced, but declined to order production for 1953 and 1954. The Government appealed as to 1953 and 1954 for a limited purpose, as explained below; the taxpayer cross-appealed as to 1951 and 1952. The record on appeal disclosed that while the matter was pending in the district court it had come to the attention of the Internal Revenue Service that an employee of the corporation, contrary to an order signed by the court about three weeks earlier, was about to destroy the books and records for all four years. Accordingly, the district court had ordered them impounded by the United States Marshal, and this was done.

The Court of Appeals affirmed the judgment of the district court in all respects. It held that the Government had made a sufficient showing to support the enforcement order as to 1951 and 1952, regardless of whether the correct standard be that applied in the Second Circuit (that no showing of fraud need be made--Foster v. United States, 265 F. 2d 183) or that applied in the Fifth, Sixth and Ninth Circuits (that reasonable grounds for a suspicion of fraud must be shown--Falsone v. United States, 205 F. 2d 734 (C.A. 5th), certiorari denied, 346 U.S. 864; Peoples Deposit Bank & Trust Co. v. United States, 212 F. 2d 86 (C.A. 6th), certiorari denied, 348 U.S. 838; Boren v. Tucker, 239 F. 2d 767 (C.A. 9th)). The court rejected the holding of the First Circuit (Lash v. Nighosian, 273 F. 2d 185, 189) that in an enforcement proceeding of this kind the district court should apply the same stringent standard that it would use in deciding the propriety of an arrest without a warrant; but went on to say, in effect, that the showing of fraud made here was adequate to meet even that test.

The Government's cross-appeal was avowedly taken only for the limited purpose of assuring that the books and records would be in existence at a future time when, it was hoped, the Service would be able to satisfy the district court that a new summons should be judicially enforced. The Government argued that if the 1953-1954 books were returned to the taxpayer and then destroyed (their likely fate) it would be impossible for the Service to determine the amounts, if any, of the understatements of income and tax liability with respect to those years; but that, on the other hand, if they were kept intact it is probable that a satisfactory showing of fraud could be made in the future on the basis of (1) proof that the allegations of the former officials as to 1951-1952 were true; and (2) an inference that at least some of the fraudulent practices continued in 1953-1954. The taxpayer argued that even if fraud were conclusively proved for 1951-1952 it would not be reasonable to infer, from that fact alone, that fraud was committed in any subsequent year. The court, agreeing with the taxpayer, held that on this record reasonable men could differ as to whether the inference claimed by the Government should be drawn from the facts; and that appellate courts have no reason to "supply an inference when [the district court] refused to draw such an inference, unless his determination is without any substantial basis in the evidence * * * or is clearly erroneous."

Staff: John J. McGarvey, Meyer Rothwacks, and Richard B. Buhrman (Tax Division)

District Court Decisions

Refund Suit Filed in State Court; Removed to District Court; Motion to Dismiss. Larry G. Martin v. Riddell (D.C. S.D. Cal.), Civil No. 65-61Y, February 7, 1961. Under Title 28, U.S. Code, Section 1340, the District Courts have original jurisdiction of any civil action providing for internal revenue and under Section 1346 the District Courts, concurrent with the Court of Claims, have original jurisdiction in civil actions for the recovery of internal revenue taxes where the United States is named the defendant. Occasionally, taxpayers have attempted to institute actions in State Courts for the recovery of internal revenue taxes.

In this case a petition for removal to the Federal District Court was filed under Title 28, U.S. Code, Sections 1441 and 1447, and after receipt of the court order the judge presiding over the Small Claims Court transmitted the case to the District Court for the Southern District of California. No claim for refund had theretofore been filed by the taxpayer, and pursuant to a motion to dismiss filed in behalf of the Director, the District Court dismissed the case for lack of jurisdiction.

This procedure should be followed in all cases where refund suits are filed in State Courts.

Staff: United States Attorney Laughlin E. Waters; Assistant United States Attorneys Edward R. McHale and Robert H. Wyshak (S.D. Calif.)

Levy for Rents -- Rental Tenants of Landlords Who Own Property as Tenants by the Entireties are not Required, Under Virginia State Law, to Pay Rentals to Internal Revenue for Tax Assessed Against One of Such Landlords. Nettie Mae Moore v. Glotzbach, Director, et al. (E.D. Va.) U.S.T.C. 61-1 CCH Par. 9185 (Dec. 8, 1960). The tax was assessed against the husband, one of the owners of the property held as tenants by the entireties. Notice of levy was served on rental tenants. The wife of taxpayer, as an owner, sued to enjoin collection of taxes from such rental tenant. The District Court held that rights of parties must be determined by the law of Virginia pertaining to titles of real estate. Based on the decision in Vasilion v. Vasilion, 192 Va. 735, 66 S.E. 2d 299, the judge found Internal Revenue was not entitled to levy on rents derived from real estate owned by taxpayer and wife, as tenants by the entireties, for taxes owed by husband alone.

Staff: United States Attorney Joseph S. Bambacus (E.D. Va.); John Gobel (Tax Division)

Statute of Limitations on Assessment and Collection. Preponderance of Evidence Showed Failure to File Returns in Certain Years. Standard Waiver Provisions in Compromise Offers on Forms 656 Tolled Statute of Limitations on Collection Although Waivers Were Never Signed by Commissioner. Depositions Offered by Government Admitted in Evidence Over Objections By Taxpayer As to Alleged Irregularities in Notices and Filings. United States v. Lawrence H. Sunbrock, et al. (S.D. Fla., February 21, 1961). The United States filed two actions under Section 3678, Internal Revenue Code of 1939, to foreclose income, withholding and admissions tax liens for 1939 to 1958, inclusive, in the amount of approximately $250,000 including taxes, penalties and interest, against Lawrence Sunbrock who operated various rodeos and shows of a similar nature. The taxes were contested on their merits and evidence consisting of numerous depositions and oral and documentary evidence was introduced. In March, 1954, the court appointed a receiver for Sunbrock under Section 3678 (d), Internal Revenue Code of 1939.

The Court decided all issues in favor of the Government insofar as the merits of the tax liabilities were concerned. It held that the Government was entitled to a lien on the property of Sunbrock prior to all other liens except a small mortgage of approximately $1,000, insofar as the Government's claims for taxes and interest were concerned. It upheld the Government's claim for fraud and delinquency penalties but reserved judgment to determine such claims as to their priority with respect to other lien claimants in the event there was a surplus after paying administration expenses and the Government's claims for taxes and interest.

The taxpayer owns a tract of real estate of approximately 55 acres on the outskirts of Orlando which should sell for enough to satisfy at least the taxes and interest of the Government's claims.

The court held that the weight of the evidence established a failure to file returns for income taxes in certain years despite

taxpayer's claim that such returns were filed and although the card indices in certain revenue offices showed that returns were filed. The Government contended that these returns were "so-called pick up returns" and offered testimony that the agents examining the tax liabilities were forced to go to outside sources. The Government's position was sustained by the Trial Court.

Taxpayer contended that the suits to foreclose liens for a large portion of the taxes were barred under Section 276 (c), Internal Revenue Code of 1939, because they were filed more than six years after the assessments. The Court sustained the Government's position that the statute of limitations was extended for periods aggregating the total time that the statute was extended under various offers in compromise which contain standard waiver provisions extending the statute while the offers were pending and for one year thereafter. The Court held that these waivers extended the statute and made the suits timely even though the waivers were not signed by the Commissioner. The Court held that the consideration of the offers was sufficient action by the Commissioner to constitute his approval of such waivers.

The Government took approximately 30 depositions at various places including a large number of Internal Revenue officials. Some of these officials were not named but were described as Internal Revenue employees who investigated Sunbrock's tax liabilities. The Court overruled objections to the depositions which were made on the grounds that the employees were not specifically named and further held that although the defendant was not formally notified of the filing of the depositions under Rule 30 (f) (3), Federal Rules of Civil Procedure, that there was a substantial compliance with that Rule with respect to notice under all of the facts in the case. Other technical objections to the depositions were overruled by the District Court.

Staff: United States Attorney E. Coleman Madsen;
Assistant United States Attorney Robert F. Nunez III (S.D. Fla.)
Homer R. Miller (Tax Division)

CRIMINAL TAX MATTERS
Appellate Decision

Evasion -- Attempt to Evade or Defeat Payment of Tax; Accountant's Actions Designed to Hinder Detection of Embezzlement of Funds Given to Him by Several Clients for Payment of Their Tax Liability Held Not to Infer a Motive to Defeat or Evade Payment of the Tax. United States v. Edward J. Mesheski (C.A. 7th, January 30, 1961). Defendant was convicted on twenty counts charging him with wilfully attempting to evade and defeat the payment of taxes in violation of Section 145(b) of the Internal Revenue Code of 1939 or of Section 7201 of the Internal Revenue Code of 1954. Defendant, an accountant, had received cash or checks drawn to his order from several of his clients for payment of their federal income taxes for the years 1952-1954. He then prepared his own personal check

to the District Director which he exhibited to his clients together with stamped envelopes addressed to the Director. He also gave his clients receipts stating that payment of the tax had been made and assuring them that their tax liability was discharged. Defendant did not file tax returns for those clients and converted the "tax" money to his own use. The taxpayers so treated by defendant were selected by him because of the relative improbability of discovery of the evasion of their taxes.

The Court of Appeals reversed. The Court held that the Defendant's actions were designed to disguise his crime of embezzlement and were not such affirmative actions as would reasonably infer a concomitant motive to evade or defeat the tax. No decision has yet been made as to whether the Government will seek certiorari.

Staff: United States Attorney Edward G. Minor;
Assistant United States Attorney Howard C. Equitz
(E.D. Wisc.)

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