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DEPARTMENT OF JUSTICE

Vol. 9 No. 11

UNITED STATES ATTORNEYS

BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 9 June 2, 1961 No. 11

IMPORTANT NOTICE

The United States Attorneys are reminded that all requests for authority to travel should be submitted to the Executive Office for United States Attorneys. In this connection, attention is directed to the instructions set out on page 102, Title 8, United States Attorneys Manual.

NEW APPOINTEES

The nominations of the following United States Attorneys have been confirmed by the Senate.

Ohio, Southern - Joseph P. Kinneary

Mr. Kinneary was born September 19, 1905 at Cincinnati, Ohio and is married. He attended Ohio State University September 24, 1924 to June 1925 and the University of Notre Dame from September 10, 1925 to June 3, 1928 when he received his A.B. degree, cum laude. He was employed by the Fleischman Yeast Company in St. Louis, Missouri from June 1928 to December 1931. He attended the University of Cincinnati from February 10, 1932 to June 7, 1935 when he received his LL.B. degree. He was admitted to the Bar of the State of Ohio February 7, 1936. From 1935 to 1942 he engaged in the practice of law in Cincinnati and was also Assistant Attorney General of Ohio in 1937-38. From March 2 to October 17, 1942 he was a legal advisor for the Quartermaster Corps, U. S. War Department in Jeffersonville, Indiana. He served in the United States Army from October 27, 1942 to March 4, 1946 when he was honorably discharged as a Captain. He then returned to the practice of law in Columbus, Ohio and was also First Assistant Attorney General of Ohio from January 1949 to January 1951. Since that time he has been a member of the firm of Jenkins & Wendt in Columbus.

Oklahoma, Eastern - Edwin Langley

Mr. Langley was born October 28, 1908 at Prague, Oklahoma, is married and has two children. He attended Harvard University from 1927 to 1932 when he received his B.S. degree. He was a reporter for Dun & Bradstreet in Tulsa from September 16, 1935 to June 20, 1936. He attended Tulsa Law School from September 1936 to May 1940 when he received his LL.B. degree. He was admitted to the Bar of the State of Oklahoma that same year. He served in the United States Army from August 25, 1940 to June 30, 1941 when he was honorably discharged as a First Lieutenant. He was then employed by Howard L. Smith, a Tulsa Attorney, until January 27, 1942 when he again served in the United States Army until his honorable discharge as a Colonel on March 6, 1946. He returned to the practice of law in Muskogee and from January 1, 1951 to 1952 he was a partner in the firm of Langley and Ruby. During this time he also served intermittently as Judge of the Muskogee Police Court and one term in the Oklahoma Legislature. On

January 1, 1952 he was appointed United States Attorney for the Eastern District of Oklahoma, by the court, and on March 10, 1952 he was given a confirmation appointment. He served until his voluntary resignation on June 17, 1953. From July 16, 1953 to April 15, 1954 he was Chairman of the Oklahoma State Industrial Commission; at present is a member of the firm of Bonds and Langley in Muskogee; and since January 15, 1959 has been Judge of the Muskogee Police Court.

Oklahoma, Western - B. Andrew Potter

Mr. Potter was born January 21, 1924 at El Paso, Texas and is married. He attended Oklahoma City University from May 1946 to May 1948 and the University of Oklahoma Law School from September 1948 to June 4, 1951 when he received his LL.B. degree. He was admitted to the Bar of the State of Oklahoma that same year. He served in the United States Coast Guard from December 1942 to March 1946 when he was honorably discharged as a Seaman, First Class. He engaged in the private practice of law in Oklahoma City from July to December 17, 1951 when he was appointed an Assistant United States Attorney for the Western District of Oklahoma. He served in this capacity until July 16, 1954. He then re-entered private practice with the firm of Rainey, Flynn and Welch in Oklahoma City and remained until 1960. In February 1960 he became an associate attorney with Miller, Melone, Adams and Rogers in Oklahoma City, where he is still employed.

Tennessee, Eastern - John H. Reddy

Mr. Reddy was born September 12, 1905 at Ebensburg, Pennsylvania and is married. He attended Dickinson College of Law from September 17, 1924 to June 7, 1926 and again from September 21, 1927 to June 4, 1928 when he received his LL.B. degree. He also did post-graduate work at the Catholic University of America in 1937-38. He was admitted to the Bar of the State of Tennessee in 1930 and to that of the District of Columbia in 1938. From 1934 to 1937 he was an associate attorney with Whitaker and Whitaker in Chattanooga. On August 16, 1937 he was appointed an attorney in the Claims Division of the U. S. Department of Justice. He served in the United States Army from October 17, 1942 to July 11, 1946 when he was honorably discharged as a Major. He then returned to the Claims Division of this Department and remained until May 2, 1949 when he was appointed an Assistant United States Attorney for the Eastern District of Tennessee. He served in this capacity until October 19, 1953 when he was appointed United States Attorney for that District by the court. He remained until his voluntary resignation on July 23, 1953. He then engaged in the private practice of law in Chattanooga until January 21, 1961 when he was again appointed United States Attorney by the court.

Vermont - Joseph F. Radigan

Mr. Radigan was born November 15, 1905 at Rutland, Vermont and is married. He attended St. Michaels College in Winooski, Vermont and the University of Notre Dame from September 1925 to June 1927. He was admitted to the Bar of the State of Vermont in 1930. From 1927 to 1931 he was Town Prosecutor of Ludlow, Vermont and law clerk and attorney in the firm of Stickney, Sargent, Skeels & Jeffords. In 1931 he engaged in the private practice of law in Rutland and for the next two years he was in partnership with Edward G. McClellan. On December 11, 1933 he was appointed Abstractor in the Office of the Solicitor, U. S. Department of Agriculture and on January 2, 1935 he was made Assistant Attorney. He remained until July 19, 1937 when he returned to the private practice of his profession. He served in the United States Army from February 13, 1941 to August 29, 1945 when he was honorably discharged as a Technical Sergeant. He again returned to Rutland and the private practice of law and in 1946 joined the firm of Abatiell, Radigan & Delliveneri. Since that time he has also served as a Member of the Rutland Board of Aldermen from 1946 to 1952; a member of the State Legislature from 1957 to 1960; a member of the State Unemployment Compensation Commission from 1959 to present; and a member of the State Racing Commission from 1960 to 1961.

The name of the following appointee as United States Attorney has been submitted to the Senate:

Pennsylvania, Western - Joseph W. Ammerman

As of May 26, 1961, the score on new appointees is: Confirmed - 29, Nominated - 5.

DISTRICTS IN CURRENT STATUS

As of April 30, 1961, the districts meeting the standards of currency were:

CASES

Criminal

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

CASES (Cont'd)

Criminal (Cont'd)

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

CASES

Civil

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

MATTERS

Criminal

Ala., M.	Ill., E.	Md.	N.C., M.	Tenn., E.
Ala., S.	Ill., S.	Mass.	Ohio, S.	Tex., S.
Ark., E.	Ind., N.	Miss., N.	Okla., N.	Utah
Ark., W.	Ind., S.	Miss., S.	Okla., E.	Wash., E.
Calif., N.	Iowa, N.	Mo., E.	Okla., W.	W.Va., N.
Calif., S.	Iowa, S.	Mont.	Pa., E.	W.Va., S.
Colo.	Ky., E.	Neb.	Pa., M.	Wis., E.
Fla., N.	Ky., W.	Nev.	Pa., W.	Wyo.
Ga., N.	La., W.	N.M.	P.R.	C.Z.
Hawaii	Me.	N.Y., E.	S.D.	Guam

MATTERS

Civil

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

JOB WELL DONE

The Director, FBI, has congratulated Assistant United States Attorney Victor W. Caputy, District of Columbia, for his successful prosecution of a recent case involving white slave traffic. The Director stated that the verdict rendered in this very difficult prosecution is certainly indicative of Mr. Caputy's outstanding legal ability, and he expressed appreciation for the vigorous, alert and determined manner in which the case was handled.

Assistant United States Attorney Luke C. Moore, District of Columbia, has been commended by the Director of Public Welfare, for the splendid manner in which a recent case was presented in court. The Director stated that Mr. Moore, in the course of his preparation for trial, spent considerable time with the Public Welfare Department and studied the case in great detail. The Director further stated that the prosecution was a difficult one because of the highly technical nature of the matter involved, and the fact that the jury found the defendant guilty on all eight counts of larceny bears witness to the excellent manner in which the matter was handled.

The Director, FBI, has expressed his personal appreciation for the splendid performance of Assistant United States Attorney Joseph J. Marcheso, Eastern District of New York, in connection with a recent prosecution. The Director observed that the determination and skill manifested by Mr. Marcheso in the preparation of all facets of the case were in the best traditions of the legal profession, that they reflect much credit on him, and that the presentation contributed immensely to the successful conclusion of the investigation.

The Maryland House of Delegates has adopted a resolution commending and congratulating the Honorable Joseph D. Tydings upon his appointment as United States Attorney for the District of Maryland and expressing the regrets of the Harford County Delegation and of all members of the House of Delegates upon his departure from the House.

The General Counsel, SEC, has commended United States Attorney Franz E. Van Alstine, Northern District of Iowa, for the splendid manner in which he conducted the prosecution of a recent bank case, involving aspects of the Securities Act of 1933.

Executive Assistant United States Attorney Jerome J. London, Southern District New York, has been highly commended by the General Counsel, on behalf of the Securities and Exchange Commission, for his exceptional skill, insight and perseverance in the investigation and prosecution of complicated Commission matters which have been brought to successful conclusions. Particular reference was made to the entry of pleas of guilty by several defendants to an indictment recently returned in the Southern District of New York, which were described as a fitting tribute to the masterful manner in which the prosecution was conducted.

Assistant United States Attorneys Jerome J. Londin and Peter H. Morrison, Southern District of New York, have been commended by the General Counsel, SEC, for the splendid manner in which they handled a recent case. It was stated that the fact that pleas of guilty were entered by the two defendants was a tribute to the thorough and excellent manner in which the case was developed, presented to the Grand Jury; and prepared for trial.

The Commissioner of Customs has extended congratulations to Assistant United States Attorney Lloyd Bates, Southern District of Florida, for the excellent manner in which a recent libel action was handled involving two Douglas B-26 airplanes seized by Customs. The Commissioner stated that the diligence and conscientious efforts of Mr. Bates greatly contributed to the favorable decision of the District Court at Miami and the Court of Appeals at New Orleans.

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ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

Attendance at Meetings and Conferences

The attention of all United States Attorneys is directed to the regulations in the Manual, Title 8, page 48 (Memo No. 283), governing payment of expenses to attend conferences, conventions and other meetings. The principal requirement for payment of travel expenses is that of active participation at the meeting. If you are scheduled to take part in a panel or discussion of a matter which has a direct relation to your work, the estimated expenses incident to the trip may be set out on a Form 25B and forwarded in advance of the travel to the Executive Office for United States Attorneys for approval. They will then be forwarded to the Administrative Assistant Attorney General for approval and payment.

Since the item of "fees" has caused some confusion, it is necessary to distinguish between registration fees for the social part of the conference and registration fees for materials, documents, etc. No fee or portion of a fee covering the social part of the conference can be paid from appropriated funds.

Orders and Memos

The following Memorandum applicable to United States Attorneys Offices has been issued since the list published in Bulletin No. 8 Vol. 9 dated April 21, 1961.

ORDER	DATED	DISTRIBUTION	SUBJECT
245-61	5-9-61	U.S. Attys. & Marshals	Amending Section 21 of Order No. 175-59 to Provide for Performance of the Duties of Certain Officers in case of Vacancy Therein.
243-61	4-12-61	U.S. Attys. & Marshals	Placing Assistant Attorney General Burke Marshall in charge of the Civil Rights Division.
244-61	4-17-61	U.S. Attys. & Marshals	Regulations Pertaining to Liaison with the Congress.

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ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

SHERMAN ACT

Elimination of Competition - Quick Release Pins; Indictment Under Sections 1 & 2. United States v. Avdel, Inc. (S.D. Calif.). An indictment was filed on May 2, 1961, in Los Angeles, charging Avdel, Inc., the principal United States manufacturer of quick release pins and an acquired affiliate, D.W. Price Corporation, with violating Section 1 and 2 of the Sherman Act.

Quick release pins are spring loaded devices used instead of nuts and bolts in sections of missiles, airplanes, and other defense equipment requiring rapid unfastening without tools. The indictment charged that prior to 1953 Avdel was virtually the sole manufacturer of such pins. Thereafter, D.W. Price Corporation entered the field and by 1958 had overtaken Avdel, making approximately 50% or more of domestic sales compared with 46% for Avdel. The indictment charged that in or about March, 1957, the two companies and certain other foreign affiliates of Avdel conspired to eliminate competition between Avdel and Price. At first the two companies made it appear that they were competitors, but ultimately merged.

Staff: George B. Haddock, James M. McGrath, Draper W. Phillips, and Malcolm D. MacArthur (Antitrust Division)

Hobbs Anti-Racketeering Act; Defendants Sentenced to Jail. United States v. Irving Bitz, (S.D.N.Y.). This case, involving a conspiracy to restrain (Count I), conspiracy to monopolize (Count II), extortion (Counts III and V), and conspiracy to extort (Counts IV and VI), under the Sherman Act and the Hobbs Anti-Racketeering Act, was tried before a jury in April. The Court dismissed Counts I and II during the trial, and the jury convicted the defendants on the extortion counts.

On May 19, 1961, Judge Weinfeld sentenced defendants Harry Waltzer (who had previously pleaded guilty) and William Walsh to 3 years' imprisonment on each of Counts III and IV, sentences to run concurrently. Defendants Sam Feldman and Angelo Lospinuso were each sentenced to one year and a day's imprisonment, under Counts V and VI and Counts III and IV respectively, with sentences to run concurrently. The indictment was dismissed against defendant Charles Gordon on application of the Government, and Counts II, V and VI were dismissed against Harry Waltzer with approval of the Government.

Defendant Sam Feldman filed a notice of appeal on May 19, and his bail in the amount of $2500 was continued pending the appeal. The other defendants were remanded to jail with their sentences commencing on May 22 and 23, 1961.

Defendant Irving Bitz had previously pleaded guilty and is currently serving a five years' sentence.

Staff: Harry G. Sklarsky, Herman Gelfand, Donald Ferguson, and D. M. Ehrlich (Antitrust Division)

Price Fixing - Milk and Cream; Jury Verdict in Favor of Government. United States v. Beatrice Foods Co. (D. Neb.). On May 12, 1961, a jury at Omaha, Nebraska, returned a guilty verdict against the remaining defendant Beatrice Foods Co. The indictment charged that Beatrice and the other two defendants, Roberts Dairy Company and Alamito Dairy, who were the three largest milk companies doing business in the Omaha, Nebraska--Council Bluffs, Iowa, area, conspired to fix prices and to allocate among themselves the business of supplying milk and cream to the Veterans Hospital and the Offutt Air Force Base. The conspiracy was carried out by submitting non-competitive sealed bids to the institutions, with Roberts getting the Veterans Hospital exclusively and Beatrice and Alamito alternately rotating the business at Offutt Air Force Base.

In February, 1960, Roberts and Alamito entered pleas of nolo contendere which were accepted by the Court, and paid fines of $5,000 each.

Trial commenced on Monday, May 8, 1961. Immediately prior to trial, defendant made a motion to quash the indictment and for production of the grand jury transcript, based on suggested irregularities before the grand jury. Defendant also filed a motion for judgment of acquittal at the end of the Government's case. Defendant did not put in a defense, but renewed its motion for judgment of acquittal after the jury's verdict was returned.

The Court overruled and denied each of the defendant's motions and deferred arguments on motions for a new trial, as well as the time for fixing of the punishment.

Staff: Earl A. Jinkinson, James E. Mann, Robert L. Eisen, Samuel J. Betar, Jr., and Elliott B. Woolley (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General William H. Orrick, Jr.

PAYMENT OF ATTORNEY'S FEES OUT OF SOCIAL SECURITY BENEFITS

In a recent case involving a claim for benefits under the Social Security Act, counsel for plaintiff moved for an award of attorney's fees to be paid out of the benefits to which the plaintiff was entitled under the district court's determination. The Social Security Act requires that benefits be paid to the beneficiary, and provides that they are not subject to levies of any kind. See Section 207 of the Act, 42 U.S.C. 407. The Act therefore prohibits the payment of attorney's fees out of the benefits. However, the United States Attorney did not oppose the motion, and the district court granted it. Because of that acquiescence, no appeal could be taken.

To avoid this problem in the future, it is imperative that any proposed order calling for the payment of attorney's fees out of social security benefits be vigorously resisted. If the court should enter such an order sua sponte, a motion should be filed promptly under Rule 59(e), F.R.C.P., to strike the provision for payment of attorney's fees out of the benefits.

COURTS OF APPEALS

APPELLATE PROCEDURE

Order Staying District Court Proceedings Pending Decision

Order Staying District Court Proceedings Pending Decision of Contracting Officer Held Interlocutory and Not Appealable. Moran Towing & Transportation Co. v. United States (C.A. 2, May 9, 1961). Libellant and the United States contracted for the towage by libellant of a barge to a French port. In the course of the voyage, the barge broke adrift. Assistance was rendered by a French tanker, whose owner subsequently obtained a judgment against libellant for salvage assistance. Libellant then brought suit against the United States seeking indemnity for the amount of the judgment on the theory that the breaking away of the barge was due to deficiencies in barge equipment which constituted a breach of contract. The Government denied the allegations of the libel. Holding that there were disputed questions of fact that must be decided by the

Contracting Officer pursuant to the disputes clause of the contract, the district court entered an order staying further prosecution of the libel pending exhaustion of the contractual remedy; the libel was not dismissed.

Libellant's appeal from this order was dismissed upon motion of the Government. The Court of Appeals ruled that the district court's order was plainly interlocutory and not appealable. The Court reasoned that the order was analogous to orders staying actions to await the decision of an arbitrator, which have been held not appealable. Further, the Court held that the order was not "collateral" to the rights asserted in the action, and did not constitute an injunction, but was merely a calendar order.

Staff: Louis E. Greco (Civil Division)

BANKING

Limited Banking Facilities on Military Installations Not Subject to State Law Prohibiting Branch Banking. State of Texas ex rel. Falkner v. National Bank of Commerce (C.A. 5, May 15, 1961). The Attorney General of Texas brought actions in the nature of quo warranto in a Texas state court against two Texas national banks which maintain limited banking facilities at Randolph and Lackland Air Force bases in Texas. The State argued that, despite the fact that the facilities in question do not make loans, they perform all other functions of a bank, and are consequently illegal in view of Texas statutory and constitutional prohibitions against branch banking, since under 12 U.S.C. 36 national banks may engage in branch banking only where state banks are permitted to do so by state law. Further, the State argued that 12 U.S.C.90, which provides for the appointment of national banks as depositories and financial agents of the United States, gives the Secretary of the Treasury no authority to designate banks to perform limited banking functions at military installations. The actions were consolidated and removed to the federal district court by the banks and the United States as amicus curiae. The district court held that such facilities were necessary, that the Secretary had the authority under 12 U.S.C. 90 to designate the banks to perform the needed functions, and that 12 U.S.C. 36 does not preclude operation of such limited banking facilities.

The Court of Appeals affirmed. It held first of all that the actions were properly removed to the federal court, since the banks were acting under an officer of the United States under color of law, as agents of the United States within the meaning of 28 U.S.C. 1442(a)(1). On the merits the Court held that 12 U.S.C. 36 and 90 need not be read in pari materia, as Texas contended, and that 12 U.S.C. 90 gave the Secretary authority to appoint the banks to perform the challenged functions. It pointed out that Congress was aware that for many years 12 U.S.C. 90 had been so used, 12 U.S.C. 36 notwithstanding. The Court thought that these banking facilities were like base exchanges in that they both

performed necessary functions of the Government. Consequently, despite the state rule against branch banking, the State could not challenge the Secretary's appointment of the banks to act as Government agencies. Judge Hutcheson dissented on the ground that 12 U.S.C. 36 precluded the establishment of the facilities in issue here.

Staff: John G. Laughlin and W. Harold Bigham (Civil Division)

CITIZENSHIP

Renunciation of American Citizenship by Persons of Japanese Descent Held Voluntarily Made Where Government Adduces "Clear, Convincing and Unequivocal Evidence" to That Effect. Kiyama v. Rusk (C.A. 9, May 9, 1961). Plaintiffs, who were born in the United States and who are of Japanese descent, were not allowed to enter the United States from Japan upon the ground that they were not United States citizens. Both had renounced their American citizenship during World War II while interned at the Tule Lake Segregation Center after their evacuation from the West Coast. In 1958, judgments in favor of the Government were affirmed by the Court of Appeals. In April 1959, however, the Court of Appeals, upon petition for rehearing, remanded the cause for further proceedings consistent with Nishikawa v. Dulles, 356 U.S. 129, which held that the Government was obliged to prove that a renunciation of citizenship was voluntarily made by "clear, convincing and unequivocal evidence." After holding further proceedings, the district court again entered judgment in favor of the Government, holding that the Government had proven the voluntary nature of the renunciations by "clear, convincing and unequivocal evidence".

The Court of Appeals affirmed. After making a "sympathetic scrutiny of the entire record" without particular deference to the findings of the district court, the Court of Appeals agreed that the evidence introduced by the Government to show plaintiff's undivided loyalty to Japan before the date of their renunciations, at that time, and subsequently met the requisite burden.

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

FEDERAL TORT CLAIMS ACT

Where U.S. Forest Service Firefighters Are Negligent in Initial Attack Upon Fire, Government Is Liable for Damage Subsequently Caused by Fire, Notwithstanding Its Intermediate Confinement and Control and No Negligence of Government in Its Ultimate Escape. Arnhold v. United States; Rayonier, Inc. v. United States (C.A. 9, October 26, 1960). Plaintiffs sued to recover for damage caused by a forest fire, which was within the fire protection area of the Forest Service, Department of Agriculture. The fire was started by the Port Angeles and Western

Railway on its right-of-way across the Olympic National Forest. From there it spread during the first 24 hours to 60 acres of Government forest land, and thence to a 1600-acre tract where it was brought under control. It smoldered for approximately 40 days, until it broke out under "extraordinary" and "unforeseeable" weather conditions, and spread a distance of 20 miles, destroying plaintiffs' property. Plaintiffs charged negligence on the part of the Government, inter alia, in failing to extinguish the fire before it reached their property.

The district court granted the Government's motions to dismiss on the ground that in fighting the fire Government personnel were acting in the capacity of "public firemen," and any alleged negligence was not actionable under Dalehite v. United States, 346 U.S. 15, 43. The Court of Appeals affirmed, holding, in addition, that the recurrence of the fire on the 1600-acre tract was the sole proximate cause of plaintiffs' damage and that no liability could be predicated on conduct occurring prior to the control of the fire on that tract. 225 F. 2d 642, 650. The Supreme Court reversed and remanded, ruling simply that the United States could be liable under the Federal Tort Claims Act for derelictions of its firemen if the laws of the State of Washington imposed liability on a private person in similar circumstances. 352 U.S. 315.

After trial, the district court rendered judgment for the United States finding, inter alia, that (1) while the United States was negligent in its initial attack upon the fire, plaintiffs had failed to establish either that, had such negligence not existed, the fire would have been contained in the 60-acre area, or that there was any causal relationship between such negligence and the ultimate existence of fire in the 1600-acre area; (2) the Government was not guilty of any negligence after the fire was contained and controlled on the 1600-acre area; and (3) the sole proximate cause of plaintiffs' damage was an unforeseeable combination of wind and weather conditions, which caused the fire to flare up after 40 days and spread to plaintiffs' property. 166 F. Supp. 373.

The Court of Appeals reversed, holding that the Government's negligence in its initial attack upon the fire was the cause in fact of the damage to plaintiffs' property, and, in direct conflict with its prior ruling, that said negligence was the proximate cause of plaintiffs' damage. 284 F. 2d 326. Moreover, while purportedly accepting the district court's findings, the Court of Appeals in effect modified them through its own interpretation to support the reversal. Petitions for rehearing en banc were denied, Judge Pope dissenting on the ground that further consideration should be given to remanding for clarification of the district court's findings.

Staff: Kathryn H. Baldwin (Civil Division)

INDISPENSABLE PARTIES

Director of Bureau of Employment Security Is Indispensable Party in Suit to Require Exercise by Director's Subordinate of a Delegated Power to Act on Director's Behalf. Rio Hondo Harvesting Ass'n v. Johnson; McBride Farms Marketing Assoc. v. Johnson (C.A. 5, May 12, 1961). Defendant, a regional director of the Bureau of Employment Security, determined that plaintiff's existing authorizations to contract for the hire of Mexican nationals should be revoked and further ones refused because of certain violations of record-keeping requirements. Plaintiff appealed to the Director of the Bureau at Washington, D. C. The Director affirmed the regional director's decision in all respects. In accordance with the Director's decision and the instructions contained therein, the regional director notified plaintiff and the Texas Employment Commission that plaintiff's existing authorizations were revoked and that no future authorizations to contract for Mexican nationals should be issued. Plaintiff brought suit to review this action. The district court dismissed the suit, holding that the Director was an indispensable party.

The Court of Appeals affirmed. The Court ruled that either the Director himself or the regional director, acting pursuant to a delegation of authority by the Director, had to take affirmative action to reestablish plaintiff's status with the Texas Employment Commission, a prerequisite to the further hiring of Mexican nationals by plaintiff. Citing Williams v. Fanning, 332 U.S. 490, as authority, the Court of Appeals held that this rendered the Director an indispensable party.

Staff: United States Attorney William B. Butler and Assistant United States Attorney Robert C. Maley, Jr. (S.D. Tex.)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Voting; Reapportionment. Baker v. Carr (U.S. Sup. Ct. No. 103). This case, discussed in the April 7, 1961 Bulletin, was argued by the Solicitor General on April 12, 1961. On May 1, 1961, the Court ordered the case set down for reargument in the October Term 1961.

Staff: Harold H. Greene, David Rubin, and Howard A. Glickstein (Civil Rights Division)

Voting, Production of Records; Civil Rights Act of 1960. In re Crum Dinkins and Gallion v. Rogers (M.D. Ala., C.A. 5). The lower court decisions upholding the constitutionality of the record demand provisions of the Civil Rights Act of 1960 are discussed in the Bulletin for February 10, 1961. On May 1, 1961, the Supreme Court denied certiorari.

Staff: Harold H. Greene, and Gerald P. Choppin (Civil Rights Division)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

MEMORANDUM TO NEWLY APPOINTED UNITED STATES ATTORNEYS

It is imperative that the Department, through the Criminal Division, be kept fully and currently apprised of all developments in important criminal cases. The circumstances and exigencies of each case will dictate whether such information should be sent by letter, wire or phone.

Among the factors which may make a criminal case "important" are: the notoriety, prominence, or number of the individuals or organizations involved; the unique or serious nature of the violation; the extent of press coverage accorded the case; the involvement of a major program or policy in the case; and a special interest expressed by the Attorney General in the case, or his designation of the case as important.

The necessity for maintaining close liaison with the Criminal Division at all stages of important criminal cases will be discussed in more detail during the United States Attorneys' Orientation Program. In the meantime, it is suggested that any questions the United States Attorneys may have with regard to this subject be addressed to the Criminal Division.

IMMIGRATION FRAUD AND PERJURY

Pleas of Guilty to Conspiracy and Perjury. United States v. Arthur Lem, a/k/a Chin Doong Art, et al. (E.D. N.Y.). On July 28, 1959, Lem and others were indicted for conspiring to bring Chinese into this country illegally, falsely representing citizenship, making false statements, failing to register under the Alien Registration Act and obstructing justice. Lem was a so-called "paper broker" engaged in bringing Chinese to the United States under assumed identities. He was also a restaurateur prominent in Long Island civic affairs. The case was tried in the Spring of 1960. The trial lasting approximately eight weeks, resulted in a hung jury and mistrial. The case was set for retrial in January, 1961, then continued until March 16 and again continued until May 1, 1961. Prior to the last date set for retrial of the case, the defendants Arthur Lem, a/k/a Chin Doong Art, and Chin Suie Tung, a/k/a Lan Dan both entered pleas to the first count of the indictment charging conspiracy. Chin Suie Tung pleaded guilty on April 11, 1961. Arthur Lem tendered a plea of nolo contendere on May 1, but, upon the Government's objection, the trial judge took the matter under advisement and on May 8 declined to accept a nolo plea. Thereupon, Lem pleaded guilty. Sentence is to be imposed on both defendants June 9, 1961. Other counts of the indictment will be dismissed upon sentence. Conspiracy carries a possible penalty of five years' imprisonment and a $10,000 fine.

Three Chinese witnesses who were brought by the Government from Hong Kong for the first trial and others already in this country cooperated with the Government in strengthening the case for retrial. Had the defendants, Arthur Lem and Chin Suie Tung, gone to trial the second time, the trial probably would have lasted much longer than the first one, as many additional witnesses had been located, and most of them were Chinese who would have required an interpreter.

In April 1961, a grand jury which was called to hear further evidence returned indictments against Chin Doong Wei, Chin Doong Ging, Chin Chong Yip and Lee Wah Chew, charging them with having committed perjury before the original grand jury and at the first trial. Three of the defendants are related to Arthur Lem. On May 1, 1961 each of the four defendants pleaded guilty to perjury. They also await sentence on June 9, 1961.

Staff: William A. Paisley and Victor C. Woerheide (Criminal Division); Assistant United States Attorney Margaret C. Millus (E.D. N.Y.)

FEDERAL FOOD, DRUG, AND COSMETIC ACT

Adulteration and Misbranding of Orange Juice; Cheating of Public; Conviction and Sentencing of Manufacturers of Fraudulent Product. United States v. Gordon E. Van Liew, et al. (S.D. Tex.). On April 7, 1961, Gordon E. Van Liew, Dell Van Liew, and Arthur R. Becker, President, Vice President, and Secretary-Treasurer, respectively, of Cal-Tex Citrus Juice, Inc., and Verne C. Madison, President of Transportation Leasing, Inc., all of Houston, Texas, were convicted by a jury for violations of the Federal Food, Drug, and Cosmetic Act and conspiracy. It was charged that these four defendants had cheated the public in a 20 state area in the south and middle west in the sale of upwards of $750,000 worth of sweetened water in the place of pure orange juice over a 1-1/2 year period. Defendants shipped in interstate commerce an orange product which was labeled "Fresh Orange Juice -- As Nature Made It . . . nothing added," which in fact was substantially adulterated with added water and sugar.

On May 5, 1961, defendants Van Liew and Becker were each fined $6,000 and given suspended jail sentences. Defendant Gordon E. Van Liew was also sentenced to serve a term of six months' imprisonment. Madison was fined $2,000. The fines totaled $20,000. In addition thereto, defendants are to pay one third the cost of the prosecution. Further, the Van Liews and Becker have been indicted for perjury allegedly committed at a hearing held earlier this year on the Government's motion for a preliminary injunction against the same defendants. On May 5, a temporary restraining order was issued to stop them from continuing to ship their adulterated and misbranded product.

Staff: Assistant United States Attorney Robert C. Maley, Jr. (S.D. Tex.)

RAILWAY SAFETY APPLIANCE ACTS

Repair and Movement of Defective Railway Cars; Strict Construction of Air Brake Provisions. United States v. Southern Pacific Company (C.A. 9). In this civil action to recover the statutory penalties under 45 U.S.C. 13, the district court found for defendant on one of the three counts of the complaint, on the ground that the train in issue met the requirements of 45 U.S.C. 9 (". . . not less than 50 per centum of the cars in such train shall have their brakes used and operated by the engineer . . . and all power braked cars in such train which are associated together with said 50 per centum shall have their brakes so used and operated . . ."). Among other things, the district court held that the Order of the Interstate Commerce Commission, issued in 1910, which increased to 85% the requirements of Section 9, was invalid. The Government appealed.

On December 29, 1960 the Court of Appeals (285 F.2d 931) reversed, holding that the 1910 Order was valid and fully applicable, and that the district court may not substitute its judgment as to the safest way to move cars with inoperative brakes. Therefore, 85% of the cars must be operated by power brakes from the locomotive, and said 85% must be associated together and with the locomotive. (Cars with inoperative power brakes must be placed behind the aforesaid grouping.)

The Court of Appeals, however, remanded the cause to the district court for a new trial on the question whether or not defendant knew that the car in issue had defective brakes and whether or not the defects could have been remedied at an earlier stop than where they were actually remedied. The Government petitioned for rehearing, contending that, on the basis of the evidence in the record, the case should have been remanded to the district court with direction to enter judgment in favor of the Government in the amount of the statutory penalty of $250 plus costs. Without granting the rehearing, the Court of Appeals reconsidered the matter and on April 26, 1961 decided that it had been in error in remanding the cause for a new trial, holding that the proviso in 45 U.S.C. 13, permitting a defective car to be hauled from the place where it was first discovered to be defective to the nearest available point where it could be repaired, does not reach back and relieve the carrier from liability for hauling the defective car from the time the defect occurred to the time the defect was discovered. The proviso of Section 13 is relevant only to train movements made after the carrier has discovered the defective car in the train. This strict construction is in accord with prior decisions.

Staff: Assistant United States Attorneys Donald A. Fareed and Carla A. Hills (S.D. Calif.)

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Alienage - Birth Abroad to Citizen Father Who Had Never Been in U. S. D'Alessio v. Lehman (C.A. 6, April 26, 1961). This appeal is from an order of the district court denying a petition to stay an order of deportation. (See Bulletin, Vol. 8, No. 8, p. 239). The sole issue was whether appellant was a citizen of the United States. If an alien, he was subject to deportation under the provisions of 8 U.S.C. 1251(a)(4) because of two felony convictions in Ohio after entry.

Appellant's grandfather was naturalized as a citizen on July 1, 1899. His father became a United States citizen under the provisions of R. S. 1993 at the time of his birth in Italy. Appellant's mother became a citizen at the time of her marriage on May 15, 1921. R. S. 1994. Appellant was born in Italy on June 10, 1922. At the time of appellant's birth his father resided in Italy and did not come to the United States until September 6, 1922.

Appellant entered this country with his mother on November 17, 1929 and was admitted for permanent residence as a non-quota immigrant. The mother was issued a United States passport in Italy. Appellant has resided in the United States continuously since his admittance. He registered for the draft in 1942, was inducted into the Army in 1943, and received a dishonorable discharge in August 1946.

District Judge McNamee gave careful consideration to appellant's claims. In a well reasoned opinion, supported by authority, he concluded that since appellant's father resided in Italy at the time of appellant's birth, the father's rights of citizenship did not descend to him and that appellant is an alien. (Weedin v. Chin Bow, 274 U.S. 657 (1927); United States v. Wong Kim Ark, 169 U.S. 649)

Judgment affirmed.

(Cf. Montana v. Kennedy (Sup. Ct. No. 198; May 22, 1961; 29 LW 4453) See also: Bulletin, Vol. 8, No. 11, p. 338)

Review of Deportation Order; Constitutionality of Statute; Adequacy of Evidence; Abuse of Discretion - Denial of Stay of Deportation. Polites v. Sahli (E.D., Mich., May 3, 1961). Plaintiff sought a judicial review of deportation proceedings which resulted in an order of deportation based on a finding that he was deportable under 8 U.S.C. 1251(a)(6) because of his membership in the Communist Party of the United States after entry. (His naturalization had been revoked on August 20, 1953 (affirmed by the Supreme Court on November 21, 1960; Polites v. U. S., 364 U.S. 426; See Bulletin, Vol. 8, No. 27, P. 807)).

He challenged the constitutionality of the deportation statute, the adequacy of the evidence of Communist Party membership, and contended that the denial of his application for a stay of deportation to Greece to avoid physical persecution there was an abuse of discretion.

The Court said that the constitutionality of the deportation statute had already been decided in Harisiades v. Shaughnessy, 342 U.S. 580 (1952), and there is no doubt that plaintiff satisfies the "meaningful association" test in relation to his Communist Party membership, as defined in Rowoldt v. Perfetto, 355 U.S. 115 (1957), since the record shows that he was an active member of the Party from 1931 to 1938 and at one time was the secretary of the Greek faction of the Party in Detroit.

With respect to the denial of the stay of deportation, the Court said that there was no convincing evidence that he would be physically persecuted in Greece today for his past activities in the United States, and since the denial was fully sufficient on its face the Court cannot make further inquiry and must affirm it (citing Obrenovic v. Pilliod, 282 F.2d 874 (1960)).

Evidence in Deportation Proceedings - Admissibility and Competency of; Substantial Evidence. Lattig v. Pilliod (C.A. 7, April 26, 1961). Lattig appealed from the district court's dismissal of his petition for review of the findings and order of deportation entered by a special inquiry officer (See Bulletin, Vol. 8, No. 13, p. 413).

The Court of Appeals held that the issue of credibility in administrative deportation proceedings is solely the function of the special inquiry officer and is not reviewable by the court.

The administrative findings and order of deportation will be affirmed where, as in this case, there exists substantial evidence to support them, such evidence being that which has relevant probative force and which a reasonable mind might accept as adequate to support a conclusion, but not including the idea of the "weight of the evidence".

Affirmed.

Administrative Subpoena - Enforcement of; Constitutional Rights. Hamilton v. Sherman (D. Mass., May 12, 1961.) Sherman appeared before an Investigator of the Service in response to an administrative subpoena, issued by the District Director, commanding him "to give testimony in connection with deportation proceedings being conducted under authority of the Immigration and Nationality Act (relating to him) concerning his privilege of entering, re-entering, residing in, or passing through the United States."

He answered questions concerning his identity, admitted his alienage, that he had registered as an alien as required by law, and that he first entered the United States in 1920. Thereafter, he refused to answer substantially all of the questions asked of him, including those relating to any absences from this country since 1920, to any re-entry permit issued to him, to any application to an American consul since 1920 for an immigration visa, and to whether or not he had ever applied for or used a United States passport under the name of Samuel Levine in 1938. He based his refusal to answer "on all the grounds that are available to me."

The District Director then sought an order from the District Court directing Sherman to give the testimony required. Sherman contended that the I & N Act does not afford a foundation for the issuance of such an order by the court in view of the Supreme Court's opinion in U. S. v. Minker, 350 U.S. 179 (1956).

The Court distinguished Minker since, in that case, the attention of the Court was focused on the right of a naturalized citizen not to be compelled by administrative subpoena to testify in an investigation the purpose of which was to determine if good cause existed for the institution of denaturalization proceedings against him.

The Court held that Minker in no way restricts the power of a District Director to subpoena an alien to testify in a deportation or exclusion proceeding as contrasted with the subpoena of a naturalized citizen in his own denaturalization hearing. It added that it would be an extremely futile thing for Congress to authorize the Service to interrogate, examine, and cross-examine an alien, as it did in 8 U.S.C. 1226 and 1252, and simultaneously withhold the power to subpoena the alien (cases cited).

As to Sherman's apprehension that such an order of the court might foreclose his claimed constitutional rights, the Court said that he made no intelligent, intelligible, or otherwise identifiable claim of any particular constitutional right, and the fears he expressed were premature on the record as it then stood.

The Court ordered him to appear before the Service on a date certain to answer then, or on any subsequent date, not only the questions he had refused to answer but any others material to the subject matter of the investigation being conducted. The Court also denied his motion for a stay of execution pending appeal.

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Labor-Management Reporting and Disclosure Act, 1959; Communist Party Membership United States v. Archie Brown, (N.D. Calif.) On May 24, 1961 a grand jury in San Francisco returned a one count indictment charging Archie Brown with a violation of 29 U.S.C. 504 which provides, inter alia, that no individual shall serve in any of certain designated union positions while a member of the Communist Party or for a period of five years subsequent to the termination of Communist Party membership. The indictment specifically charges that from October 1959 to date Brown served as a member of the Executive Board of Local 10, International Longshoremen's and Warehousemen's Union, a position within the proscription of Section 504, while maintaining membership in the Communist Party. Brown was taken before a United States Commissioner and freed on $5000 bond. Formal arraignment in United States District Court is set for May 31. 1961.

This is the first prosecution brought by the Department for a violation of either the felon or Communist provisions of the Landrum-Griffin Act.

Staff: United States Attorney Laurence E. Dayton; (N.D. Calif.) Paul Vincent and Raymond Westcott (Internal Security Division)

Merchant Marine Radiotelegraph Officers' Licenses: Due Process. Homer v. Richmond (C.A.D.C. April 20, 1961). Prior to the Act of May 12, 1948 (46 U.S.C. 229a-h (1958)) appellants Homer, McCrea and Colcord were radiotelegraph operators on vessels of the United States Merchant Marine. That Act requires such operators to be "licensed officers." Licenses are granted or denied by the Commandant of the Coast Guard. The statute provides that the Commandant shall be satisfied that the applicant's "character, habits of life, and physical condition are such as to authorize the belief that he is a suitable and safe person to be entrusted with the powers and duties of such a station." Under the Regulations a license may be denied on the basis of derogatory information indicating that the applicant is not such a "suitable and safe" person. Homer, McCrea, and Colcord applied for licenses under the Act and the applications were denied in October, 1949. After the decision in Parker v. Lester, 227 F. (2d) 708 (C.A. 9, 1955), they renewed their applications, which were again denied by reference to the previous denials. Homer and McCrea requested hearings, which were also denied, and the three appellants then brought suit for a direction that the Commandant issue licenses to them and for declaration that the regulations were unconstitutional as applied to them. After the actions were brought, the Commandant commended a Board of Officers which reviewed the files, and made

detailed findings. The Board concluded that the "accumulative effect" of the findings indicated appellants' untrustworthiness and that they were not safe and suitable persons to receive licenses. The Commandant concurred and each appellant was so informed by a letter dated March 27, 1959.

In the district court, summary judgment was granted in favor of the Commandant (8 Bull 241). The Court of Appeals affirmed as to the appellant Colclord because admittedly he did not hold a radiotelegraph operator's license from the Federal Communications Commission and by statute possession of such a license is a specific condition of the type of license sought from the Commandant. As to McCrea and Homer the Court of Appeals (Bazelon, Fahy, and Washington, Circuit Judges) reversed and remanded. The Court stated that the question was whether McCrea and Homer had been deprived of an employment opportunity in private industry by Governmental action which did not meet the requirements of the Due Process Clause, and also stated that the curtailment of this ability to follow a calling was a curtailment of liberty and, possibly, citing Greene v. McElroy, 360 U.S. 474, 492, a deprivation of a property interest. The Court held, however, that Congress had given the Commandant the power to determine an applicant's character and habits in terms of the suitable and safe entrustment to him of the responsibility which a license carried with it, and that the statutory standards for such determination were not too vague. The Court also said that in this "screening" process the Commandant could take into consideration Communist Party membership, associations and activities.

The Court remanded because it held that due process required that the applicants be given an opportunity to answer the charges made in the Commandant's letter of March 27, 1959, and to request hearings. The letter to McCrea stated findings of Communist activities and associations extending back to the Spanish Civil War, and also findings of misconduct on duty, criminal convictions, false testimony, and a violation of the Communications Act of 1934.

The March 27, 1959, letter to Homer stated findings of Party membership and activity back to 1936, and as recently as 1955, and that his wife and father-in-law were active in the Party until 1958 and 1959, respectively.

The Court said that on the appellants' answers the Commandant might be in a position to decide the applications without hearings; but that the validity of any denial would depend upon whether the grounds relied upon are admitted or are established on reliable evidence.

Circuit Judge Washington concurred in a short opinion but referred to his dissent in Borrow v. Federal Communications Commission, 285 F. (2d) 666 (CADC), certiorari denied, 364 U.S. 892.

Staff: The appeal was argued by DeWitt White (Internal Security), with him on the brief was Kevin T. Maroney (Internal Security).

* * *

TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CRIMINAL TAX MATTERS
Appellate Decisions

Embezzled Funds--Criminal Conviction for Attempt to Evade Tax Upon. Eugene James v. United States (Sup. Ct., May 15, 1961.) Petitioner, a union official, embezzled some $738,000 during the years 1951 through 1954 from the union and an insurance company with which it was doing business. He failed to report any of these funds in his federal income tax returns for those years. He was convicted of willfully attempting to evade his income taxes for 1951-1954 and was sentenced to three years in prison. The Seventh Circuit affirmed and the Supreme Court granted certiorari (the Government did not oppose it) because this case appeared to be in conflict with Commissioner v. Wilcox, 327 U. S. 404, in which it was held that embezzled funds do not constitute income to the embezzler in the year of the taking. The Government argued that the Wilcox rule was repudiated by the Court in Rutkin v. United States, 343 U. S. 130, wherein the Court held that extorted funds are taxable to the extortionist in the year he receives them. There the Court stated "We limit [Wilcox] to its facts." Six justices agreed with the Government's position in the instant case (Justice Whittaker, Black and Douglas dissenting) and held that Wilcox was wrongly decided and that embezzled funds are income taxable to the embezzler in the year of the taking. Eight justices, however, were of the opinion that the conviction could not stand (Justice Clark dissenting), although no more than three of them were able to agree as to what disposition should be made of the case, with five separate opinions being written.

(1) The Chief Justice wrote an opinion, in which Justices Brennan and Stewart concurred, announcing the judgment of the Court: (a) Since Justices Harlan, Frankfurter and Clark "agree with us concerning Wilcox, that case is overruled"; but (b) "We believe that the element of willfulness could not be proven in a criminal prosecution for failing to include embezzled funds in gross income in the year of misappropriation so long as the statute contained the gloss placed upon it by Wilcox at the time the alleged crime was committed"-- i.e.at any time up to May 15, 1961. (Emphasis added.) Since Justices Whittaker, Black and Douglas agree that the conviction must be reversed and the case dismissed, "the case is remanded to the District Court with directions to dismiss the indictment."

(2) Justice Black (in an opinion concurred in by Justice Douglas) expressed the views that Wilcox was rightly decided and should not be overruled; that the manner in which it was overruled is particularly unfortunate because it created "a judicial crime that Congress might not want to create" insofar as the new interpretation of the tax evasion statute is to be given prospective application; and that if Wilcox did indeed conflict with Rutkin, the latter should be overruled rather than Wilcox, because "deplorable consequences result when state crimes are prosecuted by the Federal Government

"under the guise of attempted enforcement of federal tax laws."

(3) Justice Whittaker wrote an opinion (concurred in by Justices Black and Douglas) in which he confined himself to the technical reasons for his belief that the Wilcox case had been rightly decided and should not be overruled.

(4) Justice Harlan (Justice Frankfurter concurring) expressed the opinion that the petitioner should be granted a new trial at which the prosecution would have an opportunity to prove that he did not rely upon--and was not misled by--the Wilcox case, i.e., that petitioner's conduct in suppressing the embezzled funds from his tax returns might have consituted a willful attempt to evade the tax despite Wilcox; and that the proper disposition of the case would be to treat as plain error.

> the failure of the trial court as trier of fact to consider whatever misapprehension may have existed in the mind of the petitioner as to the applicable law, in determining whether the Government has proved that petitioner's conduct had been willful as required by the statute.

(5) Justice Clark joined in the overruling of Wilcox, but would have affirmed the conviction either on the theory that Rutkin "devitalized" Wilcox in 1952 or that the proof "shows conclusively that petitoner* * * placed no bona fide reliance on Wilcox."

To summarize, the lineup of the Court appears to be as follows:

(a) The Chief Justice and Justices Brennan and Stewart would not permit a tax evasion conviction--based solely on the failure to report embezzled funds as income--to stand if the return was filed before May 15, 1961. Justices Whittaker, Black and Douglas, although they did not say so explicitly, would almost certainly join in voting to reverse any such conviction.

(b) With respect to offenses committed after May 15, 1961, it seems clear that the Court (with the exception of Justices Black and Douglas, and possibly Whittaker) would find the Wilcox case no bar to conviction, even if the record were wholly silent on the possibility of the defendant's mistaken reliance upon it.

Staff: Howard A. Heffron, Former Assistant Deputy Attorney General; Meyer Rothwacks and John J. McGarvey (Tax Division).

Tax Evasion - - Wilful Attempt to Evade Payment of Tax. United States v. Mollet (C.A. 2, May 9, 1961). Appellant was convicted on four counts of an eight count indictment charging wilful evasion of the payment of income taxes withheld from employees' wages and of his own and his employees' shares of FICA taxes. Appellant accurately reported the amount of his

liability for each quarterly period, but he then engaged in a course of conduct designed to evade the payment thereof. The evidence disclosed that he had adequate assets to discharge his tax liability. The requisite affirmative conduct required to constitute the felony of tax evasion under Spies v. U. S. 317 U.S. 492, 498 consisted of the "concealment" of the nature and extent of defendant's assets, particularly certain brokerage accounts in the United States and Canada. The principal defense urged was the fact that defendant had disclosed the existence of his brokerage accounts to a Special Agent of the Intelligence Division in 1951 during an investigation of his personal income tax returns. Because of the division of functions within the Service, this information did not come to the attention of the Collection Officers who were assigned to the case from 1953-1957, and the Court held the jury was entitled to conclude that the defendant on seeing that the Collection Officers had not been told of the accounts, attempted to evade the payment by concealing the extent of his assets.

Staff: Assistant United States Attorney Gerald Walpin (S.D. N.Y); United States Attorney Morton S. Robson and Assistant United States Attorney David Klingsberg on the brief.

Illegal Search and Seizure by Treasury Agents. R. Milo Gilbert v. United States (C.A. 9, March 30, 1961.) Appellant was convicted on 31 counts charging variously that he aided and abetted in the preparation of false income tax returns for his clients; that he wilfully presented forged checks to an agency of the Government with intent to defraud; and that he forged endorsements on tax refund checks issued to his clients. Judge Yankwich imposed prison sentences totalling 31 years and 31 days. Appellant's main contention (properly raised by pre-trial motion under Rule 41(e) of the Federal Rules of Criminal Procedure) was that with respect to 29 of the 31 counts the Government's evidence was obtained--directly or indirectly--as a result of an illegal search and seizure conducted by the Treasury agents at the time they arrested him at his home, where he also maintained his office. Appellant, who came under the agents' scrutiny in 1958, testified that he had refused to cooperate by turning over his records; that early in 1959, on the day that a complaint was filed against appellant on two of the counts, the agent telephoned him for an appointment; that appellant offered to meet the agent at the office of the Internal Revenue Service or at a public restaurant, but the agent insisted upon meeting him at his (appellant's)home; that four agents arrived at his home almost simultaneously, arrested him, and undertook an extensive search of his home and office, seizing evidence relating to the 29 additional counts. Appellant contended that the sequence of events shows that the agents had arranged to arrest him at a place where they could make a thorough search of his files without a search warrant, on the pretext that it was "incidental to the arrest". Apparently the district court took no testimony on the pretrial motion, deciding it on the basis of affidavits and oral argument by counsel. With respect to eleven of the 29 counts the district court held that the documents were instrumentalities of the crime of forgery, and hence were properly seized (compare Harris v. United States, 331 U.S. 145);

as to the other 18 counts the district court (before the trial) ordered the files returned to appellant, and this was done. At the trial the defense objected to the admission of crucial evidence relating to each of the 29 counts on the ground that it was "a fruit of the poisonous tree" (Nardone v. United States, 308 U.S. 338, 341) but the court ruled that this was a collateral issue for which the trial should not be interrupted, and therefore the Government never established that "its proof had an independent origin" (ID.).

The Court of Appeals reversed the judgment as to each of the 29 counts (affirming as to the other two) and remanded for a new trial. The Court interpreted Judge Yankwich's suppression of a part--but not all--of the papers seized by the agents as an implied finding (which it accepted) that appellant had not consented to the search, and held by analogy with the Harris case, supra, that the documents in question were not instrumentalities of the alleged crimes but merely evidentiary materials. The Court of Appeals recognized that the question of whether this particular search was reasonable must, like all such questions, be determined on the basis of its own peculiar facts (United States v. Rabinowitz, 339 U.S. 56, 63); and held that the search was not reasonably incidental to the arrest. Cf. Go-Bart Importing Co. v. United States, 282 U.S. 344; United States v. Alberti, 120 F. Supp. 171, 173-174 (S.D. N.Y.). The Court expressly disclaimed any opinion as to whether the Government's evidence was "a fruit of the poisonous tree", leaving that question for the trial court's consideration.

The Government will not file a petition for a writ of certiorari.

Staff: United States Attorney Laughlin E. Waters; Assistant United States Attorneys Thomas R. Sheridan and Minoru Inadomi, (S. D. Cal.).

CIVIL TAX MATTERS
Appellate Decisions

Accrual Accounting; Contested Liability for Which Payment Under Protest Had Been Made Held Not to Accrue as Federal Tax Deduction Until Contest Was Terminated. United States v. Consolidated Edison Co. (Sup. Ct., May 22, 1961). The taxpayer company, filing its returns on the accrual basis of accounting, contested municipal property taxes asserted against it. During the contest, it paid the contested amount under protest, sued for refund, and in a subsequent year settled the refund suit. The Commissioner held that the entire contested amount accrued as a deduction in the year of payment, and that the amount refunded to taxpayer in the later year of settlement was income to it in that year. Taxpayer contended that only the amount of liability finally determined to be due was dedeductible and that amount was deductible in the year in which the contest was settled rather than the year of payment. Under that theory, taxpayer brought this action for a refund of more than $5,700,000.

The district court held in favor of the Government, but the United

States Court of Appeals for the Second Circuit, in a 2-1 decision, reversed. The Supreme Court, in a unanimous opinion, affirmed the Second Circuit. The Court held that while an unconditional payment might accrue a liability, the so-called "payment" here involved, having been made under protest, "was, in effect, a mere deposit, 'in the nature of a cash bond for the payment of [so much, if any, of the contested] taxes [as might] thereafter be found to be due.'"

Staff: John B. Jones, Jr., Harry Baum and Douglas A. Kahn (Tax Division)

Income Tax Payments for Alimony and Support of Minor Children. Commissioner v. Jerry Lester, (Supreme Court May 22, 1961). Taxpayer and his wife entered into a settlement agreement, subsequently ratified by the divorce court, which provided that the wife should have custody of their three minor children and that subject to maximum limitations the taxpayer would pay specified percentages of his gross income in future years for the support of his former wife and minor children. The agreement further provided that "[i]n the event that any of the [three] children of the parties hereto shall marry, become emancipated, or die, then the payments herein specified shall .... be reduced in a sum equal to one-sixth of the payments which would thereafter otherwise accrue". In deficiency proceedings the Tax Court upheld the Commissioner's determination that the agreement fixed one-half the periodic payments as "payable for the support" of the taxpayer's minor children under Section 22(k) of the 1939 Code and, therefore, not deductible by him under Section 23(u). The Court of Appeals reversed, holding that the agreement did not fixthat amount as a sum "payable for" child support within the meaning of the statute.

The Supreme Court affirmed on the basis that the statute and legislative history require that such periodic payments be taxable entirely to the wife, and deductible by the husband, unless the amounts payable for child support are "fixed" in the sense of "specifically designated" in the agreement. The Court held that a reduction clause, from which the purpose of the parties to allocate certain amounts for child support may be inferred, is not a sufficiently clear specification to "fix" the amounts payable for that purpose within the meaning of the statute.

Staff: C. Guy Tadlock, Melva M. Graney, and Norman H. Wolfe (Tax Division).

District Court Decisions

Lien Foreclosure: Rent Owed to Taxpayer by Lessee; Court Finds Taxpayer Assented to Surrender of Lease and Therefore United States Could Not Recover Rent from Lessee. United States v. Lincoln Mills Co., et al., 61-1 U.S.T.C. Par. 9421 CCH (D.N.H.). Pursuant to levy, the lessee of a

manufacturing plant paid its rent to the District Director for application against withholding taxes owed by the lessor-taxpayer. In a disputed factual situtation, the Court found that a new tenant had entered the premises and commenced operations before the expiration of the original lease and that the lessor-taxpayer assented to the presence of the new lessee. Although the new lessee did not pay rent for the remainder of the period of the original lease (three weeks), the Court found that the presence of the new tenant was substantial evidence of a surrender and acceptance so that the United States could not recover against the original lessee.

Staff: United States Attorney Maurice F. Bois (D. N.H.), and John F. Beggan (Tax Division).

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