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UNITED STATES ATTORNEYS

BULLETIN

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NEW APPOINTEES

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

California, Northern Cecil F. Poole

Mr. Poole was born June 25, 1913 at Birmingham, Alabama, is married and has two children. He entered the University of Michigan in February 1932 and received his A.B. degree in June 1936 and his LL.B. degree on June 18, 1938. He attended Harvard University from September 26, 1938 to June 22, 1939 when he received his LL.M. degree. He was admitted to the Bar of the State of Pennsylvania in 1940 and to that of the State of California in 1946. From July 1938 to November 1941 he was with the firm of Brown, Jones and Poole in Pittsburgh. From January 21, to July 20, 1942 he was an attorney for the National Labor Relations Board in Washington. He served in the United States Army from July 24, 1942 to December 24, 1945 when he was honorably discharged as a Second Lieutenant. From February 18, 1946 to January 17, 1947 he was an attorney for the Office of Price Administration, San Francisco. He engaged in the private practice of law in San Francisco from 1947 to 1949. From April 18, 1949 to January 15, 1959 he was Senior Criminal Attorney, Office of the District Attorney for the City and County of San Francisco. Since January 1, 1959 he has been Executive Clemency Secretary and Legal Counsel to the Governor of California, and from 1952 to 1960 he was also an Instructor at the Golden Gate College of Law in San Francisco.

North Dakota John O. Garaas

Mr. Garaas was born September 22, 1922 at Wheelock, North Dakota, is married and has four children. He attended St. Olaf College in Northfield, Minnesota from September 1940 to March 1943. He served in the United States Army from March 16, 1943 to January 24, 1946 when he was honorably discharged as a Technician, Fifth Grade. He entered the University of North Dakota in February 1946 and received his A.B. degree on June 11, 1948 and his LL.B. degree in February 1949. He was admitted to the Bar of the State of North Dakota that same year. Since 1950 he has engaged in the private practice of law in Watford City, North Dakota. He has also served as States Attorney for six years; State Senator since 1956; and City Attorney for Watford City for the past four years.

The names of the following appointees as United States Attorneys have been submitted to the Senate:

Alaska	Warren C. Colver
Georgia, Northern	Charles L. Goodson
Georgia, Southern	Donald H. Fraser
Hawaii	Herman T. F. Lum
Idaho	Sylvan A. Jeppeson
Illinois, Southern	Edward R. Phelps
Indiana, Southern	Richard P. Stein
Iowa, Northern	Donald E. O'Brien
Oregon	Sidney I. Lezak
Pennsylvania, Eastern	Joseph S. Lord, III
Tennessee, Middle	Kenneth Hartwell
Texas, Northern	Harold B. Sanders, Jr.
Texas, Eastern	William W. Justice
Texas, Southern	Woodrow B. Seals
Texas, Western	Ernest Morgan
Virginia, Eastern	Claude V. Spratley, Jr

As of June 9, 1961, the score on new appointees is: Confirmed - 31, Nominated - 19.

MONTHLY TOTALS

During the month of April, triable criminal cases pending and civil cases pending, excluding tax lien and condemnation cases, registered slight reductions. However, total civil cases, including condemnation but less tax lien, and criminal and civil matters pending increased over the previous month. The increase in the total number of cases and matters pending was precedent-breaking. This is the first time in the seven years in which the litigation reporting system has been operating that the aggregate of pending cases and matters has risen during the month of April. The usual pattern for the last three months of the fiscal year has been a substantial and continued reduction. It is to be hoped that the deviation from the usual pattern will stop with the month of April. In order to continue the tradition of year-end reductions in every fiscal year since 1954, the aggregate workload will have to be reduced below 45,087, the total as of June 30, 1960. The following analysis shows the number of items pending in each category as compared with the totals for the previous month:

	March 31, 1961	April 30, 1961	
Triable Criminal	7,271	7,192	- 79
Civil Cases Inc. Civil Less Tax Lien & Cond.	14,055	14,046	- 9
Total	21,326	21,238	- 88
All Criminal	8,839	8,741	- 98
Civil Cases Inc. Civil Tax & Cond.Less Tax Lien	16,874	16,903	+ 29
Criminal Matters	10,271	10,279	+ 8
Civil Matters	12,579	12,962	+ 383
Total Cases & Matters	48,563	48,885	+ 322

The number of civil cases filed and terminated during the first ten months of fiscal 1961 was below the total for the same period of the preceding fiscal year. Reduced activity in the civil field was especially marked in cases filed which were down over 4 per cent from the prior year. Increases in criminal cases filed and terminated held the increase in the total caseload to 2.6 per cent. It is interesting to note that, despite one of the largest vacancy rates among Assistants in recent years, the pending caseload has increased only 2.6 per cent over the total for the first ten months of fiscal 1960 when vacancies in the force of Assistants were at an all-time low. In other words, a greatly reduced force has handled approximately as many cases during the past ten months as a full legal complement handled in the same period of fiscal 1960. These results open up several interesting avenues of thought. The breakdown below shows the pending totals on the same date in fiscal 1960 and 1961:

	1st 10 Months F.Y. 1960	1st 10 Months F.Y. 1961	Increase or Decrease Number	%
Filed				
Criminal	25,789	25,926	+ 137	+ 0.53
Civil	20,507	19,682	- 825	- 4.02
Total	46,296	45,608	- 688	- 1.49
Terminated				
Criminal	24,726	24,770	+ 44	+ 0.18
Civil	18,654	18,244	- 410	- 2.20
Total	43,380	43,014	- 366	- 0.84
Pending				
Criminal	8,594	8,741	+ 147	+ 1.71
Civil	19,901	20,513	+ 612	+ 3.08
Total	28,495	29,254	+ 759	+ 2.66

While total filings and terminations declined from the fiscal year high reached in March, they were the third highest totals achieved during the first ten months of fiscal 1961. Set out below is an analysis by months of the number of cases filed and terminated:

	July	Aug.	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	April
Filed										
Crim.	1,709	2,346	3,201	2,551	2,479	2,534	2,574	2,883	2,983	2,666
Civ.	1,863	2,304	1,897	1,990	1,889	1,753	1,914	1,840	2,137	2,095
Total	3,572	4,650	5,098	4,541	4,368	4,287	4,488	4,723	5,120	4,761
Term.										
Crim.	1,600	1,772	2,328	2,977	2,832	2,617	2,513	2,346	3,159	2,726
Civ.	1,463	1,906	1,798	2,005	1,627	1,816	1,797	1,751	2,045	2,036
Total	3,063	3,678	4,126	4,982	4,459	4,433	4,310	4,097	5,204	4,762

JOB WELL DONE

The presiding judge has commended Assistant United States Attorney Luke C. Moore, District of Columbia, on his work in what the judge termed "a highly technical and extremely complicated case" involving embezzlement and larceny. The judge stated that he had presided in many criminal jury cases during his tenure as a Municipal Court judge and that he could truly state that he had never before enjoyed a more pleasant experience than he did in presiding in this case. The letter further observed that it must have taken a great amount of time and effort to assemble the evidence, and that it was only through Mr. Moore's superb preparation and presentation of facts that the jury rendered a verdict on all counts. The judge stated that he rarely called to the attention of a superior any matters concerning the work of an individual employee, but that in this instance he felt it his duty to inform the United States Attorney of Mr. Moore's really outstanding efforts.

The Chief of the Trial Staff, Criminal Division, has commended Mrs. Sylvia Laffan and Mrs. Rose St. George, members of the clerical staff of the United States Attorney's office, Southern District of New York, and Assistant United States Attorney Margaret Millis, for the assistance they rendered during the preparation for trial of a recent case. The letter stated that Mrs. Laffan was exceptionally efficient and most helpful and courteous in performing the necessary clerical and stenographic work; that Mrs. St. George was indispensable in relieving the trial staff of all the detail and paper work incidental to paying witnesses and other expense items, and that her efficiency and initiative in these matters was outstanding and most helpful; and that Miss Millus' familiarity with the origin and background of the case, including the original grand jury investigation, proved to be most helpful; that she assisted to a very considerable extent in anticipated legal problems that would have arisen at the trial, in the interviewing of witnesses preparatory to trial, and in resolving the problems that arose from day to day in trial preparation.

The Foreman and members of the April Grand Jury have commended Assistant United States Attorneys Stephen E. Kaufman and David R. Hyde, Southern District of New York, for their excellent job in presenting to the jury the evidence connected with a recent banking case, which proved to be a most complicated and difficult one.

United States Attorney William B. Butler and Assistant United States Attorney Robert C. Maley, Southern District of Texas, have been commended by the Solicitor of Labor, for their efforts in bringing to a successful conclusion two recent actions which will enable the Labor Department to fully carry out its responsibilities in connection with the Migrant Labor Program. The letter stated that the excellent results obtained reflect credit upon both Departments, and expressed sincere appreciation to Messrs. Butler and Maley for their assistance.

Assistant United States Attorney Richard P. Matsch, District of Colorado, has been commended by the Technical Advisor, IRS, for his ability to master the detail of tax cases and for effectively presenting such

cases, although often not having adequate time to prepare for trial. The letter stated that Mr. Matsch's performance in a recent case measures up with the best of any he has seen, and that the Government will feel a distinct loss in his leaving the United States Attorney's office.

Assistant United States Attorneys Robert Hinerfeld and Charles Lynberg, Southern District of California, have been commended for their outstanding work in a recent criminal case. The commendation stated that it was Mr. Lynberg's alertness which led to Federal intervention in the case in May, 1959. On his own initiative he attended public hearings of the State Athletic Commission and, convinced that the testimony disclosed violations of Federal law, he succeeded in having the Federal Grand Jury consider indictments against the defendant and his co-conspirators. Two years later, convictions were obtained on the indictment artfully drawn by Mr. Lynberg, whose ability and resourcefulness substantially contributed to the successful result. The commendation of Mr. Hinerfeld stated that his legal ability is such that it was possible to entrust to him the preparation and argument of many points of law which were crucial to the trial of the case, that he is a brilliant young lawyer whose mature judgment and broad knowledge of the law entitle him to important assignments more often bestowed upon older and more experienced attorneys, that during the early stages of the trial he handled the appeal of the district judge's order remanding the defendants to custody and that his successful argument and his ability as an advocate are evidenced in the outcome of the case.

The Chief Postal Inspector has commended Assistant United States Attorney Robert Green, District of Kansas, on his recent successful prosecution of four defendants on charges of mail fraud in the operation of an "advance fee" racket. The letter stated that not only was the prosecution handled with speed and dispatch, but it is noteworthy that the defendants entered pleas of guilty after previously pleading not guilty to the indictment returned six months before. The Chief Inspector stated that the guilty pleas are attributed to the competent and commendable manner in which Mr. Green handled this important and complex case.

Assistant United States Attorneys Daniel A. Becco and Charles R. Purcell, Jr., Northern District of Illinois, have been commended by the Postal Inspector in Charge for their fine work in a recent case. The letter stated that Messrs. Becco and Purcell displayed a fine fighting spirit in the face of great opposition by the seven defense attorneys, that despite such opposition all Government exhibits offered were accepted over objections, and that the preparation displayed by these attorneys and their familiarity with the finer points of the law were impressive.

The Chief Postal Inspector has commended Assistant United States Attorney Arthur I. Rosett, Southern District of New York, on his successful prosecution of a case involving mail fraud in connection with the operation of a matrimonial scheme. In expressing sincere appreciation for the excellent manner in which this case was handled, the letter stated that the four and one-half year sentence imposed on the defendant will be helpful in eliminating frauds of this nature.

Assistant United States Attorney William L. Hughes, Jr., Northern District of Texas, has been selected to appear as a participant in the program of the Southwestern Law Enforcement Institute and International Association of Auto Theft Investigators. The participants on the program are all of high caliber and reputation, and it is a compliment to Mr. Hughes that he was invited to speak.

Assistant United States Attorney Plato C. Cacheris, Eastern District of Virginia, has been commended for his valuable participation in a recent civil rights case which resulted in a successful outcome for the Government. The letter stated that in view of the various difficulties encountered because of the four-year interval between the time of commission of the violation and the time of trial, the favorable results achieved are all the more gratifying.

* * *

ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

SHERMAN ACT

Monopoly - Linen Supplies; Conviction Reversed and New Trial Ordered. United States v. Consolidated Laundries et al. (C. A. 2, 1961) On May 31, 1961, an opinion reversing defendants' conviction and ordering a new trial was handed down.

In a non-jury trial, defendant linen supply companies had been convicted on both counts of an indictment charging violations of Sections 1 and 2 of the Sherman Act. Defendants moved for a new trial claiming a denial of due process of law. This claim was based on the discovery after trial of 43 documents in the Government files which had not been produced in compliance with a court order, and which defendants claimed were material to their defense. The motion for new trial was heard on affidavits alone and the trial judge denied the motion on the grounds that movants had failed to prove they were materially handicapped by the absence of the documents and that the documents would not have affected his determination of defendants' guilt. The judge also found that defendants were not entitled to the documents as a matter of due process since they had failed to prove any willful or negligent suppression of the documents on the part of the Government.

On appeal from the conviction and from the denial of the motion for new trial, the Second Circuit reversed the district court's determination that the 43 documents were not material to defendants' case. The Circuit Court held that these documents, comprising business records of the principal prosecution witness, would have been of obvious benefit to defendants. The Court held also that failure to produce such records to defendants was negligent suppression by the Government, since the Government had an affirmative duty to keep the documents of which it was custodian in such manner as to be available for use upon trial by all parties and the circumstances under which the documents were discovered, necessitated a presumption that they had been in the Government's possession previously. The Court concluded that "the negligent suppression of material evidence by the Government entitles a defendant to a new trial."

However, the Court expressly left open the question of whether a negligent suppression of material evidence is a denial of due process of law. Instead the Court based its order for a new trial on a "conviction that the denial of a new trial here is inconsistent with the correct administration of criminal justice in the federal courts, which it is our duty as an appellate court to supervise."

In remanding for new trial, the Court decided a number of questions likely to arise upon retrial.

First, the Court held that one corporate defendant was not subject to retrial because the indictment had been voided as to that defendant by an amendment which inserted a comma in defendant's name. This change substituted a 1951 corporation for a dissolved 1941 corporation. However the Court held this amendment did not void the indictment as to the other defendants.

Second, regarding the admissibility of statements by an alleged agent of defendants, the Court ruled that their admissibility would depend on proof of agency other than the declarations of the alleged agent. Such proof could be circumstantial, but should be substantial.

Third, the Court held that the "de minimis" exception did not apply to an interstate customer service of $523,168. Even though such business was only 1% of the total industry's volume, the Court held it could not be considered insignificent or insubstantial.

Fourth, the Court held the arrest of a conspirator removes the presumption of continuing participation in the conspiracy and places upon the Government the burden of proving participation in the conspiracy from the date of arrest.

Fifth, the Court upheld the trial judge's determination that in ruling upon a motion for acquittal at the close of the Government's case in a non-jury trial, the proper standard is whether the judge could, not whether he would, find the accused guilty on the Government's evidence.

Finally, the Court rejected defendants' contention that in an indictment for conspiracy to monopolize, both the relevant market and a dangerous probability that monopolization will result from such conspiracy must be proved. The Court held that proof of a specific intent to monopolize would be sufficient. The Court also held that the per se rule applied to an allocation of customers by competitors.

Staff: Morris Klein, Richard A. Solomon, Henry Geller, Michael I. Miller and Patrick Ryan (Antitrust Division)

Monopoly - Locomotives; Indictment Transferred. United States v. General Motors Corporation, (S.D. N.Y.). On May 25, 1961, Judge Sidney Sugarman handed down an opinion granting the defendant's motion to transfer this case to the Northern District of Illinois, Eastern Division (Chicago).

In support of its motion, General Motors alleged that its locomotive manufacturing plant, all its personnel, and its documents were located in La Grange, Illinios, a suburb of Chicago located approximately 17 miles from the city. Defendant urged that a trial in New York would deprive it of the right to defend against the charges in the indictment.

In opposition to the motion, the Government argued that the test

to be applied is not one of "relative convenience of the parties" but rather whether there are substantial contacts between the offense alleged and the forum selected by the Government. The Government pointed out that Paragraph 24 of the indictment sets forth nine acts or series of acts which occurred in the Southern District of New York, clearly indicating substantial contacts with that forum. It was further pointed out that a trial in Chicago would result in greater inconvenience to third-party witnesses, the majority of whom were located in New York or closer to New York than Chicago. The Government also urged that an adoption of the defendant's theory of "weighing convenience" would lead to the transfer of most complex antitrust cases to the home of the defendant. This, it was submitted, was not the intent of the framers of the Rules of Criminal Procedure.

In his opinion, Judge Sugarman accepted the defendant's showing of inconvenience and stated the applicable law as being:

> '. . . that any criminal statute should be construed, if possible, so as to lay the venue of a case at the home area of the defendant, at least so long as that home area has any connection with the wrong charged.'

Staff: George Reycraft, Sanford M. Litvack and Arthur H. Kahn (Antitrust Division)

Price Fixing - Transmission Line Hardware; Indictment Filed Under Section 1. United States v. Hubbard and Company, et al., (E.D. Wis.). Six manufacturers of transmission line hardware were indicted on June 6, by a federal grand jury in Milwaukee, Wisconsin, for price-fixing and other violations of Section 1 of the Sherman Antitrust Act.

All six firms manufacture various kinds of equipment called "pole line hardware" for use "in the construction and maintenance of electrical transmission, distribution, and communication lines." According to the indictment the six defendant firms do more than 75 percent of all pole line hardware business in Wyoming, Montana, Colorado, New Mexico, Texas and all states east of those states. Customers in those states, the indictment said, are principally electric utility companies and communications firms. They purchase equipment valued "in excess of $30,000,000 annually."

The indictment charged that "for many years past" the defendants have conspired to fix non-competitive prices and uniform discounts and to establish non-competitive distribution practices.

Staff: Earl A. Jinkinson, Joseph Prindaville, Jr., and Harold E. Baily (Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General William H. Orrick, Jr.

SUPREME COURT

FEDERAL TORT CLAIMS ACT

Misrepresentation Exception of 28 U.S.C. 2680(h) Applies Where Purchaser of Property Insured by FHA Relied on FHA's Negligent Appraisal of Property; Government Owes to Purchaser of Home No Actionable Duty of Exercising Due Care in Appraising Property. United States v. Neustadt (Sup. Ct., May 29, 1961). Under the National Housing Act, 12 U.S.C. 1709(a), the Federal Housing Commissioner may insure a mortgage on certain residential property in an amount computed on the appraised value of the property. An FHA appraiser inspected and appraised a residence which was for sale, and plaintiffs, as prospective purchasers, were advised of the appraisal in accordance with the requirements of Section 226 of the Act. Plaintiffs purchased the house with the aid of a loan secured by an FHA mortgage and took possession. Shortly thereafter, substantial cracks began to appear in the walls and ceilings of the house. Plaintiffs brought suit under the Tort Claims Act alleging damage as a result of the FHA appraiser's negligent appraisal of the property. The Government defended on the grounds that (1) it did not owe the purchaser of an FHA-insured house an actionable duty of exercising due care in making an appraisal, and (2) plaintiffs' claim arose from a misrepresentation and, accordingly, was excluded from the scope of the Tort Claims Act by 28 U.S.C. 2680(h). The district court entered judgment in favor of plaintiffs, and the Court of Appeals affirmed.

The Supreme Court reversed, holding that the claim was barred by the misrepresentation exception of the Tort Claims Act. The Court rejected plaintiffs' arguments that the exception was applicable only to deliberate misrepresentations, and that the instant case, rather than being an action for misrepresentation, was grounded on the negligence of the inspection, any element of misrepresentation being merely incidental. The Court also held that Congress, though requiring that the prospective purchaser of a house be informed of the appraised valuation, "did not intend thereby to convert the FHA appraisal into a warranty of value, or otherwise to extend to the purchaser any actionable right of redress against the Government in the event of a faulty appraisal * * *."

Staff: Assistant Attorney General William H. Orrick, Jr. and Sherman L. Cohn (Civil Division)

VETERANS' AFFAIRS

Personal Property of Veterans Who Die as Patients in V.A. Hospitals and Homes, Without Heirs or Will, Vests in United States Under Federal Statute Instead of Devolving to State Under Its Escheat Law. United

States v. Oregon (Sup. Ct., May 29, 1961). This case involved the competing claims of the United States, on behalf of the Post Fund of Veterans' Administration hospitals and homes, and the State of Oregon to the net estate from the personal property of a deceased, incompetent veteran who died intestate and without heirs in a V.A. hospital while receiving free care and treatment. The claim of the United States was based on 38 U.S.C. (1952 ed.) 17-17j (now 38 U.S.C. 5220 et seq.) which vests the personal property of veterans, similarly situated to the deceased here, in the United States for the recreational and religious benefits provided by the Post Fund. The State countered with the argument that the federal statute is essentially predicated on the existence of a valid, common-law contract between veteran and hospital, accomplished normally by the signing of the application form. Since the veteran in this case was admittedly incompetent upon his entrance and during his entire stay in the hospital, the State contended that no such contract had been entered into here, and that his personal estate thus passed to Oregon by virtue of its escheat law. The Oregon State courts agreed with the State's contentions and held further that if the federal statute were interpreted as self-executing and not requiring a contract, as urged by the United States, it would violate the Tenth Amendment to the Constitution by invading the State's traditional powers over the devolution of property.

On writ of certiorari, the United States Supreme Court reversed. The majority, in an opinion by Mr. Justice Black, interpreted the statute as not requiring a contract despite the opinion to the contrary of the Chairman of the House Veterans' Affairs Committee, which handled the legislation. Moreover, the majority held that, as so interpreted, there was no constitutional infirmity since the Federal Government could utilize this eminently fair and reasonable method of supporting V.A. institutions as a necessary and appropriate incident of its war powers. If necessary and appropriate, of course, the law took precedence under the Supremacy Clause over the state escheat power.

Mr. Justices Douglas and Whittaker dissented, in an opinion by the former, in which it was stated, in essence, that the power of the United States to utilize all means necessary and appropriate to its war powers did not justify the imposition here on the state's traditional control over the devolution of property.

Staff: Herbert E. Morris (Civil Division)

COURTS OF APPEAL

ABATEMENT

Civil Action by United States to Enforce Price Control Remedy Under Defense Production Act Abates Upon Death of Defendant. United States v. Price (C.A. 6, May 16, 1961). For alleged violations of the price control provisions of the Defense Production Act of 1950 (50 U.S.C. App. 2109(c)),

the United States brought suit to recover treble the amount of the alleged overcharge. Before the suit was scheduled for trial, Price died and the United States moved to substitute his estate as a defendant. The motion was denied by the district court which, on the authority of Bowles v. Farmers National Bank, 147 F. 2d 425 (C.A. 6), dismissed the action on the ground that it abated upon the death of Price.

The Court of Appeals affirmed, holding that the Government's suit against Price was not a "civil action for damages" such as would survive under 28 U.S.C. 2404. The Court reexamined the rationale underlying its prior decision in the Farmers National Bank case and concluded, consistent with its prior holding, that the Government's suit was one to enforce a statutory penalty and abated on the death of the defendant.

Staff: John G. Laughlin, Jr. (Civil Division)

FEDERAL TORT CLAIMS ACT

United States Not Liable to Employee of Independent Contractor for Injuries Caused by Negligently Constructed Scaffold. Wallach v. United States (C.A. 2, May 22, 1961). Plaintiff was a painter employed by a firm which had contracted to do redecorating work in a Post Office building in Brooklyn. While performing work pursuant to the contract, the scaffold on which plaintiff was working collapsed because of his employer's negligent construction, causing plaintiff serious injury. Plaintiff brought suit against the United States, claiming that the United States was not shielded from liability by the presence of an independent contractor. The district court entered judgment in favor of the Government.

The Court of Appeals affirmed. It ruled, inter alia, (1) that the clause in the Government's contract with plaintiff's employer which provided that state and local building codes did not apply to the contract work did not sanction the violation of New York's safety regulations which had caused the collapse of the scaffold; (2) that the Government's right to supervise the work did not mean it had such "control" over the work to render it liable; and (3) that, even though under New York law the use of a scaffold is in some situations considered an inherently dangerous operation, New York imposes on an owner of property only the duty to furnish a safe place to work--it is the contractor's duty to provide his own employees with safe tools and appliances.

Staff: United States Attorney Morton S. Robson and
Assistant United States Attorney Stephen Kurzman
(S.D. N.Y.)

INDISPENSABLE PARTIES

Civil Service Commissioners are Indispensable Parties to Action to Review Commission Decision. Haine v. Googe (C.A. 2, May 15, 1961).

Plaintiff voluntarily submitted her resignation to the New York District of the Immigration and Naturalization Service on June 26, 1959, to take effect on July 11, 1959. On July 1, 1959, she requested that her resignation be withdrawn. The employing agency did not consent, and on July 11, 1959, her employment was terminated. She then appealed to the Regional Director of the Civil Service Commission under Section 14 of the Veterans' Preference Act of 1944. He ruled that her voluntary resignation did not constitute "adverse action" by the agency and that her case was not appealable under Section 14. His decision was affirmed by the Civil Service Board of Appeals and Review in Washington and by the Civil Service Commissioners. Plaintiff then instituted this action to review the decision of the Civil Service Commission, naming only the Regional Director of Civil Service as defendant.

The district court dismissed the action for failure to join indispensable parties, the Commissioners of the Civil Service Commission, citing Blackmar v. Guerre, 342 U.S. 512. The Court of Appeals affirmed the dismissal on the opinion of the district court and on the authority of Reeber v. Rossell, 200 F. 2d 334 (C.A. 2).

Staff: Alan S. Rosenthal and Arnold R. Petralia (Civil Division)

NATIONAL SERVICE LIFE INSURANCE

Designation of New Beneficiary in Application for Renewal of Military Insurance 19 Days Before Expiration of Existing Policy Does Not Operate to Change Beneficiary Named in Existing Policy. Willis v. United States (C.A. 7, May 26, 1961). The insured under a policy of National Service Life Insurance executed an application to renew his insurance 19 days before it was to expire. His maternal aunt had been named as principal beneficiary in the existing policy, and his mother, the plaintiff, as contingent beneficiary. In his renewal form the insured designated his brother as principal beneficiary and his niece as contingent beneficiary. Three days thereafter the insured was accidentally killed. When the insured's aunt and the plaintiff filed insurance claims, the Veterans' Administration replied that although the insured had died while the existing policy was still in force, the designation of his brother in the renewal form would be given effect as a change of beneficiary. Plaintiff was given 30 days in which to advise V.A. of her intention to sue, take an administrative appeal, or submit evidence of a change of beneficiary in her favor. Plaintiff resubmitted her claim, and V.A. replied by giving her an additional 30-day period. Plaintiff filed a third claim, and V.A. gave her a third 30-day period. After the expiration of the three 30-day periods, V.A. paid the insurance proceeds to the brother. Shortly thereafter the aunt died. Plaintiff then brought this suit as remaining contingent beneficiary under the old policy.

The district court held that the burden of proving a change of beneficiary was on the Government, that the mere fact of the designation of a different beneficiary for the new insurance in the renewal form

was not enough to show an intent by the insured to change the beneficiary of the existing policy, and that plaintiff was not estopped to maintain this action by the fact that she had failed to respond in the manner requested within the 30-day periods.

The Court of Appeals affirmed. Agreeing that "* * * no formal change of beneficiary is essential, so long as the insured's intent be clear * * *", the Court concluded that there was insufficient proof of intent in this case. In addition, the Court ruled that the V.A. had erred in treating plaintiff's failure to take any of the courses of action suggested by the V.A. as an acquiescence in the V.A.'s decision. The Court indicated that the Government should have brought a suit in the nature of interpleader to protect itself from the possibility of a double recovery.

Staff: Arnold R. Petralia (Civil Division)

NEGLIGENT MISREPRESENTATION

Agent of Carrier Liable for Negligent Misrepresentation in Erroneously Certifying That Freight Rate was Lowest Rate Available to Government. United States v. Garcia & Diaz, Inc. (C.A. 2, May 24, 1961). In 1944 a shipment of canned meat, consigned to the War Department, arrived by boat at New Orleans from Argentina. Defendant, who was the agent of the carrier, presented a claim for freight charges to the Government. As a condition to payment defendant certified "that the rates charged were not in excess of the lowest net rates available for the Government, based on tariffs effective at the date of service." On post audit by the GAO in 1946, it was discovered that at the time of shipment a lower rate for canned meat had been available. In 1957, the United States instituted this suit to recover the excess freight charges. The district court held that defendant was liable for its negligent misrepresentation regarding the unavailability of lower rates, which induced the Government to pay the higher rate.

The Court of Appeals affirmed, holding that defendant was liable for its misrepresentation "whether caused by failure properly to investigate available rates or by negligent misstatement" because the Government had relied upon the certificate in making payment. The fact that the carrier here involved had not been a member of the conference which had established the lower rate was considered not to be determinative. In addition, the Court ruled that, while the Government's claim could not be barred by laches, it would be inequitable to grant the Government interest for the time prior to the district court's judgment on the amount defendant owed.

Staff: Morton Hollander and Arnold R. Petralia (Civil Division)

SOCIAL SECURITY ACT

Denial of Claim for Disability Benefits Reversed With Instructions to Take Additional Evidence on Extent of Claimant's Ability to Work and

Availability of Employment for Persons So Qualified. Hall v. Flemming; King v. Flemming (C.A. 6, April 13 and April 14, 1961). Plaintiffs in these two cases filed claims for disability benefits under the Social Security Act. Both were men with fairly serious physical impairments, low educational attainment, and manual labor backgrounds. The referees denied the claims, indicating that these men could do work of a non-strenuous nature that would constitute substantial gainful activity within the meaning of the Act. The district courts affirmed, holding that there was substantial evidence in these records to support the agency determinations.

The Court of Appeals reversed, relying on Kerner v. Flemming, 283 F. 2d 916 (C.A. 2). The Court deemed it mandatory that the agency show specifically what plaintiffs were able to do and what employment opportunities are available to persons in their condition. It remanded to the agency for this purpose. Although the Court did not explicitly so state, it is the Department's view that such a showing is required only where, as in the cases at bar, claimants are men whose education and work background are limited.

Staff: United States Attorney Jean L. Auxier and Assistant United States Attorney John W. Morgan (E.D. Ky.)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

FEDERAL FOOD, DRUG, AND COSMETIC ACT

Adulteration and Misbranding of Eye Make-Up; Protection of Distaff Side of Public from Possibly Harmful cosmetic. During April and May seizure actions were instituted in several districts throughout the country against large quantities of eyebrow pencils, eye liner pencil leads, and refills. It was discovered by the Food and Drug Administration and reported to the United States Attorneys that the make-up contained synthetic organic colors which had not been provisionally listed for cosmetic use in the area of the eye on the basis of prior commercial sale pursuant to Section 203 of the Color Additive Amendments of 1960 (P.L. 86-618, 86th Cong.). Therefore, the articles were adulterated, within the meaning of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 361(e), as amended, when introduced into interstate commerce and were unsafe within the meaning of 21 U.S.C. 376(a), as amended. Investigation revealed that practically all the leading cosmetic manufacturers and distributors in the country obtained the essential color material (the inserts) for their pencil products from one manufacturer, Jensen's, Inc., Shelbyville, Tennessee.

Seizure actions were instituted in California, Connecticut, Illinois, Minnesota, New Jersey, New York and Tennessee against lots of eye pencils bearing such internationally famous names as Hazel Bishop, Revlon, Maybelline, Avon, Max Factor, Helena Rubenstein, House of Westmore and Yardley of London. Apparently the industry was taken by surprise by the discovery that illicit dyes were being used in their product. To date there has been no contest in any of the seizure actions. The cosmetic firms are recalling from the market those shades of their eye pencils which contain the non-permitted colors and the major manufacturer, Jensen's Inc., has removed the prohibited colors from its plant at Shelbyville, Tennessee.

Multiple Seizures Authorized of "Sea Brine Concentrated Natural Sea Water" -- Grossly Fraudulent Product Cheating Public. It was discovered that a product known as "Sea Brine Concentrated Natural Sea Water" which consisted of nothing but Atlantic Ocean water "concentrated 10 times by vacuum operation" was being widely distributed and sold as a drug for treatment or prevention of cancer, diabetes, multiple sclerosis, leukemia, arthritis, goiter, dental caries, and grey hair; prolonging youth, improving mental health, providing general rejuvenation, etc. The product is, of course, grossly misleading to the injury and damage of the consumer since clearly it is not adequate or effective for the many purposes for which it is sold. In compliance with the requirements of 21 U.S.C. 334(a), the Commissioner of Food and Drugs formally made such a finding when it was decided to make multiple seizures of the "drug" product, which is manufactured in Florida. These seizures have been authorized or made in Topeka and Salina, Kansas, Detroit, Indianapolis, Columbus, Ohio, Fort Worth and Norfolk, Virginia. This profitable racket is attracting many unscrupulous operators purveying similar products. The danger in the

matter is that the unwary rely upon the fraudulent product for the treatment of dangerous diseases instead of promptly obtaining appropriate medical attention. The United States Attorneys in cooperation with the Food and Drug Administration are proceeding vigorously against such fraudulent "drugs" wherever they are found.

Severe Sentence Given Peddler of Dangerous Drugs. United States v. Elton Joseph Miller, t/a Lucky's Truck Stop (E.D. S.C.). Upon a plea of guilty to three counts of dispensing amphetamine drugs ("pep-pills") in violation of the Federal Food, Drug, and Cosmetic Act, a South Carolina truck stop owner received a prison sentence approaching the prescribed maximum.

Although the statute provides for a sentence for first offenders of up to one year for each violation, the courts have generally imposed penalties less severe. However, in this case, the Court imposed a sentence of 2-1/2 years. We believe that this action reflects an increasing awareness and a growing concern by the courts over the serious dangers presented by the illicit sale of dangerous drugs.

Staff: United States Attorney N. Welch Morrisette, Jr.; Assistant United States Attorney Frank H. Cormany, Sr. (E.D. S.C.)

FEDERAL AVIATION ACT

Civil Aeronautics Board; Prosecution for Violation of Cease and Desist Order. United States v. Eastern Air Lines (S.D. Fla.). Eastern Air Lines was found guilty on 14 of 16 Counts and fined $16,000 for violating the terms of a cease and desist order issued by the Civil Aeronautics Board in connection with company advertisements. An appeal to the United States Court of Appeals for the Fifth Circuit has been noted.

The case represents the first contested criminal prosecution for violation of a cease and desist order of the Civil Aeronautics Board.

Staff: Assistant United States Attorney Robert W. Rust (S.D. Fla.)

MAIL FRAUD

Vending Machine Scheme (18 U.S.C. 1341). United States v. Dominic Cashio et al. (E.D. La.). After only fifteen minutes jury deliberation Dominic Cashio was found guilty of mail fraud in the United States District Court at New Orleans based on a vending machine scheme which he operated in New Orleans approximately six years ago.

The scheme involved the sale of Chef-O-Matic kitchen units for use in steam tables of restaurants together with food products for the units, on the misrepresentations that a distributorship for food products was

being sold; that an excellent yearly income could be realized on an investment of only $3,000 in a route of the steam table units, locations for which would be obtained for the investor. Actually the only interest of the seller was in obtaining advance payment for the units and food products with no concern for establishing the victim in business as advertised; locations were not obtained; and the profits proved mythical. A total of $161,000 was obtained from the victims of the scheme.

Two other defendants, Max A. Sanford and Carrole Wharton, had previously entered guilty pleas. Sentencing of the three defendants will be reported in a later issue of the Bulletin.

Staff: United States Attorney M. Hepburn Many;
Assistant United States Attorney Nicholas J. Gagliano
(E.D. La.)

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IMMIGRATION AND NATURALIZATION SERVICE

Joseph M. Swing, Commissioner

DEPORTATION

Habeas Corpus; Custody of Alien Under Warrant of Deportation; Discretion. U.S. ex rel. Maneri v. Esperdy (S.D. N.Y., May 20, 1961.) Relator was released from confinement on May 12, 1961 after serving a sentence for illegal entry after being deported in 1959. He was prepared to leave the country the following day, having purchased passage for that purpose, but he was taken into custody for deportation on May 23, 1961, and his May 13th passage cancelled. His petition for a writ of habeas corpus to obtain his release followed.

The Court held that the custody of a person against whom a warrant of deportation has been issued is in the Attorney General, and his discretion as to detention, release on bond or other conditions, of such persons is not to be disturbed in the absence of a conclusive showing that he is not proceeding with reasonable dispatch. Notwithstanding the fact that the relator was willing to pay his own transportation and leave forthwith, the Court found that his detention for eleven days could not be said to be an abuse of discretion in the circumstances.

Writ dismissed.

Declaratory Judgment; Denial of Right as Citizen; Finality of Administrative Warrant of Arrest. Rossano v. Kennedy (N.D. Ill., May 18, 1961.) The Plaintiff was served with an order to show cause why he should not be deported, taken into custody under a warrant of arrest, and released on bond pending a hearing to determine his deportability. He then instituted an action under 8 U.S.C. 1503(a) for a declaration that he is a United States citizen and to enjoin the scheduled deportation proceedings. He contended that the issuance of the warrant is a final non-reviewable action.

The Court deemed that action to be dependent on the main, and as yet undisposed of, deportation hearing. Should the latter prove ill-founded, the warrant for plaintiff's arrest would also be determined to be unfounded. It concluded that plaintiff should be precluded from maintaining this suit until final determination of the deportation proceeding, since there had as yet been no final order denying him a right as a citizen. In so holding it followed many cited cases that such an action will not lie unless all administrative remedies have been exhausted.

Judicial Review; Multiple Claims - Judgment on Less Than All; Certificate Under Rule 54(b) F.R.C.P.; Piecemeal Appeals. Dombrovskis et al. v. Esperdy (S.D. N.Y., May 12, 1961). Plaintiffs sought a declaratory judgment that the denial of their applications for nonquota

visas as "refugee-escapees" (sec. 15(a)(3), Act of Sept. 11, 1957; 71 Stat. 643) was illegal and unconstitutional. That claim was dismissed, on defendant's motion, for failure to make the Secretary of State a party (July 18, 1960). Plaintiffs took an appeal but took no steps to have it heard pursuant to Rule 54(b).

In the second claim in their complaint plaintiffs alleged that the denial of their applications for a stay of deportation (8 U.S.C. 1253(h)) was the result of an arbitrary policy against favorable decisions on such applications filed by crewmen.

A motion by both parties for summary judgment on that claim was denied on the ground that there existed a question of fact. Only then did plaintiffs move under Rule 54(b) for a separate hearing of the appeal from the dismissal of the first claim on the grounds that there is no just reason for delay, for the first claim is in danger of becoming moot since "only very few visa numbers are left" and, in the event of a reversal, they "would have to have two trials of fact on practically identical issues and with very similar evidence."

The Court said that aside from the fact that the cryptic statement that "only very few visa numbers are left" was insufficient as a basis for court action, the lateness of plaintiffs' change of mind about seeking immediate review of the dismissal of the first claim persuaded it that discretion ought to be exercised in favor of the frowned-upon practice of piecemeal appeals.

"Moreover", said the Court, "the threat of two trials does not seem to me a serious one. Plaintiffs say that the issue of the existence and validity of an arbitrary rule adverse to crewmen is the same in each case. If so, I cannot imagine that a relitigation of that issue in a second suit between the same plaintiffs and what, in both cases, is substantially the United States Government would reach a different result."

Motion under Rule 54(b) denied.

(See Bulletin: Vol. 8, No. 16, p. 526)

Declaratory Judgment - Birth Abroad in 1906 to Citizen Mother; Estoppel. Montana v. Kennedy (Sup. Ct., No. 198, May 22, 1961, 29 LW 4453). Having been ordered deported on grounds which were not contested the petitioner, in an action under 8 U.S.C. 1503, sought a judgment declaring him to be a citizen. The facts and applicable statutes were discussed in the Court of Appeals opinion (278 F. 2d 68) which was digested for the Bulletin, Vol. 8, No. 11, p. 338. The Supreme Court granted certiorari (364 U.S. 861).

In an affirming opinion, Mr. Justice Douglas dissenting, the Court held that at the time of petitioner's birth in 1906, R.S. 1993 provided the sole source of inherited citizenship status for foreign born children

of American parents. As the foreign born child of an alien father, that statute cannot avail the petitioner since it was clearly intended to apply only to children of citizen fathers.

A second claim to citizenship founded upon section 5 of the Act of March 2, 1907 was not valid since it must necessarily depend upon a finding that his mother was an alien when he was born and that she later resumed her United States citizenship; but prior to the Act of March 2, 1907 the marriage of a citizen woman to an alien did not terminate her citizenship so his mother was not an alien at the time of his birth.

His last contention was that the Government is estopped to deny his citizenship because of the refusal of an American consular officer in Italy to issue a passport to his mother, then pregnant, thus depriving him of the opportunity to have been born in the United States.

The Court found that there was no evidence of a requirement in 1906 that a citizen hold a passport to return to the United States or, for that matter, to leave Italy. It also found that what may have been only the consular official's well-meant advice fell far short of misconduct which might be held to estop the Government to deny petitioner's citizenship because of the conduct of its official.

NATURALIZATION

Ineligibility to Citizenship - Exemption from Military Service; Intelligent Waiver. Keil v. United States (C.A. 9, May 25, 1961). This was an appeal from the district court's denial of appellant's petition for naturalization on the ground that he is ineligible to citizenship under 8 U.S.C. 1426 as an alien who had applied for and received an exemption from military service on account of his alienage.

In 1953 appellant, accompanied by his English speaking aunt, went to his local draft board to register for military service. He was given a questionnaire which he completed at home, with the assistance of his brother, and returned to the board. Later he received from the board an application for exemption from military service. This was also returned to the board, filled out in his wife's handwriting and bearing his signature. On this form immediately above the signature line was the printed statement: "I have read the provisions of section 315 of the Immigration and Nationality Act of 1952 (8 U.S.C.A. 1426), given below, and I fully understand the meaning thereof." He was granted the exemption and has never been called into the service.

In seeking naturalization he attempted to bring himself within the rule of Moser v. U.S., 341 U.S. 41, which requires a knowing and intelligent waiver of right to citizenship before such an exemption from military service will operate as a bar to citizenship. He argued that he did not have sufficient understanding of English to comprehend the full import and legal consequences of his application for the exemption.

The Court of Appeals agreed with the court below that the application form itself correctly, accurately and completely filled out, after being in his possession some six to nine days, constituted at least some evidence that the person who filled it out understood the language appearing on its face. Also, that the appellant furnished correctly such information called for by the form as his local draft board number, alien registration number, nationality, and the country under whose treaty the exemption was claimed.

Upon the evidence presented, the district court found that he had knowingly and intelligently waived his right to citizenship and denied his petition.

Affirmed.

* * *

LANDS DIVISION

Assistant Attorney General Ramsey Clark

Public Domain; Department of Interior May Provide by Regulation for Administrative Contest Wherein Private Party May Challenge Validity of Another's Mining Claim; Pendency of Action in State Court Does Not Bar Administrative Proceeding. Duguid v. Best (C.A. 9, May 25, 1961). Duguid sought to enjoin Best and other personnel of Interior from conducting an administrative proceeding to determine whether Duguid's mining claim was valid. The administrative proceeding was commenced by Paradise Irrigation District. The Irrigation District had been granted a special use permit by the United States to construct a dam and other irrigation works on specified lands in Lassen National Forest, the permit being subject to all valid claims. The irrigation works encroached on Duguid's mining claim. Duguid commenced action in the California state courts for damages which is still pending. The Irrigation District commenced an administrative proceeding before Interior's Bureau of Land Management seeking an adjudication of the validity of Duguid's mining claim. Duguid then brought this suit to enjoin the administrative proceeding. The district court granted defendants' motion for summary judgment.

The Court of Appeals held the Department of the Interior had authority to hear and determine the administrative proceedings initiated by the Irrigation District. While the action in the state court was properly brought under 30 U.S.C. 53 to determine possessory rights, it has no effect on the paramount title of the United States. The Department of the Interior has authority to determine at any time on its own initiative whether there has been a valid mineral discovery on an unpatented mining claim. Allowing the third party to initiate such proceedings is no transfer of the "mantle of sovereignty," but is merely a means of assisting the Secretary of the Interior to carry out his duties to protect the public domain. Such administrative proceeding does not try title as between the private parties, but seeks only to have a claim against the Government invalidated.

Staff: A. Donald Mileur (Lands Division)

Condemnation of Wherry Housing Project Tried Before Commissioners Reversed Because Valuation Based on Exchange of Property Condemned for Other Property and Other Findings Not Supported by Substantial Evidence; Case Remanded for Jury Trial. United States v. Leavell & Ponder, Inc. (C.A. 5), reverse title in Supreme Court, No. 921, O.T. 1960. The Supreme Court denied the landowners' petition for certiorari on June 5, 1961. The Court of Appeals had reversed the findings of valuation commissioners as not being based on substantial evidence and remanded the case for a jury trial. See 9 U.S. Attys' Bulletin, No. 3, p. 89.

National Forests; Right of Owner of Lands Within Roadless Area to Use Abandoned Right-of-Way Across Government Lands as Means of Ingress and Egress by Motor Vehicle. George E. Mackie v. United States (D. Minn., May 12, 1961). In Bydlon v. United States, 175 F. Supp. 891, the Court of Claims held that when the United States imposed a ban on airplane operations under a stated height over the so-called Roadless Area of the Superior National Forest the United States "took" a right of ingress and egress by air "owned" by private landowners within the Forest. In the present case, another landowner within the area sued the United States under the Tucker Act for the taking of a means of vehicular ingress and egress allegedly resulting when the Forest Service closed a road, across Government-owned land, formerly used by plaintiff.

The United States defended on the grounds (a) that the landowner at no time owned a right of ingress and egress over the intervening lands of the United States, (b) that the taking, if any, occurred more than six years before the suit was instituted and was therefore barred by the statute of limitations and (c) that plaintiff had a means of access by a combination of foot and boat travel and was at no time entitled to vehicular access. The United States also asked for an injunction restraining further trespasses by plaintiff over the Government-owned lands. On May 12, 1961, the Court held that plaintiff landowner could not claim a way of necessity for vehicular traffic since he had an alternate means of access by foot and water travel. Without discussing the additional issues, the Court concluded that the United States had taken nothing from the plaintiff and dismissed the complaint. In addition, it enjoined further trespasses by plaintiff by vehicular traffic on and over the abandoned right-of-way.

This case is the last in a series of actions resulting from the Forest Service policy of maintaining this particular area as a wilderness recreational site where canoeists can retrace the steps of the early voyageurs. The constitutionality of the air ban established by President Truman in 1949 was upheld in United States v. Perko, 108 F. Supp. 315 (D.C. Minn., 1952), aff'd sub nom. Perko v. United States, 204 F. 2d 446 (C.A. 8, 1953), cert. den., 346 U.S. 832. Later, violations of the air ban were enforced by injunction and attachment proceedings. The claims of other landowners in the area of a right to reach their property by crossing intervening Government lands has previously been denied. Perko v. Northwest Paper Company, 133 F. Supp. 560 (D.C. Minn., 1955), and United States v. Perko, 133 F. Supp. 564 (D.C. Minn., 1955).

Staff: Former Assistant United States Attorney Clifford Janes; Former Assistant United States Attorney William C. Hunt (D. Minn.); and Thos. L. McKevitt (Lands Division)

Department of Interior Lacks Authority to Cancel for Fraud Oil and Gas Lease Issued Under Mineral Leasing Act of 1920; Secretary of Interior Not Indispensable Party in Suit to Enjoin Administrative Proceedings to Cancel Such Leases; Lessee Not Required to Exhaust Administrative Remedy Before Challenging Jurisdiction of Administrative Tribunal. Pan American Petroleum Corp. v. Ed Pierson, et al. (C.A.10), reverse title in Supreme Court, No. 912, O.T. 1960. The Supreme Court, on May 29, 1961, denied the petition for certiorari filed on behalf of officials of the Department of the Interior. The Court of Appeals had held that the Secretary of the Interior had no authority to cancel administratively a fraudulently procured oil and gas lease issued under the Mineral Leasing Act of 1920. See 9 U.S. Attys' Bulletin, No. 3, p. 90.

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Conspiracy to Violate Smith Act; Grand Jury Minutes; Section 3500. Bary v. United States (C.A. 10, May 31, 1961). Arthur Bary and 6 others were indicted August 9, 1954, for conspiring to advocate the overthrow of the Government by force and violence and to organize the Communist Party (2 Bull. 5). On the first trial all were convicted. The Tenth Circuit reversed and remanded for a new trial on the ground that under Yates v. United States, 354 U.S. 298, the charge of conspiracy to organize the Communist Party was barred by limitations and should have been withdrawn from the consideration by the jury. On March 11, 1959, Bary and 5 others were again found guilty, the indictment having been dismissed on motion of the Government as against one defendant (7 Bull. 186, 1247). Two motions for a new trial on the ground of newly discovered evidence were denied (7 Bull. 678), and the second appeal was argued before the Tenth Circuit (Circuit Judges Bratton, Pickett, and Lewis) on November 19, 1960 (8 Bull. 758).

In an opinion dated May 31, 1961 (Bratton, J.) the Court reversed on the ground that the trial judge has erred in his construction and application of Section 3500 of Title 18 U.S.C. in holding that it had the power to require the Government to produce, either directly to the defense or for in camera examination by the Court, only those documents the Government conceded to be "statements". The Court of Appeals also held that the judge should have accepted for in camera examination and possible excision a number of documents which Government counsel stated they had in their possession, but which they claimed were not "statements" or were totally irrelevant. In short, the Court held that the determination of whether a questionable document is a "statement" within the meaning of the Jencks Statute, could not be left to a determination by Government counsel, but was a question for the trial judge. The opinion of the Court also stated, however, that the withdrawal from the jury's consideration of the "organizing" charge did not invalidate the indictment, that the district court properly denied defense requests for production of grand jury minutes, no "particularized need" having been shown, that the evidence was sufficient to sustain the convictions on the charge of conspiracy to advocate forcible overthrow of the Government, and that the instructions to the jury were "clear, adequate, comprehensive and fair."

Staff: The appeal was argued by George B. Searls (Internal Security) and United States Attorney Donald G. Brotzman (Colo.) With them on the brief were Jack D. Sammels and Robert L. Keuch (Internal Security Division)

Smith Act: Membership. United States v. John Francis Noto (Supreme Court). On June 5, 1961 the United States Supreme Court reversed the judgment of the Court of Appeals for the Second Circuit which affirmed

the conviction under the membership clause of the Smith Act of John Francis Noto, leader of the Communist Party in Western New York and in the underground apparatus of the Party in New York State. Defendant was convicted of violation of the membership provision of the Smith Act on April 12, 1956. The conviction was affirmed by the Court of Appeals on December 31, 1958; and on October 12, 1959, the United States Supreme Court granted certiorari. The issues in this case were similar to those in the Scales case. On February 5, 1960, the Supreme Court set the case for argument along with the Scales and the Communist Party case. Oral argument was heard on October 10, 1960. The Supreme Court, speaking through Justice Harlan, pointed out that this case raises the same questions concerning the validity of prosecution under the membership clause of the Smith Act as Scales v. United States; and, having passed on the constitutionality and statutory challenges in Scales, the Court limited its consideration to sufficiency of the evidence as to illegal Party advocacy, and concluded that the evidence was not sufficient to support the conviction of Noto. The Court found the same infirmities as were found in Yates v. United States (354 U.S. 298), to-wit: ". . .We held in YATES, and we reiterate now, that the mere abstract teaching of Communist theory, including the teaching of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action and steeling it to such action. There must be some substantial direct or circumstantial evidence of a call to violence now or in the future which is both sufficiently strong and sufficiently pervasive to lend color to the otherwise ambiguous theoretical material regarding Communist Party teaching, and to justify the inference that such a call to violence may fairly be imputed to the Party as a whole, and not merely to some narrow segment of it." The Court concluded that, upon examining the record in this case the evidence "fails to establish that the Communist Party was an organization which presently advocated violent overthrow of the Government now or in the future, for that is what must be proven." The Court expressed the view that the kind of evidence found in Scales sufficient to support the jury's verdict of present illegal Party advocacy is lacking here in any adequate substantial degree.

The Court's opinion was delivered by Justice Harlan. There were no dissents. However, Justice Brennan and the Chief Justice were of the opinion that the case should be remanded to the District Court with direction to dismiss the indictment for the reason that the prosecution was barred by Section 4(f) of the Internal Security Act, and because of the insufficiency of the evidence. Justice Black concurred with the majority but on the ground that the First Amendment forbids the Government to abridge the rights of freedom of speech, press, and assembly. Justice Douglas concurred, but, as his grounds, cited the First Amendment protections and that the prosecution is barred by Section 4(f) of the Internal Security Act.

Staff: The case was argued by Kevin T. Maroney. With him on the brief was Anthony A. Ambrosio (Internal Security Division)

Smith Act: Membership Provision. United States v. Scales (Supreme Court). On June 5, 1961, the United States Supreme Court affirmed the judgment of the Court of Appeals for the Fourth Circuit upholding the conviction under the membership clause of the Smith Act (18 U.S.C. 2385) of Junius Scales, Chairman of the Communist Party of North and South Carolina, thus concluding a legal proceeding that has been in the courts for some seven years. This was the second time the case had been before the Supreme Court. The first time, the Court on October 14, 1957 reversed and remanded the case on the basis of its decision in Jencks v. United States, 353 U.S. 657. A second trial resulted in a conviction, which was affirmed by the Court of Appeals on October 6, 1958. On the second grant of certiorari by the Supreme Court the case was briefed and argued twice, oral argument being heard first on April 29, 1959. The case was set for reargument on November 19, 1959, but upon the granting of certiorari in Noto v. United States, where the issues were similar, the Court set this case for argument immediately preceding Noto on October 10, 1960, along with Communist Party v. Subversive Activities Control Board. The Smith Act, among other things, makes a felony of the acquisition or holding of knowing membership in any organization which advocates the overthrow of the Government of the United States by force or violence. The indictment of Scales charged that from January 1946 to the date of its filing (November 18, 1954) the Communist Party was such an organization and that Scales throughout that period was a member thereof, with knowledge of the Party's illegal purpose and a specific intent to accomplish overthrow "as speedily as circumstances would permit."

Mr. Justice Harlan delivered the Court's opinion. Dissenting opinions were written by Justice Black, Justice Douglas and Justice Brennan with whom the Chief Justice and Justice Douglas joined. The majority of the Court resolved all of the issues against the petitioner reaching the following conclusions: (1) The membership clause in the Smith Act is not repealed by Section 4(f) of the Internal Security Act of 1950, so this prosecution is not barred by Section 4(f); (2) The trial court properly interpreted the clause in instructing the jury that in order to convict it must find that within the three-year limitations period (a) the Communist Party advocated the violent overthrow of the Government in the sense of present "advocacy of action" to accomplish that end as soon as circumstances were propitious; and (b) petitioner was an "active" member of the Communist Party, and not merely a "nominal, passive, inactive or purely technical" member, with knowledge of the Party's illegal advocacy and a specific intent to bring about violent overthrow as speedily as circumstances would permit; (3) The membership clause does not offend the Fifth Amendment. The factors called for in rendering members criminally responsible for the illegal advocacy of the organization are met when the statute is found to reach only "active" members having also a guilty knowledge and intent and which therefore prevents a conviction on what otherwise might be regarded as merely an expression of sympathy with the alleged criminal enterprise, unaccompanied by any significant action in its support or any commitment to undertake such action. Neither does the clause offend the First Amendment. It "does not cut deeper into the freedom of association than

is necessary to deal with "the substantive evils that Congress has a right to prevent." It does not make criminal all association with an organization which has been shown to engage in illegal advocacy. There must be clear proof that a defendant specifically intends to accomplish the aim of the organization by resort to violence; (4) While ordinarily the Court will not review the sufficiency of evidence, it felt justified in so doing in this case in order to guide the lower courts in the future in this new area. The Court discussed the evidence in this case and distinguished it from the evidence in Yates v. United States, 354 U.S. 298 citing from Yates the criteria for the evaluation of evidence in determining whether the Party's advocacy constituted "a call to forcible action" for the accomplishment of immediate or future overthrow in contrast to the teaching of mere "abstract doctrine" favoring that end. The Court found that the evidence in Scales sufficed to make a case for the jury on the issue of illegal Party advocacy, saying: "Dennis and Yates have definitely laid at rest any doubt but that present advocacy of future action for violent overthrow satisfies statutory and Constitutional requirements equally with advocacy of immediate action to that end." The Court thought that the jury under instructions which fully satisfied the requirements of Yates was entitled to infer that "advocacy of action" was engaged in, and was sufficiently broadly based to permit its attribution to the Party. There was undisputed evidence of active membership in the Party by Scales and petitioner's "knowledge" and "specific intent" are established by his utterances and activities; (5) The Court found that petitioner was not precluded from a fair trial by reason of the admission of certain evidence argued by petitioner to be irrelevant; nor by the lower court's construction and application of the Jencks Act (whose constitutionality, the Court said, was assumed in Palermo v. United States, 360 U.S. 343). Nor did the Court feel that the "Congressional findings" as to the character of the Communist Party in the Communist Control Act of 1954 and the Internal Security Act of 1950 precluded a fair trial. And, finally, the Court was of the view that petitioner waived any right to question the method of choosing grand jurors by failure to comply with Rule 12, Federal Rules of Criminal Procedure; and that there was shown no impropriety in the method of choosing grand jurors. Therefore, the judgment of the Court of Appeals was affirmed.

Staff: The case was argued by John F. Davis (Office of Solicitor General). With him on the final brief were Kevin T. Maroney and Bruno A. Ristau (Internal Security Division)

Subversive Activities Control Act of 1950; Registration Provisions Constitutional. Communist Party of United States of America v. Subversive Activities Control Board (S. Ct.). By a 5-4 vote on June 5, 1961, the Supreme Court affirmed the judgment of the United States Court of Appeals for the District of Columbia Circuit which in turn affirmed an order of the Subversive Activities Control Board under § 7 of the Subversive Activities Control Act of 1950 that the Communist Party of the United States of America register with the Board as a Communist-action organization. The Attorney General had petitioned the Board on

November 20, 1950. Extensive hearings were held by the Board, the case went three times to the Court of Appeals and to the Supreme Court on a prior petition for certiorari. There had been one remand to the Board by the Supreme Court (351 U.S. 115) and another to the Board by the Court of Appeals after the Board issued its Modified Report, 254 F. 2d 314.

The majority opinion was written by Justice Frankfurter and is 112 pages long. The main grounds on which the majority of the Court affirmed are as follows: (1) Budenz. The Board did not err in refusing to strike all the testimony of the Government witness Budenz and in striking only those portions of his testimony which related to the "Starobin" and "Childs-Weiner" matters. After the remand by the Court of Appeals Government counsel discovered that there were in the files of the F.B.I. mechanical transcriptions of interviews with Budenz and the Court ordered production of "statements" under 18 U.S.C. 3500 relating to the Starobin and Childs-Weiner matters. The portions of the transcriptions relating to those matters were delivered to the Party. It was then found that Budenz's physical condition was such that he could not be recalled for further cross-examination. The Court found that the Board's action in striking only part of the testimony was not an abuse of discretion, and that the Government had not acted so as to hamper the Party unfairly in the presentation of its case. (2) Gitlow's memoranda. Government witness Gitlow had dictated to the F.B.I. a number of memoranda explaining and interpreting documents he had delivered to the Bureau. The Board had refused to order the memoranda produced and the Court of Appeals affirmed. 223 F. 2d 531. The majority opinion said that the Party could not raise the question now, because it had not raised it in its first petition for certiorari some five years ago. (3) Production of all statements of Government witnesses. The opinion also stated that the Court of Appeals did not abuse its discretion in denying a motion for production made before it because the motion should have been made at the time of the Board hearing and the point should have been raised in the earlier petition for certiorari. (4) Control. The Court said that "control" of the Party by the Soviet Union was proved as a matter of fact by proof of "consistent, undeviating dedication over an extended period of time to carrying out the program of the foreign government or foreign organization, despite significant variation in direction of those programs." (5) Objectives of the World Communist Movement. The Court also held that the Government had proved that the Party acted to advance the objectives of the world Communist movement, and that the proof of that was not subject to the limitation set out in Yates v. United States, 354 U.S. 298, and Dennis v. United States, 341 U.S. 494, because the 1950 Act is a regulatory and not a prohibitory statute. (6) Striking of a subsidiary finding of fact. The Court of Appeals struck one finding made by the Board that the Party engaged in secret practice for the purpose of concealing foreign control on the ground that it was not supported by a preponderance of the evidence, but that Court declined to remand to the Board for further consideration after striking that finding. The Supreme Court approved because the Court of Appeals had regarded that finding as one that did not influence the Board's determination. (7) Review of the record. The Court of Appeals having reviewed the record before the Board three times, the Supreme Court declined to review it again. (8) Effect of severability provision. The

Act contains a severability clause in the common form. Partly because of that clause the majority opinion said that it was not necessary to pass on various "sanctions" in the Act, such as the requirement of labeling publications as issued by a Communist organization, denial of the right to passports, and veto, and it said that many of the questions raised in regard to those provisions were prematurely raised and depend upon contingencies that may or may not happen. The major purpose of the Act, the opinion said, was to regulate Communist-action organizations by means of the public disclosure effected by registration. Congress may regulate Communist activities to secure the United States against a foreign danger. (9) Other constitutional questions. The Court said that the Act is not a bill of attainder because it covers present activity. It does not infringe the First Amendment because the registration requirement does not depend on speech but on foreign domination and actions to advance the objectives of the world Communist movement, and the interest of the United States in self-preservation outweighs the interest of the Party's members in keeping the fact of this membership secret. For the same reason the Court sustained the requirement that the registration statement list officers and members, and printing presses, and contain a financial accounting. The Court did not pass on the validity of the penalties for failure to register or on the question of whether the officers required to file the registration statement would be required to incriminate themselves, because it regarded those questions as premature. The opinion further stated that the legislative findings of facts made in the Act of Congress do not make unnecessary the proof of the necessary and operative facts or control the result of any particular litigation before the Board.

There were four dissenting opinions. The Chief Justice dissented in an opinion which stated that the Court of Appeals erred in the Budenz and Gitlow matters, in failing to remand to the Board after striking the "secret practices" finding, and in failing to apply the Yates rule that advocacy must be proved directed at prompting or inciting forceful overthrow.

Justice Brennan in an opinion in which the Chief Justice joined said that the order requiring the Party to register and to disclose its officers and members is not constitutionally invalid and that the Court was not called upon to decide as yet the constitutionality of the duties and sanctions attaching to the Party and to its members. He dissented on the ground that the Court should decide the question whether the Act violated the Fifth Amendment rights of officers charged with the duty of completing the registration, and said that the officers could not be compelled to sign and file the registration statement and thereby incriminate themselves.

Justice Douglas agreed with the majority as to the findings of facts and the procedural points, and in the holding that the bare requirement that the Communist Party register and disclose the names of its officers and members is constitutional under the First Amendment. He dissented, however, on the points involving the application of the Fifth Amendment and the requirement that officers sign the registration statement.

Justice Black in his dissenting opinion stated that he would reverse. He criticized the failure of the Court to decide the substantial issues as to the meaning of the Act in the light of how it will operate, as amounting to deciding a hypothetical case. According to his dissenting opinion, the effect of registration under the Act is an admission by the registrant that it is engaged in espionage, sabotage, and treachery, and that it is merely waiting for a chance to overthrow the Government by force. The effect of the decision is to destroy the Party because it can not continue to function under the load of legal uncertainty plus the burdens imposed by the Act; the Act amounts to outlawry of a group because most Americans detest its doctrines. The Act is invalid under the Fifth Amendment because of the incriminatory features and because it denies procedural due process. The Act is also invalid as a bill of attainder and under the First Amendment.

Staff: The appeal was argued by the former Solicitor General J. Lee Rankin. With him on the brief were Bruce J. Terris (Office of Solicitor General), Assistant Attorney General J. Walter Yeagley, Kevin T. Maroney, George B. Searls, and Lee B. Anderson (Internal Security Division), also Frank B. Hunter, General Counsel, S.A.C.B.

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CRIMINAL TAX MATTERS

(Appellate Decision)

Fifth Amendment No Bar to Requiring Testimony Re Another's Tax Liability Where There Is No Possibility of Criminal Prosecution. United States and O. Gordon Delk, Acting Commissioner v. Richard Goodman (C.A. 5, March 30, 1961.) For several years prior to 1950, Goodman had been employed as manager of the Norfolk, Virginia, store of Associated Barr Stores, Inc., a retail jewelry chain. In 1950 after questioning by Internal Revenue Agents, he executed an affidavit stating that at the request of a company officer he had failed to keep records of certain cash jewelry sales but had forwarded the money to this official at the company's main office in Philadelphia. Goodman's employment by Associated was terminated in 1950, following his disclosures to the Revenue Agents. At the subsequent Tax Court hearing concerning alleged deficiencies in the taxes of Associated, Goodman was called as a witness by the Government but invoked his Fifth Amendment privilege and refused to answer several questions relating to his activities with Associated before 1950 and to his affidavit.

Upon the Government's motion the district court entered an order directing Goodman to answer the questions asked in the Tax Court proceedings and to give testimony with respect to the matters covered in his 1950 affidavit. The district court held that there was no possibility of self-incrimination since any illegal activities suggested by the evidence ended upon termination of Goodman's employment in 1950 and prosecution for a continuing conspiracy was thus barred by the six-year statute of limitations; and that prosecution for other suggested possible offenses was barred by the appropriate limitation statutes.

The Court of Appeals (Chief Judge Sobeloff dissenting) affirmed in part and reversed in part. The Court held that the Government had met its burden of showing that there is no longer any possibility that Goodman could be prosecuted for substantive offenses committed in or prior to 1950 but had failed to introduce evidence to satisfy its "absolute burden" of showing that no prosecution against Goodman had been instituted prior to the time the Government claims that limitations had run. Accordingly, the Court of Appeals reversed on this point and remanded the case to the district court for further proceedings so as to provide the Government the opportunity to meet this burden, if possible.

Staff: United States Attorney Joseph S. Bambacus, (E.D. Va.); Meyer Rothwacks, Norman E. Wolfe, Burt J. Abrams (Tax Division)

CIVIL TAX MATTERS

(District Court Decisions)

Liens: Priority Between Federal Tax Lien and Assignment of Title to Certain Motor Vehicle Where Tax Lien Was Recorded With County Recorder Prior to Assignment But Was Not Recorded in Compliance With Arizona Statute Requiring Filing With Motor Vehicle Division of Arizona State Highway Department. Desert Air Conditioning, Inc. v. Wood, District Director, District Court Arizona, 6 AFTR 2d 5313. Counterclaim by United States setting up Federal tax liens against D. H. Walker Construction Company, Inc., which liens were duly filed with the County Recorder of Maricopa County, Arizona, with one exception, prior to assignment of title by taxpayer to Desert Air Conditioning, Inc. of a certain motor truck which the Court found to be a bona fide conveyance. The District Director had seized the truck and it was sold pursuant to stipulation and the proceeds deposited with the Clerk of the Court. The filing of the tax liens with the County Recorder of Maricopa County did not satisfy the requirements of the Arizona statutes. The Court held the Arizona statutes to be in derogation of Section 6323 IRC 1954 since said statutes go further than merely designating a place in which notices of Federal tax liens need be filed. Under the circumstances the United States was not required to comply with the statute and the Court held that the Federal tax liens were prior and superior and that the United States was entitled to judgment directing the Clerk to distribute the fund to the United States and dismissing the complaint filed by Desert Air Conditioning, Inc.

Staff: United States Attorney Jack D. H. Hays (D. Ariz.);
C. Stanley Titus (Tax Division)

Unconstitutionality of State Sales Taxes Which Discriminate Against Federal Vendors: Immunity of Sales to United States from State Taxation: Inapplicability of 28 U.S.C. 1341 to Injunction Suits Brought by United States: Inapplicability of Eleventh Amendment. United States and Olin Mathieson Chemical Corporation v. Department of Revenue of State of Illinois, et al. (N.D. Ill., Feb. 23, 1961.) The Government and Olin Mathieson, one of its vendors, sought to permanently enjoin, as unconstitutional, the application of the Illinois Sales Tax or Retailers' Occupation Tax Act to sales of tangible personal property to the United States. (See Bulletin, Vol. 8, No. 20) Before reaching the merits, the three-judge court ruled that 28 U.S.C. 1341, which provides that "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State," was not applicable. It held that Section 1341 did not apply where, as here, the United States was a proper party plaintiff, because of its substantial pecuniary interest in the outcome by reason of its contract obligation to reimburse its vendor if the tax was properly assessed. It also held Section 1341 inapplicable because a "plain, speedy and efficient remedy" could not be had in the Illinois courts in that (a) injunctive relief was not available and (b) the "remedy by way of protest, hearing and court review," which

was available "without prior payment of any part of the assessment," was inadequate because the costs of a bond (which would have to be posted to avoid the imposition of a lien pending review) are not recoverable even where the taxpayer is successful, and (c) the availability of a declaratory judgment was uncertain. In rejecting defendants' contention that the action was barred by the Eleventh Amendment, the district court held, as the Government had argued, that "A suit to restrain unconstitutional action threatened by an individual who is a state officer, as in the defendant Director of Revenue, is not an action against the State."

On the merits, the three-judge district court, relying upon Phillips Chemical Co. v. Dumas Independent School District 361 U.S. 376 (see Bulletin, Vol. 8 No. 6) held the assessment prohibited because the statutory exemptions provided for with respect to sales to the State, its political subdivisions and charitable institutions discriminated against the United States. Accordingly the district court "permanently restrained and enjoined" the Illinois authorities from enforcing "Section 2 of the Illinois Retailers' Occupation Tax Act * * * against the plaintiff Olin Mathieson Chemical Corporation, or anyone else with respect to any sales of tangible personal property which any of them have made, or hereafter may make, to the United States * * *".

Since filing of defendants' notice of appeal to the Supreme Court of the United States, the Illinois Supreme Court, in Holland Coal Company v. Isaacs, Director of Revenue (May 10, 1961, 2 Ill. C.C.H. Par. 200-200) cited the instant case and held unconstitutional the very exemptions which the District Court here held to be discriminatory against the United States. Illinois' time to petition the United States Supreme Court for certiorari in the Holland case has not yet expired. However, it has recently moved the District Court, on the basis of the Holland decision, to vacate the injunction in Olin Mathieson. The Government is opposing the motion.

Staff: United States Attorney Robert Tieken and Assistant United States Attorney Harvey M. Silets (N.D. Ill.) William Massar (Tax Division)

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