Published by Executive Office for United States Attorneys,
Department of Justice, Washington, D. C.

June 30, 1961

United States

DEPARTMENT OF JUSTICE

Vol. 9 No. 13

UNITED STATES ATTORNEYS

BULLETIN

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NEW APPOINTEES

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

Alaska - Warren C. Colver

Mr. Colver was born January 19, 1925 at Fenton, Michigan, is married and has three children. He entered Willamette University in Salem, Oregon in September 1952 and received his A.B. degree on May 30, 1954 and his LL.B. degree on June 3, 1956. He was admitted to the Bar of Alaska in 1956. He served in the United States Navy from August 26, 1942 to June 30, 1945 when he was honorably discharged as a Yeoman, Second Class. While he was a student and during his early years in Alaska he was employed as a laborer, stevedore, and salesman. From August 1956 to July 1957 he was a Deputy United States Commissioner and from 1957 to 1959 he was a law partner of Mr. Ralph E. Moody, both in Anchorage. From July 31, 1959 to April 19, 1960 he was an Assistant Attorney General in the Alaska Department of Law and since that time he has engaged in the private practice of law in Anchorage.

Georgia, Northern - Charles L. Goodson

Mr. Goodson was born March 24, 1928 at Franklin, Georgia, is married and has two children. He attended the University of Georgia from January 3, 1946 to June 5, 1950 when he received his LL.B. degree. He was admitted to the Bar of the State of Georgia that same year. Since that time he has engaged in the practice of law in Newnan, Georgia with Mr. J. Littleton Glover with the exception of the period from February 24, 1951 to November 23, 1952 when he served in the United States Air Force and was honorably discharged as a First Lieutenant. He was also a member of the Georgia Legislature in the 1953-54-55 sessions and was executive secretary to Congressman John J. Flynt, Jr. from November 2 to December 31, 1954 and again from March 1, 1955 to May 1, 1957.

Georgia, Southern - Donald H. Fraser

Mr. Fraser was born February 27, 1906 at Hinesville, Georgia, is married and has one daughter. He attended Mercer University in Macon, Georgia from 1923 to 1925 and the University of Florida in Gainesville from September 21, 1926 to August 5, 1927 when he received his LL.B. degree. He was admitted to the Bar of the State of Florida in 1927 and to the Bar of the State of Georgia in 1928. From 1928 to 1940 he engaged in the private practice of law in Savannah and Hinesville. From January 1, 1940 to October 29, 1951 he was a partner in the firm of Fraser and Underwood in Hinesville. He also served as a Member of the Georgia House of Representatives in the 1931-32 session; as City Court Judge in Hinesville

from 1933 to 1949; and Solicitor General of the Atlantic Judicial Circuit Superior Court from April to December 1950. On October 29, 1951 he was appointed an Assistant United States Attorney for the Southern District of Georgia where he now serves.

Hawaii - Herman T.F. Lum

Mr. Lum was born November 5, 1926 at Honolulu, Hawaii, is married and has one son. He attended the University of Missouri from September 1944 to July 23, 1945. He served in the United States Navy from August 29, 1945 to August 24, 1946 when he was honorably discharged as a Yeoman, Third Class. He returned to the University of Missouri and received his LL.B. degree on February 1, 1950. He was admitted to the Bar of Hawaii that same year. From January 8, 1951 to June 18, 1952 he was Assistant Public Prosecutor for the City and County of Honolulu. He served in the United States Army from June 18, 1952 to June 23, 1954 when he was honorably discharged as a Corporal. He then engaged in the private practice of law in Honolulu and also served as attorney for the 1955 session of the Hawaiian House of Representatives. Since February 20, 1957 he has been Chief Clerk of the Hawaiian House of Representatives and since 1958 he has been a partner in the firm of Suyegana, Sakomata and Lum in Honolulu.

Idaho - Sylvan A. Jeppesen

Mr. Jeppesen was born October 9, 1922 at Moore, Idaho and is married. He attended the University of Idaho from September 27, 1940 to February 25, 1943. He served in the United States Army from March 18, 1943 to November 1, 1945 when he was honorably discharged as a Private. He returned to the University of Idaho in February 1946 and received his A.B. degree on May 31, 1948 and his LL.B. degree on May 30, 1949. He was admitted to the Bar of the State of Idaho that same year. He was then employed by Mr. Henry M. Hall in Jerome, Idaho and in December 1949 they formed a partnership. On March 26, 1952 he was appointed an Assistant United States Attorney for the District of Idaho where he remained until his voluntary resignation on August 15, 1953. From August to November 1953 he was a partner in the firm of Carver and Jeppesen in Pocatello, Idaho. He then entered a partnership with his brother in Boise and the firm is known as Jeppesen and Jeppesen. He also served as County Prosecutor for Owyhee County, Idaho from April 1957 to January 1958.

Indiana, Southern - Richard P. Stein

Mr. Stein was born September 2, 1925 at New Albany, Indiana, is married and has two children. He attended the University of Louisville, Kentucky from October 1, 1946 to June 13, 1950 when he received his LL.B. degree. He was admitted to the Bar of the State of Indiana that same year. He served in the United States Navy from July 1, 1943 to June 20, 1946 when he was honorably discharged as an Ensign and again from August 23, 1950 to October 18, 1951 when he was honorably discharged as a Lieutenant. From November 1951 to April 1952 he was employed by the Goodyear Engineering Corporation in Charlestown, Indiana. Since June 1952 he has been in a law partnership with Mr. Herbert Haville in New Albany. He also served as Deputy Assessor during the summer of 1948 and as Prosecuting Attorney since January 1, 1955 both of Floyd County, Indiana.

New Hampshire - William H. Craig, Jr.

Mr. Craig was born August 26, 1927 at Manchester, New Hampshire, is married and has four children. He attended St. Anselm's College in Manchester from September 1944 to June 1945 and again from September 1946 to June 10, 1949 when he received his A.B. degree. He attended Boston University Law School from September 19, 1949 to June 2, 1952 when he received his LL.B. degree. He served in the United States Navy from August 10, 1945 to July 29, 1946 when he was honorably discharged as a Seaman, Second Class. Upon admission to the Bar of the State of New Hampshire in 1952 he entered the practice of law with his father in Manchester and continues his partnership with him. He has also been a Representative in the State Legislature since 1954.

Pennsylvania, Eastern - Joseph S. Lord, III

Mr. Lord was born May 21, 1912 at Philadelphia, Pennsylvania, is married and has one daughter. He entered the University of Pennsylvania in 1929, received his A.B. degree on June 21, 1933 and his LL.B. degree on June 10, 1936. He was admitted to the Bar of the State of Pennsylvania in 1937. In 1936-37 he was law clerk to Judge Finletter of the Court of Common Pleas in Philadelphia. From 1937 to 1942 he was an attorney with the Philadelphia firm of Schnader, Harrison, Segal and Lewis. He served in the United States Navy from June 17, 1942 to December 16, 1945 when he was honorably discharged as a Lieutenant. He returned to the same firm for about a year and then became an associate of Mr. B. Nathaniel Richter and the firm is now known as Richter, Lord and Levy. He has also been a Commissioner for the Delaware River Port Authority of Pennsylvania and New Jersey since February 3, 1961.

South Dakota - Harold C. Doyle

Mr. Doyle was born November 25, 1926 at Yankton, South Dakota, is married and has three children. He received his LL.B. degree from the University of South Dakota on May 29, 1950 and also attended Creighton University and Northwestern University during the summer sessions of 1947 and 1950 respectively. He was admitted to the Bar of the State of South Dakota in 1950. He served in the United States Navy from December 13, 1944 to July 5, 1946 when he was honorably discharged as a Musician, Third Class. From April 1, 1955 to May 1959 he was City Attorney for Tabor, South Dakota and from January 1, 1956 to January 1, 1961 he was States Attorney for Yankton County, South Dakota. Since 1950 he has engaged in the practice of law with his brother in Yankton.

Tennessee, Middle - Kenneth Harwell

Mr. Harwell was born September 13, 1911 at Lenora, Tennessee, is married and has one son. He attended Southwestern State College at Weatherford, Oklahoma from September 1930 to September 1931. He served in the United States Army from February 8, 1933 to February 28, 1935 when he was honorably discharged as a Private. He then was a teacher in a rural school near Lenora for one year. He entered Cumberland University Law School in Lebanon, Tennessee on January 20, 1937 and received

his LL.B. degree on January 19, 1938 and his Law Certificate on January 20, 1939. During his student days he was employed in the legal office of Mr. William D. Baird in Lebanon. He was admitted to the Bar of the State of Tennessee in 1939. Since that time he has been a partner in the firm of Williams, Harwell, Howser and Thomas in Nashville with the exception of the period from June 18, 1942 to October 25, 1945 when he served again in the United States Army and was honorably discharged as a Master Sergeant.

Texas, Northern - Harold B. Sanders, Jr.

Mr. Sanders was born February 5, 1925 at Dallas, Texas, is married and has three children. He attended the University of Texas from September 1942 thru 1943. He served in the United States Navy from July 1, 1943 to July 18, 1946 when he was honorably discharged as an Ensign. He reentered the University of Texas and received his B.A. degree on August 30, 1949 and his LL.B. degree on August 31, 1950. He was admitted to the Bar of the State of Texas that same year. Since that time he has engaged in the practice of law with his father in Dallas. He has also served as a Member of the Texas House of Representatives in the 1953-1955-1957 sessions.

Texas, Eastern - William W. Justice

Mr. Justice was born February 25, 1920 at Athens, Texas, is married and has one child. He attended the University of Texas from September 18, 1937 to June 1, 1942 when he received his LL.B. degree. He was admitted to the Bar of the State of Texas that same year. He served in the United States Army from June 26, 1942 to May 27, 1946 when he was honorably discharged as a First Lieutenant. Since that time he has engaged in the practice of law in Athens and his firm is now known as Justice, Justice and Kugle. He also served as City Attorney for Athens from August 12, 1948 to April 10, 1950 and again from April 1952 to February 1958.

Texas, Southern - Woodrow B. Seals

Mr. Seals was born December 24, 1917 at Bogalusa, Louisiana, is married and has one son. He attended the University of Texas Law School from March 1, 1946 to January 21, 1949 when he received his LL.B. degree. He was admitted to the Bar of the State of Texas that same year. He served in the United States Army Air Corps from September 26, 1941 to February 24, 1946 when he was honorably discharged as a Captain. Since 1949 he has engaged in the private practice of law in Houston.

Texas, Western - Ernest Morgan

Mr. Morgan was born December 19, 1912 at Dilley, Texas, is married and has two children. He attended Southwestern University in Georgetown, Texas from 1930 to 1931; Southwest Texas State College in San Marcos, Texas from 1931 to 1933; and the University of Texas in Austin from September 20, 1933 to June 6, 1938 when he received his LL.B. degree.

He was admitted to the Bar of the State of Texas that same year. From January 1, 1940 to August 7, 1942 he was Finance Officer for the National Youth Administration in Austin. He served in the United States Army from August 22, 1942 to May 5, 1946 when he was honorably discharged as a Captain. Since that time he has engaged in the private practice of law in San Marcos, Texas. He has also been serving as city attorney for the town of Buda for the past ten years and for the towns of Kyle and San Marcos, Texas for the past seven years.

Virginia, Eastern - Claude V. Spratley, Jr.

Mr. Spratley was born February 10, 1917 at Hampton, Virginia, is married and has one son. He attended Hampden-Sydney College from September 1934 to June 1936. He then worked as a laborer at the Newport News Shipbuilding and Dry Dock Company from August 17, 1936 to June 7, 1937. He entered the University of Virginia at Charlottesville on September 17, 1937 and attended until 1940. He served in the United States Navy from October 14, 1940 to December 7, 1945 when he was honorably discharged as a Lieutenant. He returned to the University of Virginia Law School on November 2, 1945 and received his LL.B. degree on February 18, 1947. He was admitted to the Bar of the State of Virginia that same year. He then served as law clerk in the firm of Phillips, Marshall and Blalock in Newport News until June 1, 1948 when he became legal officer for Colonial Williamsburg, Inc. He has held this position to date with the exception of the period from August 17, 1951 to October 1, 1952 when he was recalled to active duty by the United States Navy and discharged as a Lieutenant Commander.

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

Nebraska - Theodore L. Richling
Pennsylvania, Middle - Bernard J. Brown
Virginia, Western - Thomas B. Mason
Washington, Eastern - Frank R. Freeman
Wyoming - Robert N. Chaffin

As of June 23, the score on new appointees is: Confirmed - 46; Nominated - 9.

JOB WELL DONE

The District Director, IRS, has commended Assistant United States Attorney William L. Bowers, Jr., Southern District of Texas, on the excellent manner in which he handled the taking of a deposition taken from the witness involved in a recent civil action. The letter stated that Mr. Bowers cheerfully cancelled important personal plans, worked long hours over the weekend, and devoted considerable additional overtime to studying this complicated case and preparing for the deposition.

The Chief, U.S. Secret Service, has commended Assistant United States Attorney Anthony R. Palermo, Western District of New York, for his excellent work in the prosecution of two defendants arrested by

the Service after passing a number of counterfeit $20 notes in the Rochester area. The letter stated that during the five-day trial Mr. Palermo presented 31 government witnesses and fifty exhibits, and that after deliberating 35 minutes, the jury returned a verdict of guilty against both defendants on all eleven counts of the indictment. The letter further stated that Mr. Palermo did an outstanding job both in the preparation and in the actual presentation of the Government's case during the trial; that his untiring efforts brought about the successful conclusion which was reached; and that the conviction of the two men will be a deterrent to counterfeit note passing activity in the Rochester area.

Assistant United States Attorney Daniel A. Becco, Northern District of Illinois, has been commended by the District Director, IRS, for his excellent cooperation with the agents of the Intelligence Division of the Service in preparing three complaints obtaining arrest warrants and coordinating their execution. The letter stated that time was of the essence in this matter and that Mr. Becco's prompt action made it possible to effect the arrests of four individuals who were allegedly conducting horse race bookmaking in the building housing the offices of the Internal Revenue Service. The letter further stated that Mr. Becco's actions are a fine expression of the cooperation so necessary in the success of any effective enforcement program.

The District Supervisor, Bureau of Narcotics, has commended Assistant United States Attorney John R. Hargrove, District of Maryland, for his work in a recent case involving the largest operation of cultivation, production and distribution of marihuana in Maryland history. The letter stated that the group convicted for conspiracy and possession of marihuana was a very important source for distribution to the Eastern Seaboard, and that Mr. Hargrove's intelligent efforts and painstaking and skillful prosecution of the case were a major contribution to the successful results.

The Director, General Regulatory Division, Department of Agriculture, has expressed appreciation for the work done by Assistant United States Attorney W. Francis Murrell, Eastern District of Missouri, in a recent case involving violation of the regulations concerning livestock inspection. The letter pointed out that the sentence under which the defendant was placed on probation for a period of two years, and was fined $500 and costs, was the most severe punishment meted out for this type of violation in the Eastern District of Missouri in recent years.

In a recent mail fraud case handled by Assistant United States Attorney Alfred Donati, Jr., Southern District of New York, conviction of all the defendants was obtained after a three-week jury trial. The presiding judge made reference to the very high standards displayed throughout the case by Mr. Donati and stated that the prosecution had been conducted by him with outstanding skill.

The Acting District Director, I & N Service, has expressed appreciation for the very able and efficient manner in which Assistant United States Attorney Elmer M. Walsh, Northern District of Illinois, secured the prompt dismissal of a recent court action. The presiding judge complimented Mr. Walsh on his work, and the officers of the Service generally on their handling of cases involving aliens.

The Chief Postal Inspector has expressed appreciation for the fine cooperation displayed by United States Attorney F. Russell Millin and Assistant United States Attorney J. Whitfield Moody, Western District of Missouri, in a recent mail fraud case relating to the sale of knitting machines for work-at-home purposes. The letter stated that although this was a difficult case to present, Mr. Moody's final summation presented the evidence in such an outstanding manner that the jury was thoroughly convinced of the guilt of the three defendants.

* * *

ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

CLAYTON ACT

Supreme Court Orders Divestiture. United States v. E. I. duPont de Nemours & Company, et al. In 1949, the United States filed a complaint which alleged, inter alia, that duPont's ownership and use of 23% of the outstanding stock of General Motors constituted a violation of Section 7 of the Clayton Act. In 1954 the district court dismissed the Government's complaint. In 1957, the Supreme Court reversed the district court, finding that a violation of Section 7 of the Clayton Act had occurred. The cause was returned to the district court for hearings on the form of relief which would be compatible with the court's decree.

At that hearing, counsel for the Government contended alternatively either that divestiture was mandatory after a finding that Section 7 had been violated or that the facts warranted no other course. Counsel for the defendants argued that the relief sought could be obtained by passing the vote of duPont's General Motors stock through duPont to its stockholders. Much of the hearing was devoted to the tax consequences of divestiture to duPont shareholders, and the market impact of divestiture on the shareholders of both duPont and General Motors. The district court accepted defendant's contention that divestiture would occasion disastrous and inequitable losses to the one million shareholders (with some overlap) of the two principal defendants. Accordingly, the district court ruled that the vote on duPont's shares attributable to its general shareholders should be "passed through" to such shareholders, but effectually disenfranchising those shareholders which the Government had alleged to be controlling. This, together with injunctive provisions looking toward independent business relations between duPont and General Motors, constituted the district court's final decree. The United States appealed.

Mr. Justice Brennan, speaking for a four-judge majority, (with Justices Frankfurter, Whitaker, and Stewart dissenting, and Clark and Harlan not participating) rejected the Government's contention that, in a district court case divestiture was mandatory after a finding that Section 7 had been violated. However, divestiture was found to be "peculiarly appropriate", the "natural", "traditional", "cleaner", "surer", and "simplest" remedy when a stock acquisition is the "heart" of the violation. In testing whether or not to apply this form of relief, the district court must first ascertain whether the alternative forms of relief suggested are "effective to redress [the] violation". And in considering the question the fact that divestiture may have a harsh impact upon defendants' stockholders is irrelevant; such matters can only be considered in choosing between effective means for correcting the illegal situation.

A pass through of the vote is not an adequate remedy, since

> . . .there can be little assurance of the dissolution of the intercorporate community of interest which was

> found to violate the law. The duPont shareholders will ipso facto also be General Motors voters. It will be in their interest to vote in such a way as to induce General Motors to favor duPont, the very result which we found illegal on the first appeal.

Nor did the Court feel that the pass through was saved by the district court's concomitant injunctions.

> Moreover, an injunction can hardly be detailed enough to cover in advance all the many fashions in which improper influence might manifest itself. And the policing of an injunction would probably involve the courts and the government in regulation of private affairs more deeply than the administration of a simple order of divestiture.

Finally the Court rejected a suggestion that duPont be permanently disenfranchised from voting the General Motors stock owned by it. The Court pointed out that as long as duPont owns the stock its power to transfer is alone a significant leverage device, and that permanent loss of the vote of 23% of the GM shares, would "not only" run directly contrary to accepted principles of corporate democracy but would make it easier for owners of other blocks of GM stock, well below a majority, to secure working control, perhaps raising new antitrust problems.

The Court therefore concluded:

> We think the public is entitled to the surer, cleaner remedy of divestiture. The same result would follow even if we were in doubt. For it is well settled that once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor.

We therefore direct complete divestiture.

The case was remanded to the district court with instructions that duPont was to submit a plan of divestiture within 60 days of the district court's order (to be issued on receipt of the Supreme Court's mandate); the plan to be effective within 90 days; and divestiture to be complete within 10 years thereafter. The Government was to comment on the duPont plan in 30 days and the district court to give precedence to the case on its calendar.

The case was argued for the Government by Mr. John F. Davis of the Solicitor General's office. On June 19 the Supreme Court denied duPont's application for a rehearing on the ten-year limitation for completion of divestiture.

Staff: Charles H. Weston, George D. Reycraft, Eugene J. Metzger, and Bill G. Andrews. (Antitrust Division)

SHERMAN ACT

Drug Association Found Guilty of Restraint of Trade. United States v. Northern California Pharmaceutical Association and Donald K. Hedgpeth. (N.D. Calif.). On June 16, 1961, the jury returned a verdict of guilty against both defendants. The indictment charged that defendants had engaged in a conspiracy with various co-conspirators to restrain the interstate commerce in prescription drugs in northern California. The conspiracy was effectuated by the use of a pricing schedule which was printed and distributed by the Association and which the Association's pricing committee, headed by defendant Hedgpeth, had formulated. The Association had also urged its members to use this schedule.

Trial commenced on May 31, 1961. Immediately prior to the commencement of trial, defendants moved to dismiss the indictment on the grounds of lack of interstate commerce, basing their arguments on the recent Supreme Court decision in Eli Lilly and Company v. Sav-On Drugs, Inc., et al. This motion was summarily denied by Judge Louis E. Goodman. The Government took five and a half days to present its evidence. Defendants then moved for a verdict of acquittal on the grounds that the prosecution had failed to present sufficient evidence for the case to go to the jury. This motion was denied, and the Court stated that in his opinion the Government's evidence was overwhelmingly sufficient for the case to go to the jury.

The defense introduced evidence for two and a half days. Much of the evidence they sought to introduce was excluded by Judge Goodman on the grounds that it was immaterial, irrelevant and incompetent to any issue of the case. This evidence related to the professional status of pharmacists, the history of the profession of pharmacy, and the nature of the professional education of pharmacists. In addition, defendants offered a survey of prescription drug prices, which had been made on their behalf to show non-uniformity of prices. This survey was excluded by the Court on the grounds that it was immaterial and irrelevant and also that it was hearsay and did not fall within any of the recognized exceptions to the hearsay rule.

Staff: Lyle L. Jones, Don H. Banks, Gilbert Pavlovsky and Robert W. Culver. (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General William H. Orrick, Jr.

SUPREME COURT

ATOMIC ENERGY ACT OF 1954

Atomic Energy Commission Not Required to Make Definitive Determination of Safety Prior to Issuance of Construction Permit for Nuclear Reactor. United States, et al. v. International Union of Electrical Workers, et al. (Supreme Court, June 12, 1961). Power Reactor Development Company was granted a construction permit by the AEC under Section 185 of the Atomic Energy Act of 1954 to construct a "fast breeder" reactor, the stated purpose being to demonstrate "the practical and economical use of nuclear energy for the generation of electrical energy." The proposed reactor will be the largest of its type in the United States and its site is thirty miles southwest of Detroit, Michigan. Before granting the construction permit, the AEC found "reasonable assurance in the record, for the purposes of this provisional construction permit, that a utilization facility of the general type proposed in the PRDC application * * * can be constructed and will be able to be operated at the location proposed without undue risk to the health and safety of the public." The construction permit was subject to the condition that a more extensive safety investigation, and a definitive safety finding, would have to be made before operation was permitted.

Several labor unions sought review of the AEC's order on the ground that the reactor, under present technological conditions, will be inherently unsafe and will place the members of the unions in serious danger. The Court of Appeals for the District of Columbia Circuit, one judge dissenting, set aside the grant of the construction permit. 280 F. 2d 645. It reasoned that, when read together, Section 182 of the Act, concerning the issuance of operating licenses, and Section 185, concerning construction permits, indicate that Congress intended the AEC to make a definitive finding that the "facility can be operated at the location proposed without undue risk" prior to issuance of a construction permit. Further, the Court of Appeals held that the Commission could not authorize the construction of a nuclear reactor near a large population center without compelling reasons for doing so.

The Supreme Court reversed, holding that the definitive safety determinations required for the issuance of an operating license were not required where only a construction permit was involved. The Court agreed with the Government that the Act and Commission's regulations were properly interpreted by the Commission to authorize a deferral of a definitive finding of safety. The Court accorded "to the Commission's interpretation of its own regulation and governing statute that respect which is customarily given to a practical administrative construction of a disputed provision." In addition, it was found persuasive that the administrative construction had repeatedly been brought to the attention of the Joint Committee of Congress on Atomic Energy, which oversees the operation of the AEC.

Justices Douglas and Black dissented, concluding that the statute, as illuminated by certain legislative history, required a definitive finding of safety at the construction permit stage. They were concerned that the Commission might be disinclined to refuse an operating license after it had permitted the expenditure of substantial sums to construct a facility.

Staff: Solicitor General Archibald Cox; Lionel Kestenbaum (Atomic Energy Commission)

COURTS OF APPEALS

ADMINISTRATIVE LAW

Plaintiffs Required to Exhaust Administrative Remedies Before Bringing Suit to Overturn Interstate Commerce Commission Decision. Neisloss v. Bush (C.A.D.C., June 8, 1961). Plaintiffs, stockholders of Alleghany Corporation brought suit in the district court for declaratory and mandatory relief against certain actions taken by the Interstate Commerce Commission. They alleged that the Commission had erred in holding that Alleghany was not required under Section 5(2) of the Interstate Commerce Act to obtain Commission approval of its acquisition of control of the New York Central System. They also claimed that they were aggrieved by Commission decisions which were the product of improper influences brought to bear on members of the Commission. The district court entered judgment dismissing the complaint for failure to state a claim upon which relief could be granted.

The Court of Appeals affirmed. At the outset, the Court ruled that the action could not be maintained as a suit to enforce a statutory right granted by Section 5(2) because that section merely authorizes the Commission to exercise its jurisdiction over certain transactions and neither commands the Commission to do so nor refers to stockholders in such a manner as to indicate that they have any enforceable rights correlative to the Commission's duties. The Court then went on to hold that the suit, viewed as an action to review administrative action, was, nevertheless, properly dismissed because plaintiffs had failed to exhaust their administrative remedies. The Court pointed out that plaintiffs had not availed themselves of the opportunity to petition the Commission under Section 5 (7) of the Act for relief from the allegedly unlawful acquisition and had not given the Commission the opportunity to consider the charges of improper conduct made against some of its members.

Staff: Robert W. Ginnane (Interstate Commerce Commission)

FEDERAL JURISDICTION

Suit to Enjoin Construction of Bridge Mooted During Pendency of Appeal by Completion of Construction. Pacific Inter-Club Yacht Assn. v. Morris, et al. (C.A. 9, April 10, 1961). Plaintiff brought suit against the Army's District Engineer and certain California officials to enjoin the construction of a bridge across Montezuma Slough, a navigable waterway

in California, which the Secretary of the Army had approved pursuant to 33 U.S.C. 525. The district court rejected plaintiff's attack on the constitutionality of 33 U.S.C. 525 as insubstantial, found no jurisdiction to supervise the District Engineer's behavior to ensure that he complied with the directives of the Secretary, and held that plaintiff did not have standing to urge that the construction of the bridge would obstruct navigation unreasonably. It dismissed the complaint for lack of jurisdiction.

Plaintiff appealed, but did not obtain a stay, as a consequence of which the bridge was constructed. The Court of Appeals dismissed the appeal as moot, holding that no continuing rights of plaintiff could be affected by a decision on the merits and that no important public questions were involved which would have an effect upon future cases.

Staff: Keith R. Ferguson (Civil Division)

FEDERAL PROCEDURE

No District Court Jurisdiction Over Counterclaim for Illegal Discharge in Suit by Government for Overpaid Allotments. Thompson v. United States (C.A. 10, May 9, 1961). The United States brought suit against defendant to recover for overpayments made to defendant's mother as a Class E Voluntary Allotment for which no deduction was made from defendant's pay. Defendant denied indebtedness and filed a counterclaim for having been illegally discharged from the postal service. The Government moved for and the district court granted summary judgment on defendant's counterclaim on the ground that the court did not have jurisdiction over the subject matter.

The Court of Appeals agreed with the district court that the latter lacked jurisdiction over the counterclaim because the counterclaim was neither "germane or reasonably incident to" the original suit nor did it present a question of law or fact involved in the original suit. However, the Court ruled that summary judgment was inappropriate and it therefore vacated the judgment and remanded with directions to dismiss the counterclaim.

Staff: United States Attorney Newell A. George;
Assistant United States Attorney George T. Van Bebber
(D. Kan.)

GOVERNMENT CONTRACTS

Bidder Held Bound by Bid for Surplus Manila Rope Nets Notwithstanding That Some Nets Were Not Made of Manila Rope. Dadourian Export Corp. v. United States (C.A. 2, June 5, 1961). The U. S. Army invited bids on a quantity of surplus cargo nets represented to be made of Manila rope. The general sale terms and conditions accompanying the invitation provided that failure to inspect would not constitute grounds for a claim or for the withdrawal of a bid, that property was offered

for sale "as is", and that the Government made no warranty as to quality or description of the property. Plaintiff, without making an inspection, tendered a bid of $30,893, accompanied by a $7,000 deposit, which was accepted. Before delivery plaintiff discovered that several of the nets were made of fiber rope which is substantially inferior to Manila rope. Plaintiff refused to accept the fiber rope nets, and demanded an adjustment in the price. Pursuant to the disputes clause of the contract, plaintiff unsuccessfully sought relief from the Contracting Officer and the Armed Services Board of Contract Appeals. After the Board's decision, the Government sold the nets for $7,830.87. None of the nets were described as made of Manila rope.

Plaintiff then brought suit in the district court under the Tucker Act for rescission and the return of its deposit. The Government counterclaimed for damages for breach of contract in the amount of $17,152.81 with interest. On cross motions for summary judgment, the complaint was dismissed and judgment was rendered in favor of the Government for the full amount of its claim, which included the expenses of the resale.

The Court of Appeals, one judge dissenting, affirmed the dismissal of plaintiff's complaint, but remanded for a trial of the issue of damages arising out of the Government's counterclaim. The Court rejected plaintiff's argument that there had been a mutual mistake of fact going to the identity of the subject matter of the contract, holding that the subject matter was nets and that the representation of Manila rope content was merely descriptive. Plaintiff was held to be bound by the terms of the contract that precluded avoidance of the contract on the basis of deficiencies in the merchandise which could have been discovered by inspection. The entry of judgment in favor of the Government on the counterclaim was reversed and remanded, however, for a trial on the question whether the Government had exercised reasonable care in the conduct of the resale. Specifically, the trier of fact will consider whether the Government should have offered the Manila rope and fiber rope nets separately for sale, and whether the resale had been unduly delayed.

Staff: United States Attorney Morton S. Robson;
Assistant United States Attorney Renée J. Roberts
(S.D. N.Y.)

SOCIAL SECURITY ACT

Court of Appeals Orders Remand for Taking of Additional Evidence as to Amount of Business Expenses Borne by Employee for Purpose of Determining True Amount of Wages Earned. Angell v. Flemming (C.A. 4, May 19, 1961). Plaintiff, a traveling salesman, brought suit to review a final decision of the Secretary that he was not entitled to social security benefits in 1956. In 1956, plaintiff had received weekly pay checks of $58.80, $60.00 less $1.20 social security tax. His employer computed the tax on the total amount of the weekly payment of $60.00. Plaintiff claimed that only $20.00 per week was his income and that the remaining $40.00 was for business expenses he incurred. The

referee determined that the entire $60.00 per week was income, and that therefore he had earned a sum greater than the benefits to which he would otherwise have been entitled plus $1,200, the maximum allowable earnings in order to receive full benefits. Plaintiff's motion for a remand for the taking of additional evidence was denied, and the Secretary's motion for summary judgment was granted.

The Court of Appeals reversed, holding that the case should be remanded to the Secretary for the taking of further evidence. The Court indicated that the referee's reliance on plaintiff's employer's method of computing the social security tax was arbitrary in the face of evidence that plaintiff actually had expenses and had borne them himself, and that plaintiff's employer had indicated that $40.00 of the weekly pay check was supposed to be reimbursement for expenses. The Court did not direct the entry of judgment in favor of plaintiff, however, for there had been no evidence adduced in the administrative proceedings as to the amount of expenses plaintiff actually incurred. It directed a remand for that purpose.

Staff: United States Attorney Joseph S. Bambacus;
Assistant United States Attorney Shanley Keeter
(E.D. Va.)

Inquiry Into Actual Nature and Value of Employee's Services for Purpose of Determining Whether Remuneration Constituted Wages Held Proper. Poss v. Ribicoff (C.A. 2, April 3, 1961; rehearing denied, May 1, 1961). Plaintiff performed stenographic and typing services for corporations of which her husband was secretary and a major stockholder. She worked without remuneration until 1953; thereafter she was paid $600 per year. In 1956 plaintiff's husband resigned as secretary and plaintiff was designated in his place at a salary of $4,200 per year. Their services to the corporation remained substantially unchanged. A referee of the Social Security Administration determined that the only "wages" paid plaintiff during 1956 and 1957 were $600 in 1956 and $300 in the first two quarters of 1957. The additional moneys, he found, were not wages paid for her services. The Appeals Council denied plaintiff's request for review. Suit was then brought in the district court pursuant to 42 U.S.C. 405(9). The district court granted the Secretary's motion for summary judgment.

The Court of Appeals affirmed, holding that the bona fides of the plaintiff's appointment as secretary and the actual nature and value of her services were relevant to a determination of whether the amounts she received were "wages" within the meaning of 42 U.S.C. 415(a). In addition the Court of Appeals agreed with the district court that the administrative findings of fact and the inferences drawn therefrom were supported by substantial evidence and were therefore conclusive.

Staff: United States Attorney Cornelius W. Wickersham, Jr.;
Assistant United States Attorney Malvern Hill, Jr.
(E.D. N.Y.)

DISTRICT COURTS

NATIONAL BANK ACT

Comptroller of Currency's Approval of Branch Bank Application Upheld as Not Arbitrary or Capricious. Community National Bank of Pontiac v. Gidney, et al. (E.D. Mich., May 12, 1961). Plaintiff brought this action to require revocation of the Comptroller of the Currency's approval of an application by the defendant bank to establish a branch bank in Bloomfield Township, Oakland County, Michigan, and to enjoin its further operation. Plaintiff contended that the approval violated 12 U.S.C. 36(c) because there was no necessity for such branch at the particular location and because the branch is not located in a village or city, in violation of the location restrictions of Michigan law. By virtue of its opinion of March 10, 1961, United States Attorneys' Bulletin, Vol. 9, p. 208, trial of the case was limited to the location question.

The Court determined that its function was limited to reviewing the Comptroller's determination of the location question under the standards set out in 5 U.S.C. 1009(e), and that it did not have the authority to decide the question de novo. The Court stated that if it were in error as to the limited scope of review, it would have found de novo that the area in question was not a village as that term is used in Michigan law, and, more specifically, is not an unincorporated village under the standard set out in Wyandotte Savings Bank v. State Banking Commissioner, 347 Mich. 33. However, the Court concluded that the definition of an unincorporated village in the Wyandotte case was extremely broad and left room for a reasonable difference of opinion when applied to a particular set of facts. Considering all the evidence introduced at the trial and before the Comptroller and applying it to the Wyandotte standard, the Court upheld the Comptroller's decision as neither arbitrary nor capricious nor an abuse of discretion or otherwise not in accordance with law.

Staff: Andrew P. Vance (Civil Division)

NATIONAL SERVICE LIFE INSURANCE

Minor Secondary Beneficiary Barred by Failure of Primary Beneficiary to Sue Within Period of Statute of Limitations. Philippine National Bank v. United States (D. D.C., May 29, 1961). The insured, a Philippine serviceman, died April 15, 1942, while covered by $5,000 gratuitous National Service Life Insurance. He was survived by a widow and a son (plaintiff's ward). Under the statute (38 U.S.C. (1952 ed.) 802(d)(2)), the son was only a secondary beneficiary for the insurance while the widow was the primary beneficiary. Although the widow remained alive during the seven-year period following insured's death, she neither sought the insurance at that time nor remarried. The Veterans Administration first received a claim from her on December 20, 1949. This was denied as not timely filed so far as the widow herself was concerned (filing of administrative claim within seven years is required by 38 U.S.C. (1952 ed.) 802(d)(5)), but it was accepted as a claim on behalf

of insured's son. Thereafter plaintiff, the legally qualified guardian, was awarded gratuitous insurance benefits on the son's behalf. After plaintiff had received installments totaling $4,077.40, the award was terminated on the ground that the failure of the widow to file timely claim prevented recovery by a secondary beneficiary. On demand, plaintiff repaid the $4,077.40 to the Veterans Administration. However, suit was filed on January 4, 1961, seeking resumption of the benefits. The son is still a minor.

The Government moved for summary judgment, urging that suit was barred by the statute of limitations. The statute of limitations (38 U.S.C. 784 (b)) requires such actions to be brought within six years after the serviceman's death, but also provides that persons suffering legal disabilities "shall have three years in which to bring suit after the removal of their disabilities." The Government urged that since the widow, as primary beneficiary, did not file an administrative claim within seven years, as required, and did not file suit within six years, as required, all claims for the gratuitous insurance were now necessarily barred, including a claim by a minor secondary beneficiary. Plaintiff argued that the son's minority prevented the running of limitations against him, and that upon the expiration of the seven-year filing period the right to claim the insurance passed from the widow to the son, since the widow was thereafter totally barred. On May 29, 1961, the District Court ruled in favor of the Government.

Staff: Peter C. Charuhas and David V. Seaman
(Civil Division)

STATE COURTS

WAGNER-PEYSER ACT

Labor Department Regulation Prohibiting Referral of Agricultural Workers to Struck Farms Held Valid. DiGiorgio Fruit Corp., et al. v. Department of Employment of State of California, et al. (Calif. Sup. Ct., May 29, 1961). Petitioners brought suits for writs of mandate to compel the California Department of Employment to refer agricultural workers to their fruit ranches during the 1960 harvest season. Pursuant to a regulation of the United States Secretary of Labor, 20 C.F.R. 602.2(b), issued under the Wagner-Peyser Act, 29 U.S.C. 49-49n, the Department had refused to refer workers to petitioners because a strike was in progress at petitioners' ranches. After refusing to permit the Secretary to intervene in support of his regulation, the trial court concluded that the regulation was invalid and entered judgment directing that a writ of mandate issue.

Initially, the Supreme Court of California denied a motion to dismiss the case as moot, notwithstanding the end of the 1960 harvest season, because the parties still had an interest in the legal issues involved and because of the public interest in the orderly operation of the employment service. The Court then went on to reverse the trial

court's decision on the merits, holding that the Secretary's regulation prohibiting the referral of workers to struck farms was authorized by the policy of the statute. The Court stated that the fact that the challenged regulation represented the consistent administrative construction of the statute of the agency charged with putting the statutory machinery in effect was entitled to great weight and that such a regulation would not be overturned unless "clearly erroneous."

The Secretary's appeal from the denial of his motion to intervene was dismissed. The Court ruled that, since he had been heard on the merits at the appellate level, he had not suffered any prejudice by not being allowed to intervene, and that, therefore, there was no point in determining whether the trial court had erred in denying his petition to intervene.

Staff: United States Attorney Laurence E. Dayton; Assistant United States Attorney Charles Elmer Collett (N.D. Cal.)

FOREIGN COURTS

SOVEREIGN IMMUNITY

Government Subject to Suit for Injuries Arising Out of Operation of Vehicle, Regardless of Purpose for Which Vehicle Is Used. Holoubek v. United States (Supreme Court of Austria, decided February 10, 1961, announced April 28, 1961). Plaintiff's automobile was hit by a United States Embassy car in Vienna, en route to the airport to collect mail for the Air Attaché. Plaintiff brought suit in the Landesgericht in Vienna. Without notice to the United States, the trial judge dismissed the case sua sponte on the ground that sovereign immunity existed where a governmental purpose existed for the activity which gave rise to the suit. The United States only learned of the suit after plaintiff had successfully appealed to the Oberlandesgericht.

On further appeal by the United States, the Supreme Court upheld the reversal of the trial judge's order of dismissal. In the Court's view, the so-called "restrictive theory" of sovereign immunity--whereby a foreign State can claim immunity from local jurisdiction only for acts performed in its sovereign capacity, jure imperii, but not for acts performed in a "private" capacity, jure gestionis--was to be applied by determining whether a private person could physically perform the act in question. The purpose of the act was said to be of no legal import. Here, the Court held, through the instrumentality of an Embassy vehicle, the United States had participated in ordinary city traffic--an activity in which any private person could engage--and it was therefore an activity for which it was subject to suit. The United States unsuccessfully argued that all "acts" of a government are ultimately describable in terms of the physical activity of individuals, so that there was no valid test apart from purpose.

Staff: Geo. S. Leonard and Bruno A. Ristau (Civil Division); Dr. Walther Kastner (Vienna, Austria)

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(Civil Division)

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Staff: United States Attorney Laurence E. Dayton; Assistant United States Attorney Charles Elmer Collett (N.D. Cal.)

FOREIGN COURTS

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Staff: Geo. S. Leonard and Bruno A. Ristau (Civil Division); Dr. Walther Kastner (Vienna, Austria)

Invocation of Sovereign Immunity Deprives All Local Courts of Jurisdiction; Direct-hire Employees Under NATO Status of Forces Agreement. Raynal v. Toul-Rosieres Officers' Open Mess (Court of Appeals, Nancy, France, Labor Section, May 18, 1961). In a suit against an American Officers' club and its manager for improper discharge, the Labor Court at Toul rejected the United States' plea of sovereign immunity on the grounds that article 169 of the French Code of Civil Procedure requires a litigant who challenges the jurisdiction of a labor court to name the competent tribunal to which the case can be transferred. Reversing the order, the appellate tribunal held that article 169 applies only to challenges of jurisdiction within the French judicial system. It does not apply to pleas of immunity interposed by a sovereign State, since in such a case, if the plea is valid, all French courts lack jurisdiction over the controversy. The Court was satisfied that the Officers' Club had no independent juridical personality under American law, and that therefore the suit was in effect one against the United States. Moreover, the Court held that plaintiff had no standing under article 9(4) of the NATO-SOF Agreement (4 UST 1792; TIAS 2846), since he was hired directly by the officers' club and not through "the assistance of the authorities of the receiving State." As a direct-hire employee, he was on notice that in the event of litigation he might be opposed by a plea of sovereign immunity.

Staff: Geo. S. Leonard and Bruno A. Ristau (Civil Division); Jean L. Sarrut, Esq. (Paris, France) and Claude Sicard, Esq. (Nancy, France)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959

Direct Referrals. Memo No. 277, containing instructions for United States Attorneys relating to the functions of the Department of Justice under the criminal provisions of the Labor-Management Reporting and Disclosure Act of 1959, has been revised. Pursuant to the revised instructions all criminal violations of the Act, with the exception of those involving membership in the Communist Party, shall be handled directly by the United States Attorney. Complaints alleging violations of those provisions which are investigated by the Federal Bureau of Investigation will be referred directly to the Bureau without the necessity for transmittal to the Criminal Division. United States Attorneys are authorized to determine whether such cases shall be prosecuted, without the necessity for prior consultation or approval of the Criminal Division. The United States Attorneys are further authorized to determine whether violations of the Act, which are also violations of state or local laws, should be prosecuted by local authorities or whether they warrant federal prosecution. The intention of these referrals is to permit local violators to be prosecuted by local authorities. However, in any instance where it is apparent that local authorities are reluctant to take action on such referrals, the United States Attorney should initiate federal prosecution in order to insure that the violation is not ignored.

Complaints received by United States Attorneys which allege violations of the Act which are investigated by the Department of Labor shall be referred directly to the nearest office of the Bureau of Labor-Management Reports, Department of Labor. Upon completion of the investigation of these cases they shall be referred directly to the appropriate United States Attorney who is authorized to determine whether the case shall be prosecuted.

The Criminal Division should be notified immediately upon receipt of any complaint which involves a labor organization, or an official thereof, appearing to be subject to racketeer influence.

REMOVAL ON BASIS OF INDICTMENT

Indictment Coupled with Proof of Identity is Sufficient to Establish Probable Cause for Removal; Not Subject to Attack in Removal Proceeding. A removal hearing under Rule 40(b)(3) and a preliminary examination under Rule 5(c) are for the identical purpose of establishing probable cause to hold a defendant to answer in further proceedings in the district court.

Under Rule 40(b) the indictment constitutes conclusive proof of probable cause to order removal and the only issue left open for determination upon removal hearing is the identity of the person apprehended.

Hemans v. Matthews, 6 F.R.D. 3; Singleton v. Botkin, 5 F.R.D. 173; United States v. Alvah Bessie et al., 75 F. Supp 95; and United States v. Fitch, 66 F. Supp. 206. See also Note to Rule 40, Rules of Criminal Procedure.

Even before passage of the Rules of Criminal Procedure, it was well established that in a removal hearing neither the Commissioner nor the judge in the apprehending district could go beyond the four corners of the certified copy of the indictment and conduct any type of hearing concerning its legality, whether it was properly returned, or enter into the merits of the case. See Fetters v. United States, 283 U.S. 638 at p. 641. Since Rule 40 has not modified this rule of law settled by the Supreme Court, the judge is precluded from reviewing the question of probable cause, following introduction of a certified copy of the indictment and proof of identity of the defendant. The production of a certified copy of the indictment, coupled with proof of identity mandatorily requires removal.

ELKINS ACT

Soliciting and Receiving Rate Concession by Misstating True Weights of Shipments; Failure of Railroad to Strictly Observe its Tariffs. United States v. Interstate Express Car Corporation and Ringsby Truck Lines, Inc.; and United States v. Chicago, Rock Island and Pacific Railroad Company (N.D. Ill.). Published tariffs of the above railroad on file with the Interstate Commerce Commission covered the movement of trailers on flat cars (so-called "piggy-back" service) a relatively new method of transportation. The two above corporations have been quite substantial operators in soliciting shipments in trailers by railroad as so-called "shipper's agents".

On March 21, 1961, the railroad pleaded guilty to five counts charging violations of the Elkins Act (49 U.S.C. 41(1)), by failing to observe strictly its published tariffs, in that the bills of lading issued in connection with the shipments referred to in the counts did not as required by the tariff, show (a) the endorsement "Shippers' load and count" and "Shippers' weight", (b) specify the tare weights of the trailers, and (c) certify that the contents of the trailers conformed to the weight limitations of the tariff. A total fine of $5,000 and costs was imposed which has been paid.

On March 6, 1961, a 15-count information was filed against the Interstate corporation for soliciting and accepting a rate concession by the device of understating the weights of the shipments referred to therein in violation of 49 U.S.C. 41(1) and against the Ringsby corporation as an aider and abettor. On May 2, 1961, both corporations pleaded guilty to 10 counts, the other five counts being dismissed. On these 10 counts the total of the understatements of weight came to about 245,000 pounds and the total concessions to about $2,800. Each corporation was fined $1,000 on each of the ten counts, said fines to be cumulative in the amount of $10,000 and $13 costs. On May 4, 1961, each paid the total fine of $10,000 and the costs. Total fines collected from the three defendants thus came to $25,000.

Staff: Assistant United States Attorney Robert F. Monaghan (N.D. Ill.).

MAIL FRAUD
(18 U.S.C. 1341)

Knitting Machine. United States v. Silverman, et al. (D. Minn.). On a plea of guilty to one count of mail fraud in operation of a knitting machine promotion in Minneapolis, Erwin Aloff was sentenced to three years' imprisonment. Harold Silverman, who with Aloff operated under the name American Fashions, Inc., also entered a guilty plea and will be sentenced later.

The scheme featured the typical pattern of high pressure sales of knitting machines at exorbitant prices through representations that American Fashions, Inc. needed home workers to knit products for which they had large orders; that earnings from use of the machine would pay for its purchase; and that the company would buy back all completed garments. None of these representations was true and housewives who had sought to supplement meager family incomes found themselves saddled with heavy installment payments on machines of no value for commercial production.

Staff: United States Attorney Miles W. Lord;
Assistant United States Attorney William S. Fallon (D. Minn.).

Vending Machine Scheme. United States v. Dominic Cashio et al. (E.D. La.). The description of this unique mail fraud promotion and the convictions of its operators are reported in the Bulletin issue of June 16, 1961, Volume 9, No. 12, page 363.

Dominic Cashio and Max A. Sanford have each been sentenced to two years' imprisonment. Carroll Wharton was committed for three months for study and recommendation under 18 U.S.C. 4208(b) after which he will be resentenced.

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

FRAUD

Wire Fraud; Horse Race Betting Scheme. Bagdasian v. United States (C.A. 4, May 29, 1961). The Court of Appeals affirmed the conviction on seven counts of an indictment charging violations of the fraud statute (18 U.S.C. 1343). The case had been tried by the United States District Court for the District of Maryland without a jury (188 F. Supp. 683), and sentence was imprisonment for one year on each count, the terms to run concurrently.

Defendant practised a classic scheme to defraud by falsely representing that he was employed as manager of a bookmaking establishment and was in the position to cheat his employers by placing bets on winning horses after races had been run. He obtained payment of five money orders in the sum of $8,500 from one victim. Another victim did not advance any money, although asked for $5,000, and did not receive any "winnings" which were represented as collected on his bets. The bets were placed by telephone from Virginia to a number in Maryland.

On appeal, the Fourth Circuit held that the indictment was legally sufficient, noting that it followed closely form 3 suggested in the Appendix of Forms of the Federal Rules of Criminal Procedure. The Court also held that the Judge was well justified in his view of the evidence that the plan to cheat the "employer" was a fiction held out to bait the victims, and that defendant's real scheme was to cheat them by pretending that he was in league with them to cheat someone else.

Staff: United States Attorney Joseph D. Tydings;
Assistant United States Attorney Robert E. Cahill
(D. Md.).

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Review of Deportation Order; Crime Involving Moral Turpitude - Disorderly Conduct. Hudson and Matos-Jordan v. Esperdy (C.A. 2; June 1, 1961). This was a consolidated appeal from a district court dismissal of the appellants' complaints for a review of deportation orders against them.

Each appellant had been ordered deported under 8 U.S.C. 1251(a)(1) and (4) in that he had been convicted of disorderly conduct as particularly defined in section 722(8) of the New York Penal Law. The dismissals below were on the authority of Babouris v. Esperdy, 269 F.2d 621, cert. den. 362 U.S. 913 and U. S. v. Flores-Rodriguez, 237 F.2d 405.

The Court of Appeals held that the action below was correct, but it limited its affirmance to the specific violation of sec. 722(8) in these cases defining a particular offense of loitering about a public place soliciting men "for the purpose of committing a crime against nature or other lewdness", and specifically did not hold that a conviction of other offenses under this very broad state statute is a ground for deportation.

The Court also turned aside as without merit contentions that its holdings in the cited cases conflict with the Fifth and Tenth Amendments.

Affirmed.

NATURALIZATION

Ineligible to Citizenship; Exemption from Military Service Under Treaty; Effect of Subsequent Voluntary Service. Cannon v. U. S., (C.A. 2; 288 F.2d 269; Mar. 27, 1961). Cannon, a petitioner for naturalization, had applied for and received exemption from service in our armed forces in 1952 pursuant to a treaty with Ireland. In 1954 he withdrew his claim for exemption, was reclassified I-A and in 1956 was inducted into the Army where he served honorably for two years.

His 1958 petition for naturalization was denied by the District Court (SDNY) in an unreported opinion on the grounds that he was ineligible to citizenship under 8 U.S.C. 1426(a) and that the statutory bar resulting from the exemption was not raised by his later withdrawal of the application for exemption and consequent induction.

The Court of Appeals in reversing adhered to its opinion in an earlier case, U. S. v. Hoellger, 273 F.2d 760 (See Bulletin, Vol. 8, No. 4, p. 109) in which it concluded that 8 U.S.C. 1426(a) contemplates "effective", i.e., permanent, relief from service. It found no valid basis for distinction in the fact that this petitioner's exempt status was voluntarily withdrawn whereas Hoellger's was not but was lost to him by the abrogation of his country's treaty.

The Solicitor General declined to petition for certiorari.

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Contempt of Congress Cases: On June 19, 1961, the Supreme Court granted certiorari in four contempt of Congress cases, Russell v. United States, Whitman v. United States, Liveright v. United States, and Price v. United States. In all of them, convictions for contempt had been affirmed by the Court of Appeals for the District of Columbia Circuit. See Bulletin 448 and 486. Whitman, Liveright, and Price involved the Senate Internal Security Subcommittee; Russell the House Un-American Activities Committee. On the same day the Court denied certiorari in Wheeldin v. United States, which came up from the Ninth Circuit, and which arose out of a refusal to appear before a subcommittee of the House Committee.

Contempt of Congress. Bernhard Deutch v. United States (S.Ct.) By a 5-4 vote on June 12, 1961 the Supreme Court reversed the judgment of the United States Court of Appeals for the District of Columbia Circuit which had upheld the conviction of petitioner for refusing, in violation of 2 U.S.C. 192, to answer five questions put to him by a subcommittee of the Committee on Un-American Activities of the House of Representatives, investigating Communist Party activities in the Albany, New York area.

In 1954 petitioner had been subpoenaed to appear before the Subcommittee holding hearings in Albany, New York; but at the request of his counsel it was agreed he could appear instead three days later in Washington, D.C. Accordingly, petitioner appeared in Washington and his interrogation began without any opening statement or explanation by the chairman or member of the committee as to the subject under inquiry. In response to questions, petitioner testified that he had been a member of the Communist Party and answered questions with respect to his own Party activities at Cornell University in Ithaca, New York; but he refused to answer five questions he was asked concerning other persons with whom he had been associating in such activities, giving as a reason his moral scruples against informing on another person. The record shows that the Albany hearings were conducted under Rule XI of the Standing Rules of the House of Representatives specifying the investigative authority of the Committee. At the opening of the 1953 Albany hearings the Chairman paraphrased this resolution and stated the purpose of the hearings was to investigate Communist Party activities within the Albany area, their nature, extent, character and objects. In opening the 1954 Albany hearings the Chairman stated that the subcommittee would "resume this morning the investigation of Communist Party activities in the capital area". He pointed out that the testimony at the 1953 hearings had related to the efforts of the Communist Party to infiltrate industry and other segments of society in the capital area, and "this committee is investigating communism within the field of labor where it has substantial evidence that it exists."

In Washington the chairman made no opening statement, and petitioner heard no other witnesses testify. Committee counsel simply advised the

petitioner that the committee had previously heard evidence regarding Communist activity at Cornell, and that he proposed to ask the petitioner "certain matters relating to your activity there." When the petitioner declined to give the names of other people, no clear explanation of the topic under inquiry was forthcoming.

The Court summarized the Government's proof and considered it in the light of the rules laid down in Barenblatt v. United States, 360 U.S. 109, and Watkins v. United States, 354 U.S. 178.

The Court pointed out that the statute (2 U.S.C. 192) defines the crime as refusal to answer "any question pertinent to the question under inquiry" and that due process requires that the pertinency of the interrogation to the topic under inquiry must be brought home to the witness at the time the questions are put to him. The Court felt that, while petitioner was not made aware at the time he was questioned of the question then under inquiry nor of how the question asked related to such a subject, the petitioner's objections were not such as to "trigger what would have been the subcommittee's reciprocal obligation had it been faced with a pertinency objection." Nevertheless, the Court concluded that petitioner should have been acquitted because the Government at the trial failed to carry its burden of proof as to what the subject under inquiry was and the pertinency of the questions. The Court added that "We do not decide today any question respecting the power or legislative purpose of this subcommittee" and that it did not reach petitioner's First Amendment claims "Our decision is made within the conventional framework of the federal criminal law."

Justice Harlan dissented in an opinion in which Justice Frankfurter joined on the ground that the petitioner's failure to object on grounds of pertinency left the Government at trial free to satisfy the requirement of pertinency in any way it chose, and that a proper showing of pertinency had been made.

Justice Whittaker, with whom Justice Clark joined, dissented in an opinion in which he said that the Court had "grossly misread" the record and that the petitioner was fairly advised of the subject under investigation.

Staff: The case was argued by Kevin T. Maroney (Internal Security). With him on the brief were Bruce J. Terris (Office of Solicitor General) and Robert L. Keuch (Internal Security).

Withdrawal of Security Clearance, Navy Installation. Cafeteria & Restaurant Workers Union, and Rachel M. Brawner v. McElroy, (S.Ct.) By a five-four vote on June 19, 1961 the Supreme Court affirmed the judgment of the United States Court of Appeals for the District of Columbia Circuit, upholding the authority of the Superintendent of the Naval Gun Factory, Washington, D.C., to withdraw summarily the indentification badge of Rachel M. Brawner, a short-order cook in a cafeteria operated by a private contractor at the Gun Factory. An identification badge was issued to persons authorized to enter the premises by the Security

Officer, a Naval subordinate to the Superintendent. Brawner was required to turn in her badge because the Security Officer found that she failed to meet the security requirements of the installation. She was thus denied access to the installation and her place of work.

Justice Stewart, delivering the Court's opinion, stressed that control of access to a military base is within the Constitutional power of Congress and the President; by statute the Secretary of the Navy has custody and charge of Navy property and authority to promulgate regulations for the government of his department; and duly approved Navy regulations delineated the traditional responsibilities and duties of a commanding officer. The Court's decision was premised upon the finding that the Constitution, statutes and regulations explicitly confer upon the Superintendent in the exercise of his traditional command responsibility the power summarily to deny Brawner access to the Gun Factory.

In the opinion of the Court, the Superintendent's action did not violate the requirements of procedural due process under the Fifth Amendment, because under the circumstances of this case notice and hearing were not required. Brawner was not deprived of a right to follow a chosen trade or profession, but was free to obtain employment elsewhere. All that was denied her was the opportunity to work at one isolated and specific military installation. In the words of the Court, "This is not a case where government action has operated to bestow a badge of disloyalty or infamy, with an attendant foreclosure from other employment opportunity." Because of the nature of the private interest impaired and the Government power exercised, this case is distinguished from Greene v. McElroy, 360 U.S. 474, 364 U.S. 813, and other cases relied on by petitioner.

Staff: The case was argued by Mr. John F. Davis (Office of Solicitor General). With him on the brief were Bruce J. Terris (Office of Solicitor General), Kevin T. Maroney, Lee B. Anderson, and Irma M. Lang (Internal Security).

Navy Discharge: Confrontation in Administrative Proceedings, Bland v. Connally (C.A. D.C. June 15, 1961). In 1942 appellant Bland was commissioned as an officer in the Naval Reserve and called to active duty. He was separated from active duty "under honorable conditions" in 1946 and transferred to the inactive reserve. In 1955, the Navy sent Bland a memorandum charging that he had been a member of the Communist Party from 1947 to 1950, and had belonged to various allegedly subversive groups in subsequent years. The memorandum advised him that failure to respond to the charge and the interrogatory included therein would be considered as an admission of the truth of the assertions. Bland refused to respond to either, and demanded and was accorded a hearing before a field security board. The Navy adduced no evidence and appellant declined an opportunity to produce witnesses in his own behalf. Upon the findings of this board it was recommended that Bland be discharged "under conditions other than honorable". The Commandant of the Naval District approved the recommendation, and such a discharge to appellant was issued. Appellant sued in the United States District Court for the Southern District of California, to enjoin these administrative proceedings, but an injunction was denied

and the Court of Appeals affirmed. Then appellant applied to two Navy review boards for change in the character of his discharge to "honorable". Both boards declined, and he filed suit against the Secretary of the Navy in the District Court for the District of Columbia in December 1959, seeking a judgment directing the issuance of an honorable discharge. The District Court granted the Government's motion for summary judgment (8 Bull.)

The Court of Appeals speaking through Judge Washington, summarily rejected the Government's contention that the California decision was res judicata and barred the instant suit. Bland had failed to exhaust his administrative remedies before bringing the California suit, the Court said, and thus that suit would not preclude a suit against the ultimate authority - the Secretary of the Navy - after Bland had exhausted his administrative remedies.

Reaching the merits, the Court held that Greene v. McElroy, 360 U.S. 474, bound it to refrain from deriving by implication authority to sustain administrative actions in the area of national security which raise serious constitutional questions. The Court found no statute purporting expressly to vest in the Secretary authority to issue a punitive discharge to an inactive reservist on the basis of secret information relating to his associations subsequent to separation from active duty, nor did it find such authority even by implication.

The Court felt that it must assume the Navy's right to separate any member for any cause and without hearing through a non-derogatory "honorable" discharge. What was at stake, the Court continued, was merely the Navy's right to label, and not its right to secure itself against subversives. Thus the position of Bland was much stronger than Greene's, for in the contest between a legitimate government interest and a legitimate private interest, the balance to be struck in this case is tipped even farther in the individual's favor because the government can protect completely its interest in the integrity of the defense establishment by effecting an "honorable" separation without inflicting injury upon the person discharged.

In remanding, the Court indicated that Bland would be entitled to have the discharge he has been given declared to be void and to insist that any further administrative proceedings against him be conducted with the procedural safeguard of confrontation.

Staff: Kevin T. Maroney and Samuel L. Strother (Internal Security).

Army Discharge; Failure to Disclose Pre-Induction Conduct; Confrontation. Davis v. Stahr (C.A. D.C. June 15, 1961). In 1950, appellant Davis was inducted into the United States Army as a draftee. Two years later he was honorably separated from active duty and transferred to the Ready Reserve. In 1956, the military authorities sent Davis a letter setting forth certain derogatory information concerning his activities and associations, and advising him that failure to respond might be deemed an admission of the truth of the charges. Appellant replied by demanding a hearing before a field Board of Inquiry, with confrontation of any and all persons whose testimony or statements might be used against him. A Board was convened, and at the hearing the Government presented no witnesses.

Davis declined to take the stand and offer evidence in his behalf. The Field Board findings related to (1) Appellant's pre-induction contacts and associations; (2) his post-induction failure to disclose such pre-induction conduct in filling out Form DD 398 (Statement of Personal History) and insertion of the word "none" in response to a question concerning possible subversive associations on a Form DD 98 (Loyalty Oath); and (3) his refusal to answer questions, at an interview while he was a reservist, relating to his pre-induction associations and to subversive statements he allegedly made while on active duty. Some months after the hearing, Davis was issued an undesirable discharge. Upon his subsequent application for a favorable discharge, the Army Discharge Review Board refused that relief but did change the discharge to a "general (under honorable conditions)" one. The Board for Correction of Military Records refused to change the character of the discharge to "honorable". Davis brought suit in the district court against the Secretary of the Army. Upon Davis' appeal from an order granting the Government's motion for summary judgment, the Court of Appeals remanded because a genuine issue of material fact was present: whether or not the Army acted solely on the basis of appellant's military record. The findings of the Field Board and an affidavit from the Chairman of the Army Board for Correction of Military Records were then made a part of the record. The affidavit recited that appellant's pre-induction conduct "did not constitute any basis for the board's action in arriving at a final determination on Mr. Davis' application." On consideration of the record as so supplemented, the district court granted the Government's renewed motion for summary judgment. (8 Bull. 486)

In reversing the district court, the Court of Appeals in an opinion by Judge Washington held that since the pre-induction conduct had been stricken from consideration, the Board would hardly be entitled to consider, an independent ground, the failure to disclose such conduct. Since pre-induction conduct, according to Harman v. Brucher, 355 U.S. 579, is irrelevant to the character of the discharge, the Court reasoned that the issuance of a less than honorable discharge upon the basis of failure to disclose such conduct would amount to giving weight to irrelevant matters, and such consideration was not authorized by virtue of an Army regulation permitting consideration of failure to answer pertinent questions. It would, as well, allow the prohibition of Harman v. Brucher to be circumvented by indirection. With such failures to disclose subtracted from the Board's consideration, all that remained to support the determination, in the Court's view, was the allegation that appellant had made derogatory remarks about the United States and the Government, and that he refused to discuss those remarks during an interrogation. The Court held that this ground was not a proper one on which to base a discharge from the inactive reserve, at least without permitting Davis to confront his accusers. On the authority of Greene v. McElroy, 360 U.S. 474, and the Court's own decision that same day in Bland v. Connally (supra), the Court held that any cancellation of the right of confrontation, where its denial could be so prejudicial, must come from Congress and must be explicit. Explicit Congressional

authorization for the denial of the right of confrontation being absent, the Court reversed and remanded the case for further proceedings not inconsistent with its opinion.

Staff: Kevin T. Maroney and Samuel Strother (Internal Security).

The Stowaway Statute, 18 U.S.C. 2199: Self Incrimination. Buenaventura v. United States; Suente v. United States. (C.A. 9, May 31, 1961) Appellants were apprehended aboard a U.S.N.S. vessel en route to Guam, and delivered to the Immigration Service upon arrival there. They were charged in identical two-count informations with unlawfully entering the Guam Defensive Sea Area in violation of 18 U.S.C. 2152 (a felony) and with being stowaways in violation of 18 U.S.C. 2199 (a misdemeanor). Appellants moved to dismiss the counts relating to breaching the Defensive Sea Area on the grounds that the Executive Order establishing the Defensive Sea Area was invalid. At the hearing on the motion, the district judge asked whether appellants were arrested on the high seas and whether they were in custody when they entered the Defensive Sea Area. The U. S. Attorney was unprepared at the time to answer these questions and, after some discussion, the judge suggested that appellants be given the opportunity to take the stand, and called them to testify as to where they had been apprehended. Over objection of counsel, both appellants took the stand and stated in answers to the court's questions that they had been placed in custody three days before the ship reached Guam. Additionally, appellant Buenaventura stated that he was a stowaway. On the basis of these statements, the court dismissed the count relating to the Defensive Sea Area as to both appellants on the grounds that no offense had been committed under 18 U.S.C. 2152 since appellants were in custody when they entered the Defensive Sea Area.

Appellants subsequently made a motion to dismiss the remaining counts on the grounds that they were required to incriminate themselves. Although there is only one district judge assigned to the District of Guam, this motion was heard by a judge sitting in Guam during the absence of the district judge. The motion was denied on the grounds that no prejudice had been shown, and that the proper time for such an objection would be when and if the prosecution attempted to enter the incriminating statements at the trial. The cases were set for trial, and appellants were tried by the court without a jury with the district judge presiding. Appellants renewed their motion to dismiss because of the prior action of the district judge in taking their testimony and moved, in the alternative, for a continuance until the matter could be heard by another judge. Both motions were denied and the trial proceeded. Uncontradicted evidence, including confessions made by appellants to an immigration officer at the time the ship docked at Guam, was entered establishing the fact that appellants had been stowaways. The testimony given by appellants at the hearing on their first motion to dismiss was not offered or received as evidence. Appellants did not take the stand and no evidence was offered on their behalf. The court found both appellants guilty.

The Court of Appeals (opinion by Circuit Judge Hamlin) affirmed the convictions. The Court stated that the action of the district judge in questioning the appellants was improper and should not have occurred. However, the Court found that appellants were not prejudiced and that a reversal of the convictions was not necessary. The Court stated that uncontradicted evidence established "without question" the guilt of each appellant and, pointing out that in almost every case where a trial is before a judge without a jury the judge may receive, during the course of the trial, information (including confessions) which is decided not to be legally admissible and which is not received in evidence, the Court observed that a trial judge can and must separate such evidence from that which has been legally admitted. Accordingly the Court of Appeals felt that appellants had not suffered substantial injustice.

Staff: The appeal was argued by Robert L. Keuch (Internal Security) With him on the brief were Kevin T. Maroney (Internal Security) and United States Attorney Herbert G. Hoenne, Jr. (Guam)

Subversive Activities Control Act of 1950; Communication of Classified Information by Government Officer or Employee. United States v. Irvin C. Scarbeck (Dist.Col.) On June 19, 1961, a grand jury in the District of Columbia returned a one count indictment charging Irvin C. Scarbeck with a violation of 50 U.S.C. 783(b) which makes it a crime for any officer or employee of the United States to furnish classified information to any agent or representative of a foreign government without proper authorization. The indictment specifically charges that on a day between January 1, 1961 and May 30, 1961, Scarbeck who was the Second Secretary, General Services Officer, of the United States Embassy at Warsaw, Poland, did communicate to representatives of the Peoples Republic of Poland, classified information, to wit, Foreign Service Dispatch No. 344 dated January 13, 1961, entitled "An Examination of U.S. Policy Toward Poland During the Past Four Years" without specific authorization.

Scarbeck had previously been arrested by agents of the FBI on June 13, 1961 in the District of Columbia. He waived a preliminary hearing before the Commissioner and was bound over for the grand jury under $50,000 bond. At the time the indictment was returned, he was incarcerated in the District of Columbia jail.

Staff: Paul C. Vincent (Internal Security Division)

Unlawfully Entering Restricted Area and Boarding U.S. Submarines. U.S. v. Victor Richman, et al. (D. Conn.) Members of the Committee for Nonviolent Action, a pacifist organization, have for some time been engaged along the Eastern seaboard in unlawful demonstrations protesting the launching of U.S. missile-firing submarines. As a result of these repeated activities eight individuals were indicted in December of 1960 for violations of regulations issued pursuant to 50 U.S.C. 191 and 797 by entering a Coast Guard restricted area and by boarding a submarine. Thereafter, as a result of similar activities on two more occasions by

some of these same individuals, another indictment and an information charging violations of the same statutes were filed. Two defendants entered pleas of guilty. The cases were combined for trial and on May 22, 1961 all other defendants were found guilty. On June 19, 1961 the Court sentenced six of the defendants to prison terms of 90 days or less; one defendant was sentenced to an indefinite prison term carrying a maximum of four years and one defendant received a sentence of one year which was suspended.

Staff: Special Assistant to the United States Attorney John P. Diuguid and former Assistant United States Attorney Hadley W. Austin. (D. Conn.)

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Repurchase Priority of Surplus Property Act of 1944 Was Temporary. Harrison v. Phillips (C.A. 5, May 9, 1961). Plaintiff sought a judgment declarative of his right to repurchase realty from the United States in an action against the Regional Commissioner of the General Services Administration. Federal officers were alleged to have represented in 1944, the time of purchase, that under the Surplus Property Act of 1944, plaintiff would have the right to repurchase if and when the realty ceased to be used by the Government and was declared surplus. The property was declared surplus in 1960 and offered for sale by public auction. Plaintiff was informed that repurchase was no longer a right because the Federal Property and Administrative Services Act of 1949, continued priorities only until December 31, 1949.

The district court dismissed the action upon the ground that the complaint did not state a claim upon which relief could be granted. 185 F. Supp. 204. It reasoned that the 1944 Act gave only a temporary privilege to repurchase which expired by its own terms in 1949; that no federal officer had authority to bind the United States to the contrary; and that the parol evidence rule prevented proof of representations varying the fee simple title conveyed to the United States.

The Court of Appeals affirmed per curiam, expressing "agreement with the conclusion reached by the district court * * *."

Staff: Raymond N. Zagone (Lands Division).

Condemnation: United States Liable for Interest on Deposit Where Distribution is Delayed by Assertion of Title by United States. Bishop v. United States, 288 F. 2d 525 (C.A. 5, 1961). Land formerly owned by the United States was condemned. Distribution of the deficiency award plus interest was delayed upon the Government's motion and amended complaint that at all pertinent times title was in the United States. The Government therefore claimed the fund on deposit plus estimated compensation previously disbursed to the appellant. The district court's order of April, 1956, sustaining the Government's claim of title was reversed on appeal. 266 F. 2d 657. In September, 1959, the district court disbursed the fund on deposit, but denied interest for the period of April, 1956, to September, 1959.

On the landowner's appeal, the Government contended that the United States is not liable for interest on an award deposited in a court registry where the delay in distribution is a result of a contest as to title between the United States and the landowner. It argued that payment into court by the United States as condemnor stops the running of interest; the United States may oppose distribution upon the ground that the party

seeking the deposit does not have title; the United States can assert title to be in itself in a condemnation action; United States v. 93.970 Acres in Cook County, 360 U.S. 328 (1959); and any other unsuccessful claimant to the deposit in the same circumstances would not be charged interest for the distribution delay where that claimant does not have use of the fund during the delay.

The Court of Appeals reversed, allowing interest during the period of delay on the ground that the deposit was not available to the landowner as required to stop the running of interest because the United States itself in effect withdrew or froze the deposit. While the decision is believed to be erroneous, certiorari will not be sought in this case.

Staff: Raymond N. Zagone (Lands Division).

Cabinet Officer May Not Be Sued in Official Capacity Outside District of Columbia. Martinez v. Seaton, 285 F. 2d 587 (C.A. 10, 1961), cert. den. June 5, 1961. Plaintiff filed an action in a federal district court seeking a judgment declaratory of her tribal status and right to benefits, and another action, sounding in tort, in a state court. The Secretary of the Interior, who was personally served while visiting Denver, Colorado, and an Indian tribe were named defendants. Jurisdiction in the first case was alleged to be based upon diversity of citizenship. The second case was removed to the federal district court, where plaintiff moved to add the United States as a party defendant. The district court dismissed both actions.

The Court of Appeals affirmed, holding "the service of summons upon a cabinet officer within the territorial jurisdiction of a court outside the District of Columbia will [not] confer jurisdiction upon such court over him in his official capacity." Refusal to add the United States in the second case was approved because state courts do not have jurisdiction of claims based upon the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 1402, and the federal district court, to which the action was removed, could derive no jurisdiction. As to the tribe, the second case was remanded to the state court for determination of plaintiff's rights under state law. Plaintiff's petition for certiorari in the first case has been denied.

Staff: Raymond N. Zagone (Lands Division).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

IMPORTANT ANNOUNCEMENTS
Arguing Merits of Tax in Collection Suits

Reference is made to the previous item found in United States Attorneys Bulletin, Vol. 8, No. 13, p. 420, dated June 17, 1960.

The Tax Division, together with the Internal Revenue Service, has exhaustively examined the District Court's holding in United States v. Briglia, 182 F. Supp. 271 (S.D. N.Y.) and certain statements contained in the Second Circuit's opinion in Pipola v. Chicco, 274 F. 2d 909, to the effect that an assessment is conclusive and may not be contested by the taxpayer in suits brought by the Government seeking foreclosure of its liens or to obtain judgment for the taxes owed. It has been concluded that the Government will not advance the argument that the assessment is conclusive in those cases in which the Government seeks foreclosure of its lien against property of the taxpayer or asks the Court to enter a judgment for taxes against a delinquent taxpayer. (See Damsky v. Zavatt, ____ F. 2d ____, 7 AFTR 2d 1017, decided April 3, 1961.) This is in accordance with the position taken by the Government and adopted by the Court of Appeals for the Second Circuit in United States v. O'Connor, ___ F. 2d ____, 7 AFTR 2d 1541, decided June 5, 1961. (See synopsis below.)

Briefing and Argument of Appeals in Criminal Tax Cases

Except when specifically advised to the contrary, the United States Attorneys will brief and argue criminal tax cases in the Courts of Appeals. The Manual (Title 6, p. 8.1)states:

> "In all such instances, a draft of the Government's brief should be submitted to the Department far enough ahead of the due date to give sufficient time for adequate review by the Tax Division."

This sentence has been quoted in full since in the past it has been frequently overlooked. For the future, it is hoped that all United States Attorneys will impress upon their staffs, the necessity of complying with the instruction. The review by the Department will have three objectives: First, to avoid, if possible, the occasional embarrassment which has occurred in the past of confession of error in the Supreme Court of the United States by earlier admission of error. Second, to coordinate the Government's position on points of law in the several courts of appeal. Third, to identify those cases where the Government's statement of the facts is thought to be inadequate and, hopefully, to put the Department in a position to make any helpful suggestions it may have. Five points should be borne in mind: (1) The Department should be notified immediately when an appeal is taken. (2) A copy of the transcript should be sent promptly

to the Department. (3) If the circuit is one which requires a printed record, a copy of the printed record should be transmitted to the Department as soon as received. (4) A copy of the appellant's brief should be sent to the Department upon its receipt. (5) The draft of brief prepared by the U. S. Attorney should be submitted in "sufficient time for adequate review" prior to the due date of the brief. What is "sufficient time for adequate review"? That will vary with the individual case, but as a general rule two days in addition to mailing time would appear to be the minimum. Where necessary, an extension of time should be requested from the court of appeals.

CIVIL TAX MATTERS
Appellate Decisions

Excess Profits Taxes, Korean War Law; Income From Sale of Manufactured Products Cannot Constitute Income From "Exploration, Discovery, or Prospecting" so as to Qualify for Korean War Excess Profits Tax Relief as "Abnormal Income" Under Section 456. Jarecki v. G.D. Searle & Co., Polaroid Corporation v. Commissioner (Supreme Court, June 12, 1961). During the years subject to the Korean War excess profits tax, Searle derived income for the sale of two patented drugs produced as the result of extended research and development. During the same period, Polaroid similarly derived income from the sale of two patented products, developed by it as the result of extended research and development. Each taxpayer claimed Korean War excess profits tax relief under Section 456 for "abnormal income" attributable to other years, asserting that the income in question constituted income from "discovery" within the class of abnormal income specified in Section 456(a)(2)(B), i.e., income resulting from "exploration, discovery, or prospecting".

It was of course possible to take the view, as had the Seventh Circuit in Searle, that the bare terms of the statute permitted the conclusion that income from the sale of a new product or invention resulting from research and development could qualify under the statute as income from "discovery", in one of the dictionary meanings of that word. However, the First Circuit in Polaroid, upon the basis of the extensive legislative history shown by the Government, had concluded that the phrase "exploration, discovery, or prospecting" was used in Section 456(a)(2)(B) to refer only to the natural resources industries.

The Supreme Court, agreeing with the First Circuit, upheld the Government's position in both cases and held that income from the sale of the products in question could not qualify for relief under Section 456(a)(2)(B), as income resulting from "exploration, discovery, or prospecting". The Court pointed out that that phrase had been used in the tax laws since 1918 always with reference solely to the extractive industries; that while the corresponding World War II "abnormal income" relief provision (Section 721(a)(2)(C) of the Code) had included income from the sale of products resulting from research and development, Congress in the Korean War law -- consistently with other basic changes it then made with respect to the

grant of excess profits tax relief -- had deliberately eliminated income of that character from the classes accorded relief as "abnormal income" under Section 456.

In this connection, attention is invited to the fact that -- unlike the situation with respect to determinations as to relief under the World War II Excess Profits Tax Law, which by reason of the prohibition contained in Section 732(c) were not reviewable by any court other than the Tax Court (without any appellate review) -- determinations by the Commissioner under the excess profits tax relief provisions in the Korean War law will be fully reviewable in the courts.

Staff: Wayne G. Barnett (Office of the Solicitor General)
Harry Marselli and Norman H. Wolfe (Tax Division)

Liens: In Suit Under Section 7403 Of Internal Revenue Code of 1954, Taxpayer May Challenge Merits of Assessment Underlying Asserted Tax Lien. United States v. Raymond A. O'Connor et al. (C.A. 2, June 5, 1961). On September 12, 1951, the Commissioner made jeopardy assessments against Raymond O'Connor and his wife for deficiencies in income taxes, fraud penalties and interest for the years 1943-1949. Later, Raymond and his wife filed a petition in the Tax Court requesting a redetermination of the deficiencies and penalties but did not file a bond to stay the collection of the tax as permitted by §273(f) of the Internal Revenue Code of 1939. The Commissioner answered and taxpayers replied, but no further proceedings were had. On August 4, 1952, the Commissioner made transferee assessments against Elizabeth F. Fitzpatrick as the alleged transferee of certain real property deeded to her by Raymond's wife on July 31, 1951. On August 23, 1957, just before the six-year statute of limitations would have run on the O'Connor assessments, the Government brought this action under §7403 of the Internal Revenue Code of 1954 to enforce its liens against the assets of the defendants, and in conjunction therewith made application for the appointment of a receiver.

The Government's complaint sought a personal judgment against the O'Connors for the amount assessed; the setting aside of the transfers to Mrs. Fitzpatrick; judgment against Raymond as executor of her estate for the amount of the transferee assessment; determination of the validity and priority of all liens and claims with respect to the O'Connors's properties; sale and distribution to satisfy the liens; and finally the appointment of a receiver to enforce the Government's liens against the properties of the O'Connors with the powers of a receiver in equity. Annexed to the complaint was a certificate of the Commissioner filed pursuant to §7403(d) that appointment of a receiver for the O'Connors was in the public interest.

On appeal from the district court's order appointing the receiver taxpayers urged, among other things, that the appointment of a receiver with the power to seize and sell their property upon approval by the district court, without the Tax Court's having finally determined the extent of their liability, constituted a deprivation of property without due process of law. As buttressing support for this argument, taxpayers relied on the Second Circuit's decision in Pipola v. Chicco, 274 F. 2d 909 (1960), which

was an action by purchasers of real estate under 28 U.S.C. §2410(a) to cancel a Government tax lien against their grantor as erroneously assessed, in which the Government argued, and the Court reluctantly accepted, on the authority of certain statements contained in Bull v. United States, 295 U. S. 247, 259-261, that the taxpayer-grantor could not have contested the merits of the assessment in a suit brought by the Government to enforce a tax lien, hence, a fortiori the grantee in an action brought under §2410(a) could not.

In response to taxpayers' reliance on Pipola, the Government, after further research, concluded that it erred in arguing to the Court in Pipola that in a suit under §7403 a taxpayer may not challenge the merits of the assessment underlying an asserted lien and asked the Court in O'Connor to reconsider the proposition that the merits of an assessment are beyond the scope of a suit brought by the Government under §7403 to enforce its tax liens.

Upon reconsideration, the Court, speaking through the judge who had written the decision in Pipola, overruled those statements in Pipola reflecting its acceptance of the Government's argument as referred to above. Pointing out that their decision to overrule these statements was supported by the legislative history of §7403 and a long line of judicial decisions, the Court concluded that ". . . when the Government seeks the aid of the Courts in enforcing the assessment in any form, it opens the assessment to judicial scrutiny in all respects."

Staff: United States Attorney Neil R. Farmelo (W.D. N.Y.); Richard M. Roberts, James P. Turner and Robert W. Kernan (Tax Division)

District Court Decision

Tax Liens - Priority - Mechanic's Liens - Assignment. Randall v. Colby, 190 F. Supp. 319 (N.D. Iowa), 7 AFTR 2d 432, 61-1 USTC Par. 9178. The owner of a tract of land contracted with the taxpayer-corporation to build a warehouse. Taxpayer failed to pay two subcontractors for materials furnished. Both subcontractors filed mechanic's liens against the property of the owner, but one was not filed within the time prescribed by statute. Taxpayer gave an assignment to a bank for the sum due it under the building contract on a date subsequent to the assessment of the tax but before the notice of tax lien was filed.

Held: 1. Under Iowa law, the owner may properly pay unpaid subcontractors and materialmen from funds withheld from the contractor under the contract. A contractor who has not paid materialmen has no interest in the withheld fund where the contract provided that materialmen must be paid. Accordingly, there was no property interest of the taxpayer-contractor to which the tax lien could attach. The properly filed mechanic's lien was held to be a first lien upon the retained fund.

2. Because the second subcontractor failed to perfect his mechanic's lien as required under state law, he had no absolute right to the withheld funds. The federal tax lien was held to be superior and prior to the claim of the subcontractor to any residue remaining from the withheld fund after the first perfected mechanic's lien had been satisfied.

3. The bank which took an assignment from the contractor-taxpayer to its right to the retained funds was held to be neither a purchaser nor a pledgee under Section 6323 of the Internal Revenue Code of 1954 and its claim to the residue was therefore inferior to the federal tax lien which arose prior to the assignment but was filed at a subsequent date.

Staff: United States Attorney F. E. Van Alstine (N.D. Iowa); Edward A. Bogdan, Jr. (Tax Division)

Criminal Tax Matters
Appellate Decisions

Time for Taking Appeal in Criminal Case Where Motion in Arrest of Judgment Has Been Filed After Entry and Acceptance of Nolo Contendere Plea. Lott v. United States (Supreme Court, June 12, 1961). A question of general importance to the administration of the criminal Rules --whether the time prescribed by Rule 37(a)(2) F.R. Crim. P., for noting appeals in criminal cases can be enlarged by the filing of an untimely motion in arrest of judgment -- was involved in this case.

On March 17, 1959, petitioners entered nolo contendere pleas which were accepted by the court. Pronouncement of judgment was deferred until the conclusion of the jury trial of two other co-defendants. On June 19, 1959, upon termination of that trial, the court orally pronounced judgment of conviction and imposed sentence. On June 22, formal judgment was filed. On June 23, petitioners filed motions in arrest of judgment. These motions were denied on July 13. On July 15, petitioners filed notices of appeal.

The Government contended that the appeals were untimely, since, under Rule 37(a)(2), the notices were required to be filed within 10 days "after entry of judgment or order appealed from"; that the appeals should have been taken by June 30 or July 2 -- depending upon whether it was the oral pronouncement of June 19 or the formal entry of June 22 that constituted the judgment; that the excepting clause of Rule 37(a)(2) -- "but if a motion * * * in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion" -- is not applicable because, under Rule 34, such motion would have to be made within "5 days after determination of guilt" -- and here there was a determination of guilt on March 17, when the nolo contendere pleas were proferred and accepted.

In rejecting this rationale, the Court concluded "that it was the judgment of conviction and sentence [on June 19 or June 22, 1959], not the tender and acceptance of the pleas of nolo contendere, that constituted the 'determination of guilt' within the meaning of Rule 34". Thus, since

the motions in arrest of judgment were "made within 5 days after [that] determination of guilt", as required by Rule 34, and "in any view, were also 'made within the 10-day period' after entry of the judgment appealed from, as required by Rule 37(a)(2), that appeal, taken 'within 10 days after entry of the order denying the motion,' was timely." In the view of the majority (five members of the Court), the pleas of nolo contendere -- despite their analogy to admissions of guilt for other purposes -- did not constitute determinations of guilt, within the meaning of Rule 34, because each plea (a) was "only a confession of the well-pleaded facts in the charge" and (b) "does not dispose of the case" (since it was still up to the trial court to render judgment thereon and, with the consent of the court, the plea could be withdrawn at any time before imposition of sentence). In the circumstances, the Court deemed it unecessary to resolve conflicting views on the question whether Rule 34 (as well as Rule 33) modifies Rule 37(a)(2) so as to limit the time specified for the taking of an appeal. That problem and kindred ones it left "for resolution by the rule-making process". The Court also found it unnecessary to decide petitioners' alternative contentions that the motions in arrest of judgment should be treated as motions under Rule 12(b)(2) or as motions to vacate sentence under 28 U.S.C. 2255.

The dissenting opinion, in essence following the rationale advanced by the Government, regarded the entry and acceptance of a nolo contendere plea as a determination of guilt within the meaning of Rule 34 and viewed Rule 34 as necessarily involved in determining the proper time for appeal where a motion in arrest of judgment has been filed.

Staff: Bruce J. Terris (Assistant to the Solicitor General)
Richard B. Buhrman and Meyer Rothwacks (Tax Division)

Willful Attempt to Evade Taxes-Sufficiency of Indictment. Radford v. United States. (C.A. 9, April 3, 1961). Taxpayer moved to quash an indictment which charged that he had filed a joint income tax return for the calendar year 1953 which stated that his and his wife's adjusted gross income was $825.37 on which amount of the tax due was "none" when he well knew that his adjusted gross income was $9,170.78 upon which there was a tax due of $1,639.22. Taxpayer's theory was that "adjusted gross income" is not a concept of taxability and that therefore no crime was charged under Anderson v. United States, 11 F. 2d 938 (C.A. 7). The district court denied the motion and the Court of Appeals, in affirming the conviction, held that the indictment "contained the element of the offense in alleging that he falsely stated in his return that the amount of the tax due was 'none' [and that the indictment] apprised the defendant of a key item in proof he was going to have to meet."

The Court further stated that due to the liberal pleading permitted under the Federal Rules of Criminal Procedure there is considerable doubt whether the Seventh Circuit would now follow the Anderson case, supra. The Court went on to distinguish the Anderson case in that the indictment in that case merely charged that the defendant had omitted $53,125.96 from

gross income and had deprived the United States of the amount of the tax on that sum while in this case the indictment charged the amount of adjusted gross income omitted and the exact amount of the tax due thereon.

Taxpayer also contended that under Long v. United States, 257 F. 2d 340 (C.A. 3), it was error to admit testimony showing his failure to file in 1950 and 1951 since this act was a misdemeanor under Sec. 7203. The Court held that since the Government had used the net-worth method of proof, these two facts were details--"parts of the scheme or plan for the jury to evaluate."

Staff: United States Attorney Dale M. Green (E.D. Wash.)

District Court Decision

Tax Evasion - Willful Attempt to Evade Payment of Taxes - Statute of Limitations. United States v. Mousley (E.D. Penn.) This was a ruling on a motion to dismiss the first four counts of a nine count indictment. The tax years involved were 1942 through 1946. However, the alleged attempts to evade took place in 1955, 1956, and 1957 by means of false statements made as part of an offer to compromise and application for discharge of property from federal tax lien.

Taxpayer argued that the false statements were part of the original attempted evasion and were therefore also barred by the statute of limitations. Taxpayer based his argument on United States v. Bridell, 180 F. Supp. 268 (N.D. Ill. E. Div., 1960.) which held that, where a taxpayer filed an individual return and a corporate return at the same time, or closely related thereto, both acts were part of the same attempt to evade and if the statute of limitations had run on one, it had run on both. In distinguishing the Bridell case from the instant case, the Court held that in that case the filing of the individual and corporate returns were part of one scheme to evade taxes, while in this case, though there was an attempt to evade taxes in 1942 through 1946, against which years a deficiency had been assessed, the false statements, made as part of the offer to compromise over the years 1955, 1956, and 1957, were entirely separate acts attempting to evade the payment of taxes "and from a legal standpoint, are wholly unrelated to the filing of a false tax return sometime in 1946 or prior thereto".

The Court pointed out that to accept the defendant's argument would create a ridiculous situation since a taxpayer who had attempted to evade taxes at one time and had been prosecuted or had escaped prosecution because the statute of limitations had run, could thereafter come in at any time and make false statements to the Government regarding his civil liability without fear of further prosecution. The motion was accordingly denied.

Staff: United States Attorney Walter E. Alessandroni and Assistant United States Attorney Joseph J. Zapitz (E.D. Pa.); and Willard C. McBride (Tax Division)

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