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Vol. 9 November 24, 1961 No. 23

COORDINATION OF GOVERNMENT ACTIVITIES

Set out below is the Memorandum from the President on the above mentioned subject. The Federal Executive Boards established by the President's memorandum will be set up by the Civil Service Commission in Boston, New York, Philadelphia, Atlanta, Chicago, St. Louis, Dallas, Denver, San Francisco and Seattle. These boards will facilitate coordination of various Federal activities at a regional level and promote improvement of management skills through the sharing of technical knowledge in fields of common interest. It is anticipated that these boards will arrange briefings on various programs that cut across agency lines such as manpower utilization, recruitment, et cetera.

MEMORANDUM FOR HEADS OF DEPARTMENTS AND AGENCIES

As an integral part of present steps to increase the effectiveness and economy of Federal agencies, I want coordination of government activities outside of Washington significantly strengthened. That is to include improvement of the management and direction of Federal offices throughout the country by the chief departmental officials in Washington, and provision for an inter-agency working group for closer coordination across department and agency lines in important centers of Federal activity outside the National Capital area.

More than ninety percent of all Federal employees work outside of the Washington area. Decisions affecting the expenditure of tens of billions of dollars are made in the field. Federal programs have their impact on State and local governments largely through the actions of regional and local representatives of our departments and agencies. Most important, Federal officials outside of Washington provide the principal day-to-day contact of the Government with the citizens of this country and generally constitute the actual point of contact of Federal programs with the economy and other phases of our national life.

In the international assistance programs, previously separate U. S. efforts are being brought together in order to provide a common focus on the needs and problems of individual countries. Here at home we must similarly bring more closely together the many activities of the Federal Government in individual states and communities throughout the nation.

Although each Executive agency and its field organization have a special mission, there are many matters on which the work of the departments converge. Among them are management and budgetary procedures, personnel policies, recruitment efforts, office space uses, procurement activities, public information duties, and similar matters. There are opportunities to pool experience and resources, and to accomplish savings. In substantive programs, there are also opportunities for a more closely coordinated approach in many activities, as on economic problems, natural resources development, protection of equal rights, and urban development efforts.

As a first step in bringing Federal officials outside of Washington closer together, I have directed the Chairman of the Civil Service Commission to arrange for the establishment of a Board of Federal Executives in each of the Commission's administrative regions. Where associations of Federal regional officials exist in other regional centers they will be continued. Each Executive department and agency is directed to arrange for personal participation by the heads of its field offices and installations in the work of these Federal Executive Boards. These activities are not to require additional personnel but provide means for closer coordination of Federal activities at the regional level.

The cooperative activities of Federal Executive Boards must be undertaken primarily through the initiative of the heads of our field activities. The Chairman of the Civil Service Commission and the Director of the Bureau of the Budget will furnish the Boards from time to time with guides on official goals and objectives in the management field and will arrange for periodic briefings by national executives of the government. Each of the Boards will consider management matters and interdepartmental cooperation and establish liaison with State and local government officials in their regions. A clearinghouse will be provided in the office of the Chairman of the Civil Service Commission on problems and recommendations submitted by the regional Boards.

Following a reasonable period for evaluation of these initial steps, recommendations are to be prepared by the Chairman of the Civil Service Commission and the Director of the Bureau of the Budget for continuing improvement of the management and coordination of Federal activities.

Within each department, I want the chief officers of each agency, particularly the chief operating officials for administrative matters, to make a critical appraisal of pending field management procedures with the principal regional officers of that agency. The Director of the Bureau of the Budget shall provide guidance to department and agency heads on their internal appraisals of field management. Over all, new emphasis shall be placed on management skills in support of improved economy, efficiency, and the substantive effectiveness of the Executive Branch of the Government.

John F. Kennedy

IMPORTANT NOTICE

All letters, memoranda, and other communications from United States Attorneys' offices should show the district from which the communication is sent. Much valuable time and effort is expended unnecessarily in the Department in attempting to ascertain the district from which a letter or other communication is received. A stamped address or other means of identifying the issuing office will eliminate this waste of time and effort.

COMMENDATORY LETTERS

Experience over the years has shown that the practice of publishing commendatory letters relating to the work of Assistant United States Attorneys has not operated with equal fairness to all Assistants. For instance, Assistants engaged in appellate work, or those whose work does not bring them into close contact with agencies which make it a practice to issue commendatory letters, are rarely mentioned in commendatory items although their work may be equally as outstanding as that of other Assistants.

Accordingly, it has been decided to eliminate the Job Well Done section of the Bulletin. Commendatory letters received, however, will continue to be filed in the individual's official personnel folder.

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ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

SHERMAN ACT

Federal Trade Commission Denied Examination of Grand Jury Transcript. Electrical Investigation. (E.D. Pa.). The Federal Trade Commission petitioned the Court for an order permitting examination and copying of portions of the transcript and exhibits produced before the recent grand jury on the turbine-generator and steam surface condenser industries. The Commission sought to examine the material for the purpose of determining whether companies who have been indicted as a result of the investigation and have pleaded either guilty or nolo contendere to such indictments have violated (during 1937-1960) certain cease and desist orders entered against them in 1937.

Relying on Rule 6(e) of the Federal Rules of Criminal Procedure, which provides that grand jury material may be disclosed when the court so directs "preliminarily to or in connection with a judicial proceeding," the Commission argued that the requested disclosure might lead to judicial proceedings, and that in these circumstances, it would serve the interests of justice, because it would "facilitate law enforcement." The Court and the parties agreed that this petition presented a case of first impression in view of the fact that the Commission is "a 'collateral' agency of the Government to the one which instituted the criminal prosecution." The court stated "that a Federal Agency stands in no higher degree of privilege than a private litigant in this respect" and refused to relax the policy of maintaining the secrecy of grand jury proceedings where the demand for revelation is based upon "economics", that is, the savings in time and energy which would accrue to the Commission if it could investigate the possible violation of its cease and desist order by examining grand jury material. Relying heavily upon the Procter & Gamble and the Pittsburgh Plate Glass Company decisions, and stressing the Commission's ability to proceed through its plenary investigative powers, the Court stated that the "ends of justice" would not be served by disclosing grand jury proceedings where the only interest of the Commission is the facilitation of a civil enforcement remedy.

Staff: George H. Schueller, Donald G. Balthis and John E. Sarbaugh. (Antitrust Division)

SHERMAN ACT - CLAYTON ACT

Price Fixing; Bid Rigging; Indictment Filed Under Section 1 of Sherman Act and Section 14 of Clayton Act. United States v. South Florida Asphalt Company, et al. (S.D. Florida) A federal grand jury sitting in Miami, Florida, returned an indictment on November 15, 1961, charging the South Florida Asphalt Company; the East Coast Asphalt Corporation; R. H. Wright, Inc.; Joseph J. Packo; Eugene G. Ballard; and Robert J. Hummel with a conspiracy to fix the price of asphalt paving materials. The six defendants were charged with violating Section 1 of the Sherman Act by participating in an unlawful conspiracy dating from August 1959, by raising and fixing prices and rigging bids to public and private customers for the sale of asphalt paving materials. The individuals were also charged, in a second count, with violating Section 14 of the Clayton Act by

authorizing and doing the asserted Sherman Act violations of their corporations.

It is alleged that the three defendant corporations sold approximately $3,000,000 worth of hot mix asphalt and other paving materials in 1960, 90% of the total sold in Broward County, Florida.

The indictment is the result of a grand jury investigation begun in July, 1961.

Staff: Wilford L. Whitley, Jr., Bruce L. Montgomery and Ernest T. Hays. (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General William H. Orrick, Jr.

SUPREME COURT

ADMIRALTY

Doctrine of Seaworthiness Not Applicable to Deactivated Vessels of Moth-Ball Fleet Used for Storage of Grain. William J. Roper v. United States, et al. (November 6, 1961). Roper was injured while unloading grain from a government vessel, the HARRY LANE. The HARRY LANE had been deactivated in 1945, and from 1954 on had been used as a depository for storage grain. At the time of his injury, Roper was in the hold of the vessel, operating a "marine leg", a shore-based device for unloading grain. The cause of his injury was a latent defect in a part of the marine leg.

Roper brought a libel in the district court against the United States, pursuant to the Suits in Admiralty Act, 46 U.S.C. 742, asserting negligence, and unseaworthiness of the marine leg. The district court found that there was no negligence, and, concluding that the HARRY LANE was not in navigation, held that the United States did not warrant the seaworthiness of the vessel or the unloading equipment. 170 F. Supp. 763. The court found it unnecessary to decide whether the fact that the defective equipment was shore-based would in itself render the warranty of seaworthiness inapplicable. The Court of Appeals for the Fourth Circuit affirmed. 282 F. 2d 413. Judge Sobeloff dissented on the ground that the HARRY LANE was not a dead ship but was a vessel in navigation being used as a barge to transport grain from one point to another. 282 F. 2d at 419. He also expressed the view that the warranty of seaworthiness applied to unloading equipment, including a marine leg, regardless of the fact that such equipment was not found as part of the equipment of any vessel, and was unlike any ship's gear.

The Supreme Court granted certiorari. Roper relied primarily on the arguments advanced by Judge Sobeloff. The Government contended that the warranty of seaworthiness applies only to vessels in navigation, and that the concurrent factual findings of the two lower courts that the HARRY LANE was not in navigation should not be disturbed. The Government also contended that the warranty of seaworthiness does not apply to equipment which, like the marine leg, is unlike any equipment which goes to sea as ship's gear, citing McKnight v. Patterson, 181 F. Supp. 434, affirmed on opinion below, 286 F. 2d 250 (C.A. 6), certiorari denied, November 13, 1961.

The Supreme Court (per Mr. Justice Clark) accepted the Government's first argument, and affirmed. The Court stated that the test for determining whether a vessel is in navigation is "the status of the ship", and

that where the vessel is not in navigation it follows that there is no warranty of her seaworthiness. The Court accepted the concurrent determinations of the two lower courts that, since she was being used solely for the storage of grain, she was not in the maritime service of navigation, and held that the United States did not warrant the seaworthiness of the HARRY LANE. The Court therefore found it unnecessary to determine whether the shore-based marine leg could be within the warranty of seaworthiness. (The following week, however, it denied certiorari in McKnight v. Patterson, supra). Justices Douglas, Warren and Black dissented for the reasons stated in Judge Sobeloff's dissenting opinion.

Staff: Leavenworth Colby and David L. Rose (Civil Division)

COURTS OF APPEALS

CIVIL SERVICE

Plaintiff Held to Be Clerk Rather Than Deputy Marshal. Samuel Krawitz v. James J. P. McShane, United States Marshal, et al. (C.A.D.C., Nov. 9, 1961). In 1951 Krawitz was sworn in as an Office Deputy Marshal (clerk) GS-301-4 in the office of the United States Marshal for the District of Columbia. In 1956, after the Department of Justice had terminated the use of that classification, he was sworn in as a Special Deputy Marshal. The order terminating the old classification noted that service as Special Deputy was at the Marshal's discretion and would continue until revoked. On March 26, 1958, Krawitz's special deputization was revoked by the then Marshal and he thereafter performed strictly clerical duties in the Marshal's office. Due to a reduction in force, Krawitz, who was at the bottom of the retention group for clerks GS-301-4, was separated from service on June 30, 1958.

Krawitz brought suit in the District Court seeking a judgment declaring that he was unlawfully separated from his employment since he was a Deputy United States Marshal to which the reduction in force would not apply. That Court held that he had no claim to a position as Field Deputy Marshal, as Office Deputy Marshal (since that classification was abolished), nor to a position as Special Deputy Marshal (since that deputization was subject to the Marshal's revocation and had in fact been revoked). Judgment was therefore entered for the United States. Although the Court of Appeals found some ambiguity in the status of Krawitz's position, it affirmed the lower court, concluding that the district court was correct in holding that the position came within the clerk classification and that accordingly the reduction in force applied to him.

Staff: United States Attorney David C. Acheson; Principal Assistant United States Attorney Charles T. Duncan; Assistant United States Attorneys Judah Best and Thomas D. Quinn, Jr. (D.D.C.)

Administrative Officials Did Not Act Arbitrarily or Capriciously in Refusing to Accept Employee's Untimely Appeal of Reduction in Force. Senta S. Rogers v. Luther H. Hodges, Secretary of Commerce, et al. (C.A.D.C., Nov. 9, 1961). Miss Rogers was employed as a chemist at the Bureau of Standards starting in 1955. In a letter dated April 8, 1958, she was advised that she would be separated from the agency on May 31, 1958 due to reduction in force caused by lack of funds, and she was in fact so separated. In a letter dated August 30, 1958, she appealed to the Appeals Examining Office of the Civil Service Commission, alleging that she had been deprived of her rights and privileges as a career Civil Service employee and stating that she had not previously appealed because she had been hospitalized from December 27, 1957 to May 23, 1958. She further alleged that she had thought that she had 90 days to appeal. She was informed that her appeal had been denied because it was not submitted within the ten day period prescribed by Civil Service Regulations and the reasons she had presented did not justify her actions in not appealing before August 30. She requested and was granted an extension of time to make an appeal to the Board of Appeals and Review of the Civil Service Commission, but she failed to make such appeal and the original decision was affirmed. On January 7, 1959 and again on January 12, she wrote seeking a reconsideration of this appeal, amplifying the reasons why she did not appeal within requisite time limits. On May 7, 1959, she was informed by the Chairman, Board of Appeals and Review, Civil Service Commission that the material submitted by her did not justify an acceptance of her delayed appeal.

She brought suit in the District Court for reinstatement but that Court granted summary judgment in favor of the Government. The Court of Appeals affirmed, per curiam, on the grounds that administrative officials had not failed to follow correct procedures or acted arbitrarily either in rejecting her original request for an extension on the basis of the reasons she had then submitted or in not exercising their discretion to reconsider their action when she submitted additional reasons.

Staff: United States Attorney David C. Acheson; Principal Assistant United States Attorney Charles T. Duncan; Assistant United States Attorneys Robert Brewer Norris and Harold D. Rhynedance, Jr. (D.D.C.)

Charges and Findings Pursuant to Which Government Employee Was Removed from Office Held Valid. George G. Tannen v. John B. Connally, Secretary of the Navy, et al. (C.A.D.C., October 13, 1961). Tannen, a veterans preference eligible, was employed as a purser by the Military Sea Transportation Service in Yokohama, Japan. The Commander of MSTS sent him an Advance Notification of Intent to Remove which informed him of the intent to remove him for unsuitability of personal character. The five charges which were the basis for the issuance of the Advance Notification were set forth therein. He was charged, inter alia, with having purchased excessive amounts of liquor and having obtained billets

to which he was not entitled. He answered the charges in some detail, and received a hearing at his request. Thereafter, he received a notice of removal setting forth the four findings pursuant to which he was removed. All four findings began with the phrase "You did not consider it wrong to" and then set forth an act the commission of which he had been accused.

After exhausting his administrative remedies in the Civil Service Commission, Tannen brought suit in the District Court seeking reinstatement to his position. The District Court granted the Government's motion for summary judgment. On appeal, Tannen urged that the charges were not sufficiently specific and that he had not been found to have committed the acts alleged in the charges, but rather had been found only to have had a poor attitude with respect to the commission of such acts. The Government contended that the charges were sufficiently specific to enable him to prepare his defense against the charges, and that the findings, although inartfully phrased, amounted to a decision, when fairly read, that plaintiff had committed the acts of which he had been accused. The Court of Appeals affirmed per curiam, declaring that Tannen had been accorded his statutory and procedural rights.

Staff: David L. Rose and Marvin S. Shapiro (Civil Division)

United States Not Required by Veterans' Preference Act to Produce at Hearing Persons Whose Affidavits Supply Factual Basis for Employee's Dismissal. Daniel A. Williams v. Eugene M. Zuckert, Secretary of the Air Force, et al. (C.A.D.C., Nov. 9, 1961). Williams, an ex-Air Force enlisted man and civilian employee at the Air Force Academy, was removed from his position because of alleged indecent acts with three airmen. At a hearing before the Civil Service Commission the Government declined to order the production of the three airmen as witnesses and his discharge was sustained.

Williams brought suit in the District Court alleging that under pertinent provisions of the Veterans' Preference Act, as amended, 5 U.S.C. 863, and regulations issued pursuant thereto, he was entitled to have the Government produce the persons whose affidavits supplied the factual basis for his dismissal. The District Court granted summary judgment for the Government and the Court of Appeals affirmed. The latter Court held that the burden of producing witnesses at a Civil Service Commission hearing is placed upon the party who wants them, 5 C.F.R. 22.607, and that Williams was required to request the three airmen to attend, if he desired their testimony. Since he did not do so, he failed to use the available administrative means to arrange for the appearance of witnesses and could have no recourse to the courts.

Staff: United States Attorney David C. Acheson; Principal Assistant United States Attorney Charles T. Duncan; Assistant United States Attorneys Frank Q. Nebeker and Charles T. McCally (D.D.C.)

FEDERAL TORT CLAIMS ACT

Radio Control Tower Employees' Failure to Determine Safe Separation Between Planes Held Negligence But Not Proximate Cause of Plaintiff's Injury. William H. Johnson, et al. v. United States (C.A. 6, October 25, 1961). In 1957 a Cessna aircraft piloted by Johnson attempted a flight from Michigan to Omaha, Nebraska. Fifteen minutes before landing, the Cessna was alerted by the radio control tower of the Omaha Municipal Airport that an Air Force B-47 was executing practice approaches to the airport. The Cessna continued on toward the airport and entered a traffic pattern in order to land on a runway known as 14-left. On making its fifth approach, the B-47 crossed the path of the Cessna at right angles, reached the boundary of the airfield and continued over runway 14-left. The Cessna completed its turn so that it would be lined up with runway 14-left and proceeded to make its landing approach in the wake of the B-47. At a point about 800 feet from the approach end of the runway the Cessna crashed.

Johnson and the Cessna owners sued the United States under the Federal Tort Claims Act contending that the crew of the B-47 and the personnel of the control tower were negligent. The court found no merit in plaintiffs' contention that the B-47 crew was negligent in carrying out the practice maneuvers even if it knew that such would create a turbulence hazard, for it held that the B-47 had the right of way since it was the plane on the right, was the heavier and therefore less maneuverable aircraft, and was on final approach to land. 14 C.F.R. 60-14(b) and (e). But the court agreed with plaintiffs that the employees of the control tower had a duty to determine the safe separation between planes so as to avoid the impact of turbulence, even though no specific regulations regarding this have been promulgated in the Code of Federal Regulations.

Nevertheless, judgment was entered for the Government on the ground that the breach of duty by the control tower employees was not a proximate cause of the crash but that the Cessna itself was negligent in flying below required altitude and other respects, so as to cause its own destruction. The Court of Appeals issued an order affirming this judgment, based upon the opinion of the district court.

Staff: United States Attorney Lawrence Gubow;
Assistant United States Attorney Willis Ward
(E.D. Mich.)

GOVERNMENT CONTRACTS

United States Not Entitled to Proceeds of Insurance Received by Bailee for Loss of Government-Owned Tomatoes, Since Bailee Assumed Liability for Risk of Loss; Corporate Officer Personally Liable Under 31 U.S.C. 192 Only if Corporation Was Insolvent When Debts were Paid to Creditors Other Than United States. United States v. Leo Lutz

(C.A. 5, Nov. 3, 1961). Lutz was the president and virtually sole shareholder of two food processing corporations, Lutz Canning Co. and Delphi Canning Co. In October 1952, the Army contracted to purchase $27,000 worth of canned tomatoes from the Lutz Canning Co. and $8,000 worth from Delphi. Although the Army made immediate payment, the tomatoes were not to be delivered until March 1953. The contract required the sellers to indemnify the Government for the loss of or damage to any supplies remaining in the sellers' possession after title had vested in the Government. On November 28, 1952, the Delphi Warehouse and about $100,000 worth of tomatoes were destroyed by fire. Delphi collected the insurance and Lutz turned over $65,000 of the proceeds to a bank that held the warehouse receipts on the inventory and used the remaining funds to pay debts to creditors of the corporations. The Lutz Canning Co. had 90,000 cases of tomatoes at another warehouse with which Lutz allegedly anticipated paying his debts to the Government, but the market for tomatoes collapsed and Lutz was forced to sell at a loss, leaving the corporation without sufficient funds to pay all creditors. Although they have not filed a petition in bankruptcy, the corporations have ceased operations and have been unable to pay the Government debt.

The United States asserted that under the contract $35,000 worth of the tomatoes destroyed by the fire belonged to it, and brought suit for that amount in the district court. The United States contended that the corporations were obligated to hold the insurance proceeds in trust and that Lutz became personally liable under the common law doctrine imposing personal liability on a corporate officer who misappropriates funds belonging to another even though he receives no benefit himself. It was argued in the alternative that Lutz became liable under 31 U.S.C. 192 by paying corporate debts to other persons before satisfying debts to the United States. The district court rejected these contentions.

On appeal, the Fifth Circuit refused to find Lutz liable under the common law theory of liability. Although the pleadings and testimony were sufficient to show that the United States acquired ownership of the tomatoes, the Court would not accept the contention that ownership of the tomatoes gave the United States a right to the insurance proceeds collected for their loss. The United States had claimed that it was entitled to such proceeds under accepted principles of bailment and insurance. The Court held, however, that these principles were inapplicable because of the contract provisions which shifted the risk of loss to the corporations as bailee, in light of which provisions the United States had no insurable interest. The Court stated that the various attributes of ownership, such as right to use and control, the right to sue to regain possession from a third party, risk of loss, etc. may pass separately and at different times.

The Court refused to attribute personal liability to a corporate director under 31 U.S.C. 192 unless the corporation was insolvent when the payments to creditors other than the United States were made, construing Section 192 together with Section 191 (where the word "insolvent" is used) to reach such a result. It also noted that the Government's

reading of the statute would produce a harsh and unfair result which it did not think Congress intended when it passed the law, for corporate officers would run the risk of being personally liable any time they paid a debt while owing money to the United States, regardless of how solvent the corporation might then be. The Court remanded the case to the district court for a finding as to whether the corporations were actually insolvent when Lutz distributed the insurance proceeds to the other creditors, in which instance he would be personally liable.

Staff: Ronald A. Jacks (Civil Division)

DISTRICT COURT

GOVERNMENT CONTRACTS

No Breach of Warranty by Government Where Invitation for Bids on Sale of Surplus Property, "As Is, Where Is", With Inspection Invited, Erroneously Described Property as "Unused". Ellis Bros. Incorporated v. United States (S.D. Cal., Sept. 29, 1961). The United States issued an Invitation to Bid for 89 surplus automobile differentials. The Invitation to Bid included a statement that the differentials were not used. Before submitting its bid Ellis Bros. had a chance to examine the differentials but inspected only one and purchased the lot for $9,283.41. The contract was an "As is, where is" agreement in which the United States made no guaranty, warranty or representation, express or implied, as to quantity, kind, character, etc. After receipt of the differentials, Ellis Bros. sought to rescind the sale and recover the price paid on the ground that the differentials were in fact used rather than unused. The District Court granted summary judgment for the United States, citing contract provisions that failure to inspect did not constitute grounds for a claim against the Government, that the contract was "As is, where is" without recourse, and that any warranty of any kind was disclaimed. It concluded that the above clauses "override what in an ordinary contract might be considered a warranty against misdescription". The United States Attorney anticipates that the plaintiff will appeal.

Staff: United States Attorney Francis C. Whelan and Assistant United States Attorney Edward C. Gellman (S.D. Calif.); Whitfield H. Clark (Civil Division)

No Breach of Warranty by Government Where Invitation for Bids on Sale of Property "As Is, Where Is", with Inspection Invited, Erroneously Described Property as "White". M. Berger Co. v. United States (W.D. Pa., October 24, 1961). The Department of the Navy offered for sale certain bandages described in the Invitation to Bid as "white". The sale was to be "As is, where is", without warranties. Berger Co. entered a bid which was accepted, but attempted to rescind because many of the bandages received were camouflage brown. However, the contracting officer and the

Armed Services Board of Contract Appeals refused to accept Berger's contention and the company instituted this action in the District Court for breach of warranty, alleging expenditures for transportation and storage charges and loss of profit on the proposed resale to a third party. The District Court granted the United States' motion for summary judgment, holding that Berger's failure to make an adequate inspection deprived it of any breach of warranty under the contract terms. The Court gave its approval to the dictum of United States v. Silverton, 200 F. 2d 824, 827 (C.A. 1) that even under such a contract the Government could not advertise oranges and ship apples, but felt such was inapposite here because, as it stated, "a bandage is still a bandage even though not white". The Court refused to try the case de novo, holding that, while it could retry questions of law, it should decide such questions on the basis of evidence adduced before the Board of Contract Appeals.

Staff: United States Attorney Joseph S. Ammerman and Assistant United States Attorney Byron E. Kopp (W.D. Pa.); Whitfield H. Clark (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

MAIL FRAUD

Study of Phrase "Scheme and Artifice to Defraud" Under 18 U.S.C. 1341 and 1343. About two years ago, pursuant to the request of the Assistant Attorney General of the Criminal Division, and in connection with a specific factual problem, an exhaustive study of the phrase "Scheme and Artifice to Defraud", was prepared by the late Ellis L. Arenson, Deputy Chief of the Fraud Section. Copies of this study, which has been used by many federal prosecutors to great advantage in attacking mail fraud problems, are forwarded with this issue of the Bulletin. Since the preparation of the study, the Supreme Court has decided Parr v. United States, 363 U.S. 370. We do not discuss Parr at this time other than to submit that it is, in our opinion, a somewhat narrow construction of the statute. It is our view that the discussion in the study is not materially affected by Parr. The Fraud Section will be pleased to help resolve problems which may be suggested by Parr as well as other mail fraud questions.

Additional copies of the study are available upon request.

Staff: Ellis L. Arenson, Deputy Chief, Fraud Section (deceased); Irvin K. Jenkins and John L. McCullough, Fraud Section.

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Judicial Review of Deportation Order Based on Communist Party Membership; Fraudulent Visa; Rule in Rowoldt v. Perfetto. Langhammer v. Hamilton (C.A. 1, Nov. 3, 1961.) This was an appeal from the district court's dismissal of appellant's complaint for a review of a final order of deportation (194 F. Supp. 854). He contended on appeal, as in the court below, that (1) the deportation order was invalid since his Communist Party membership was not proved but even if proved was involuntary by operation of law under 8 U.S.C. 1182(a)(28)(I)(i); (2) the record disclosed no willful misrepresentation of a material fact when he obtained his visa; and (3) it was error not to consider discretionary relief from deportation under 8 U.S.C. 1251a.

In affirming, the Court of Appeals agreed with the court below that the Supreme Court's holding in Rowoldt v. Perfetto, 335 U.S. 115, established no rule of universal application that the testimony of an alien, standing alone, is insufficient to establish the requisite "meaningful association" essential to sustain a deportation order based on Communist Party membership and that the testimony of the alien may well in and of itself establish the requisite membership, as it did here. It also agreed that the nicety of a medical education was not what Congress had in mind when it used the phrase "employment, food rations, or other essentials of living" in 8 U.S.C. 1182(a)(28)(I)(i) to relieve an alien from exclusion from the United States because of such membership. (Grzymala-Siedlecki v. U. S., 285 F.2d 836, C.A. 5, 1961, distinguished.)

As to the second contention, the Court found that the fact of his Party membership was an eminently material matter with respect to the issuance of his visa since its mere disclosure would have revealed that he was a member of an excludable class of aliens, and that the record supported the finding of willful concealment.

The Court found no merit in his third contention for it could not say that his application for discretionary relief was not considered; moreover, under the plain words of 8 U.S.C. 1251a, to be entitled to relief an alien must be "otherwise admissible at the time of entry" which the appellant was not because of his Communist Party membership at that time.

Staff: Assistant U.S. Attorney James C. Heigham (D. Mass.); United States Attorney W. Arthur Garrity, Jr. was on the brief.

Judicial Review of Deportation Order; Voluntary Departure - Alien "ship-jumper" - Discretionary Denial; Scope of Review. Loconte v. Pederson (C.A. 6, Oct. 30, 1961.) Plaintiff appealed from the District Court's (S.D., Ohio) grant of summary judgment to the defendant. See Bulletin: Vol. 9, No. 1, p. 15.

The Court of Appeals affirmed per curiam.

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Contempt of Congress. United States v. Pauline Feuer (E.D. La.) Feuer was indicted in New Orleans, Louisiana, for refusing to answer questions concerning her Communist Party Membership and activity before the Senate Internal Security Subcommittee which was investigating the extent and nature of the Soviet activity in the United States. On October 30, 1961, the Court accepted a plea of nolo contendere without objection by the Government and Mrs. Feuer was sentenced to one year suspended, was put on probation for this period and fined $200 which must be paid within 60 days or she will be committed.

Staff: United States Attorney M. Hepburn Many (E.D. La.); Paul C. Vincent (Internal Security Division)

Contempt of Congress. United States v. Elliot Sullivan (S.D.N.Y.) Sullivan was indicted for refusing to answer questions concerning his Communist Party membership and activity before a subcommittee of the House Committee on Un-American Activities which was investigating Communist infiltration in the field of entertainment in New York City. On October 30, 1961, Judge Sugarman acquitted Sullivan on the grounds that the Government had failed to provide the defendant with the resolution of the Committee authorizing the Subcommittee to hold the hearings in New York City. Judge Sugarman stated that since the Government had not provided this resolution in its bill of particulars, it was precluded from introducing it into evidence at the trial, and the Government's case must fail since the resolution was a vital link in its case.

Staff: Assistant United States Attorney Irving Younger (S.D.N.Y.)

Contempt of Congress. United States v. George Tyne (S.D.N.Y.) Tyne was indicted for refusing to answer questions concerning his Communist Party membership and activity before a subcommittee of the House Committee on Un-American Activities which was investigating Communist infiltration in the field of entertainment in New York City. On October 30, 1961, Judge Sugarman acquitted Tyne on the grounds that the Government had failed to provide the defendant with the resolution of the Committee authorizing the Subcommittee to hold the hearings in New York City. Judge Sugarman stated that since the Government had not provided this resolution in its bill of particulars, it was precluded from introducing it into evidence at the trial and the Government's case must fail since the resolution was a vital link in its case.

Staff: Assistant United States Attorney Irving Younger (S.D.N.Y.)

Sabotage; Destruction of Communication Systems Operated or Controlled by United States. United States v. Bernard Jerome Brous and Dale Christian Jensen (D. Nev.). As previously reported, a federal grand jury in the District of Nevada returned a two-count indictment on June 29, 1961, charging defendants with violations of 18 U.S.C. 2153 of the sabotage statutes and on September 29, 1961, returned a three-count indictment against the defendants

charging violations of 18 U.S.C. 1362, which relates to the destruction of or interference with communication facilities "operated or controlled by the United States." The charges in the indictments related to the destruction of two microwave stations and a K-repeater underground station located in Nevada and Utah. On October 19, 1961, defendant Brous entered a plea of guilty to the three counts of the September 29 indictment relating to Section 1362 and defendant Jensen entered a plea of guilty to two counts of the same indictment. On November 2, 1961, each defendant was sentenced to a total of eight years imprisonment.

The Government on the same date requested the dismissal of the remaining charges against the defendants.

Staff: Former United States Attorney Howard W. Babcock (D. Nev.); James A Cronin, Jr., Victor C. Woerheide and Alta M. Beatty (Internal Security Division)

Espionage; United States v. George William Sawyer and Garlan Euel Markham, Jr. (E.D. Pa.) On November 9, 1961, a nine-count indictment was returned against George William Sawyer, a former Supervisor, Naval Air Technical Services Facility, Department of the Navy, Philadelphia, Pennsylvania and Garlan Euel Markham, Jr., a manufacturer's representative under his own name and under the name of Washington Procurement Consultants, Fairfax, Virginia. The first count charges defendant Sawyer with receiving compensation for services rendered by him for defendant Markham in relation to proposed Government contracts, in violation of 18 U.S.C. 281. Counts two, three and four charge defendant Markham with giving various sums of money to defendant Sawyer, then a Government employee, with intent to induce him to do acts in violation of his lawful duty, in violation of 18 U.S.C. 201. Counts five and six charge defendants with selling and buying, respectively, certain classified documents and publications, being the property of the Department of the Navy and having a value in excess of $100, in violation of 18 U.S.C. 641. Count seven charges defendant Sawyer, aided and abetted by defendant Markham, with delivering certain classified documents and publications relating to the national defense to Markham, which documents contained information Sawyer had reason to believe could be used to the advantage of a foreign nation in violation of 18 U.S.C. 793(d) and 2(a). Count eight charges defendants with conspiracy to violate 18 U.S.C. 281, 201 and 641 and conspiring to deprive the Government of its right to have its affairs conducted honestly and impartially, in violation of 18 U.S.C. 371. Count nine charges defendants with conspiracy to violate 18 U.S.C. 793(d) supra. A bench warrant was issued for each defendant by Judge Van Dusen who set their bail at $5,000 each. Sawyer was apprehended by FBI agents in Philadelphia, and Markham in Washington, D. C. No trial date has as yet been set.

Staff: Victor C. Woerheide and Robert J. Stubbs (Internal Security Division)

Action for Money Damages; Robert O. Wilbur v. United States of America (D. D.C.) On August 8, 1961, plaintiff filed a complaint in the District Court for the District of Columbia complaining of acts allegedly

committed by an investigative agency of the Government. Plaintiff asserted that Government agents had wrongfully associated him with undercover agents working for an enemy power, had made a surveillance of him, had caused denunciatory claims against him to be circulated, and had conspired with Lafayette College of Easton, Pennsylvania to wrongfully "convict" plaintiff as an enemy of the state. Plaintiff also alleged that defendant is depriving him of all means of livelihood, attempting to destroy him physically and destroying plaintiff's business and his character in the business community. These actions allegedly took place from 1947 to the present time. Plaintiff asks for $3,500,000 money damages and other relief. Defendant denied these allegations in its answer served November 6, 1961.

Staff: Benjamin C. Flannagan and Glenn R. Brown
(Internal Security Division)

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Mineral Lease Applications; Authority of Secretary of Interior to Require by Regulation That Application Must Cover at Least 640 Acres; Construction of "Open for Leasing"; Authority of Secretary to Cancel Lease Erroneously Issued. Boesche v. Stewart L. Udall, Secretary of the Interior (C.A. D.C.). An oil and gas lease had been issued to Boesche's predecessor when the manager of a local land office failed to note that the application did not comply with the so-called "isolated tract" regulation providing for a minimum of 640 acres to be covered by a noncompetitive oil and gas lease application. An application by parties which complied fully with the law and the regulations had been denied by the local manager on the ground that the lands were already under lease to Boesche's predecessor. On appeal to the Director, Bureau of Land Management, the manager's decision was reversed on the ground that the application was not in accordance with the regulation. The Boesche lease was held for cancellation. The Director's Action was affirmed by the Secretary of the Interior who concluded that Boesche's predecessor was not the first qualified applicant within the meaning of 30 U.S.C. 226. On suit brought by Boesche, the District Court held that the Secretary's regulation (43 C.F.R. 192.42(d)) was valid; that an applicant for an oil and gas lease under the Mineral Leasing Act of 1920 is not the first qualified applicant when, in applying for lands in an area where less than 640 acres of public lands are available, he fails to include in his application all of the public lands that are available even though some part of such lands may be included in a pending lease application filed by a third party; and that in awarding a public lands oil and gas lease to the first qualified applicant, the Secretary of the Interior may cancel or direct the cancellation of a lease covering the same lands erroneously issued by a subordinate to another applicant.

On appeal, the Court of Appeals held that the regulation was valid and that the Secretary's "interpretation is reasonable and we should not reject it. In interpreting 'an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt.' Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413-414 (1945)." The Court also took occasion to state that: "Although the Secretary's interpretation of his regulation had 'general applicability and legal effect', it was not necessary to publish it in the Federal Register."

Though unmentioned in the per curiam opinion, the decision in Pan American Petroleum Corporation v. Pierson, 284 F.2d 649, reh. den. 284 F. 2d 657 (C.A. 10, 1960), cert. den. 366 U.S 936 (9 U. S. Attorneys Bulletin, No. 3, pp. 90-91), was cited to the Court of Appeals for the District of Columbia Circuit and it was furnished with copies of the petition for a writ of certiorari and of the ruling with respect thereto by the Supreme Court in that case. There the Tenth Circuit had held that the Secretary of the Interior

is not authorized under R. S. 441, 5 U.S.C. 485, to cancel by administrative action fraudulently procured oil and gas leases issued under the Mineral Leasing Act of 1920. In this setting, the Court of Appeals in the instant case stated in its opinion: "This court has held that the Secretary not only has authority to cancel a lease issued on a defective application but may be required to do so. McKay v. Wahlenmaier, 96 U.S. App. D.C. 313, 226 F. 2d 35 (1955). Cf. Hawley v. Diller, 178 U.S. 476, 495."

Staff: Harold S. Harrison (Lands Division)

Indian Lands; General Allotment Act; Selections Made Outside Approved Allotting Programs Do Not Vest Rights to Land; Enactment of Allotment Legislation Vests No Rights. Irene Ward Chingman Wise v. United States (C.A. 10, November 7, 1961). Relying on a selection made for her by her father in 1919, a Shoshone Indian sought an allotment of and a patent to a tract of land on the Wind River Reservation in Wyoming, claiming that a right to the land vested in her under an 1868 treaty with the Shoshones, 15 Stat. 673, and the General Allotment Act of February 8, 1887, 24 Stat. 388, as amended, 25 U.S.C. 331 et seq. At the time of the alleged selection, there was no authorized allotting agent on the Reservation, but a farmer employed by the Indian Service signed and gave appellant's father a slip of paper describing the land she claims. He had no instructions or authority from the Department of the Interior to entertain or acknowledge selections of land for allotments. In accordance with the local practice, this alleged selection was recorded in the Reservation Allotment Book, but only as one of 398 tentative selections, not as an allotment. Alloting on the Reservation had ended and the allotment rolls had been closed in 1914, four years before appellant was born. Later correspondence shows that the Bureau of Indian affairs considered but never resumed alloting.

The Court of Appeals first held that the Treaty of 1868 did not vest any right in an individual Indian to a tract of land. Before the Treaty's allotting provisions could take effect, implementing legislation was necessary. The General Allotment Act, the legislative authority setting forth the procedure applicable here, requires certain administrative steps before an interest vests in an allottee. Before alloting can even begin, there must be an administrative determination that the Indian Land is suitable for agriculture or grazing, there must be a survey, and, after the survey, there must be a second administrative determination, i.e., that allotment is in the best interest of the Indians. Only then may the Indians select land for allotments. The actual allotments must be made by special agents appointed by the President and then certified by them to the Commissioner of Indian Affairs. None of these administrative steps had been taken in this case.

Appellant also relied on the Act of May 21, 1928, 45 Stat. 617, which authorized the Secretary of the Interior to allot lands in the Wind River Reservation to children born after the closing of the allotment rolls. This statute contained no mandatory language, and the Court held it had been correctly construed by the Department of the Interior as granting the Secretary discretion as to when and where to make new allotments. Before this act could be said to vest any rights in appellant, all of the preliminary administrative steps mentioned above would have to be taken. Enactment of allotment legislation does not of itself vest any rights to allotments.

Staff: Hugh Nugent (Lands Division)

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

REMINDER NOTICE

United States Attorneys are reminded that the forms in Appendix "A" in the Tax Division's "The Trial of Criminal Income Tax Cases" which speak of "net income" had reference to nomenclature in former income tax returns which has been changed. Most returns now used as the basis for indictment employ the term "taxable income". The indictment forms should be changed to conform with that terminology.

CIVIL TAX MATTERS
COURT OF APPEALS DECISION

Priority of Liens--"Mortgagee" Entitled to Protection of Federal Statute Defined. Frances E. Hoare, etc. v. United States (C.A. 9 September 21, 1961.) On October 16, 1957, Joseph A. Hoare (since deceased) and his wife, Frances E. Hoare (survivor-appellant), as owners, leased restaurant premises in Port Angeles, Washington, to Alfred P. Conrad and his wife for a period of five years at a rental of $660 per month. On October 31, 1957, as required by the lease, the Conrads executed and delivered to the Hoares a promissory note in the face amount of $15,000 and a chattel mortgage on the lessees' property on the premises. The note was given "as security for the performance" for the lease. It was "without interest" but contained the provision that "if not paid when due" it would bear interest at 6%. The note was by its terms intended as liquidated damages for breach of the lease agreement. The chattel mortgage was given "as security for the payment" of the note and also "as security for the performance" of the lease.

On October 14, 1958, the District Director levied upon and took possession of the leasehold of the Conrads for the payment of taxes assessed against the Conrads in the net amount of $5,775.58, notice of lien with respect to which was filed on or before that date. On November 13, 1958, Hoare served upon the Conrads, under the terms of the agreement, a formal notice of cancellation of the lease. Four days later the Conrads filed their voluntary petition in bankruptcy. By agreement of the parties, the assets of the Conrads were sold for an amount insufficient to pay claims against the estate, consisting of the claim for taxes in the sum of $5,775.58, the claim of the Hoares for $15,000 alleged to be due under their promissory note and chattel mortgage, and other claims not here material.

At the time of cancellation of the lease the bankrupts were delinquent in rent payments in the amount of $3,800, and had permitted utility bills and labor liens to accumulate against the property in the sum of $616.56 (for which claims apparently were not filed by holders of the liens). The referee and district court allowed the lessors' claim in the amount of $11,000, but gave priority to the federal tax lien on the ground that the

mortgage lien was inchoate, relying on United States v. Ball Construction Co., 355 U.S. 587. Reversing, the Court of Appeals held that the promissory note, for which the mortgage was given as security, was for liquidated damages and not choate at the time the federal lien arose, but held that as to the arrearages for rent which had become due prior to the notice of lien the Hoares became "mortgagees" within the meaning of Section 6323(a) of the 1954 Code and entitled to priority as such. The decision makes it clear that to be entitled to the protection extended by that section to a "mortgagee" the mortgage instrument must stand as security for a definite and specific obligation.

Staff: Fred E. Youngman (Tax Division).

District Court Decision

Injunction of Collection of Taxes: Taxpayers May Not Maintain Action for Injunction and Mandamus Even Though No Notice of Deficiency Was Sent To Them, Since Amount Assessed Was Not in Excess of Amount Shown as Tax Due Upon Their Return. Michael and Betty T. Kearney v. Harold B. A'Hern, et al. (S.D. N.Y., September 7, 1961.) The District Director moved to dismiss the complaint which sought an injunction against him prohibiting his attempts to collect taxes from plaintiffs, and mandamus, seeking an order requiring him to issue a statutory deficiency notice. The District Court granted the Government's motion to dismiss those portions of the complaint which sought the injunction and mandamus on the ground that since taxpayers had shown a tax not in excess of the amount assessed to be due upon their return, no notice of deficiency was required to be sent, since a deficiency is defined in the Code as the excess above the amount shown as the tax by the taxpayer upon his return. Internal Revenue Code of 1939, §271(a).

Plaintiffs relied upon the exception to the rule of "self assessment" on the ground that even though taxpayer shows an amount due on his return, if he "believes the correct tax" to be less than that amount, a statutory notice of deficiency is required. Fred Taylor, 36 B.T.A. 427 (1937). The Court rejected this contention on the ground that the return read as a whole gave no such notice to the District Director of such a belief of the taxpayers. Furthermore, the Court held that an amended return filed by taxpayers, showing no tax due, did not provide such notice, since acceptance or rejection of an amended return is solely within the discretion of the Commissioner. Since in this case there was no assessment on the basis of such amended return but solely upon the original return, there was no indication that the Commissioner had ever accepted such amended return. See New York Trust Co., et al., 3 B.T.A. 583 (1936); Miller v. Standard Nut Margarine Co., 284 U.S. 498 (1932).

Staff: United States Attorney Robert M. Morgenthau and Assistant United States Attorney Morton L. Ginsberg (S.D. N.Y.)

State Court Decisions

Liens; Federal Tax Lien Priority Cannot Be Subverted in Foreclosure Action by Selling Premises Subject to State and Local Tax Liens. Walkill Valley Savings and Loan Association v. Roggio, United States of America, et al. (Supreme Court, New York, Ulster County.) The mortgagee in this foreclosure action sought to have the Court provide in the judgment of foreclosure and sale that the premises should be sold subject to unpaid state and local tax liens. The Government opposed on the ground that if the federal tax lien were extinguished, the continued presence of the state tax liens after the foreclosure sale would entail a priority for such state tax liens over prior federal tax liens. Furthermore, the Government contended that if the sale is subject to the local and state tax liens, the purshaser will automatically deduct from foreclosure sale the amounts of such unpaid state taxes, which will diminish the possibility of payment of the federal tax liens. The Court held that the device of selling the property subject to the local and state tax liens was an encroachment upon the federal priority and could not be permitted.

Staff: United States Attorney Robert M. Morgenthau and Assistant United States Attorney Morton L. Ginsberg (S.D. N.Y.)

Liens; State Statute Held Ineffectual to Overcome "First in Time" Priority of Federal Tax Liens. Cooperative Savings and Loan Association v. McDermott, United States of America, et al; First Federal Savings and Loan Association v. Lewis, United States of America, et al. (Appellate Division, New York.) In the Cooperative case, the judgment of foreclosure below provided that all unpaid state and local taxes should be paid prior to the payment of the federal tax liens, even though the latter had been assessed and filed prior to the state and local liens. In modifying the judgment below, the Court held that the federal tax liens are to be accorded priority pursuant to United States v. City of New Britain, 347 U.S. 81, notwithstanding the provision in Section 1087 of the New York Civil Practice Act that all unpaid state and local assessments, water rates, etc., which are liens on the premises at the date of the foreclosure sale, shall be paid first as "expenses of the sale," by the referee, regardless of any prior liens.

In the First Federal case, the same issue was involved with the additional question as to whether a mortgagee who had advanced payment for such local taxes and insurance premiums would be reimbursed for such payments prior to payment of earlier filed federal tax liens. The Court again held that the federal tax liens were to be accorded priority over such payments, notwithstanding the provisions of the mortgage and the New York Real Property Law which provided that such payment by the mortgagee entitled him to add the sums advanced to the mortgaged debt.

Staff: United States Attorney Robert M. Morgenthau and Assistant United States Attorney Morton L. Ginsberg (S.D. N.Y.).

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