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UNITED STATES ATTORNEYS
BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 9 December 15, 1961 No. 25

MONTHLY TOTALS

Totals in all categories of work pending in United States Attorneys' offices rose during the month of October, with the exception of triable criminal cases which dropped slightly. This, in turn, caused a slight drop in the total of all criminal cases pending. The aggregate of pending cases and matters shows the largest total for any month in the last five and one half years. The following analysis shows the number of items pending in each category as compared with the total for the previous month:

	September 30, 1961	October 31, 1961	
Triable Criminal	8,062	8,004	- 58
Civil Cases Inc. Civil Less Tax Lien & Cond.	15,088	15,338	+ 250
Total	23,150	23,342	+ 192
All Criminal	9,664	9,608	- 56
Civil Cases Inc. Civil Tax & Cond. Less Tax Lien	18,032	18,274	+ 242
Criminal Matters	11,539	11,773	+ 234
Civil Matters	14,125	14,379	+ 254
Total Cases & Matters	53,360	54,934	+ 674

Criminal filings and terminations and civil terminations continue to show a decrease from the comparable period of the previous fiscal year. Civil filings, however, showed an upturn of 206 cases, or approximately 2.5 per cent. As of October 31, the pending case load was 9.8 per cent above the same period in fiscal 1961. Triable criminal cases pending were 7.4 per cent higher than at the beginning of the backlog drive in August 1954. Pending civil cases including condemnation but less tax lien, showed the highest total of any month in the past five and one half years. The pending caseload is now 544 cases higher than it was at the close of fiscal 1954. The breakdown below shows the pending totals on the same date in fiscal 1961 and 1962.

	First 4 Mos. F.Y. 1961	First 4 Mos. F.Y. 1962	Increase or Decrease Number	%
Filed				
Criminal	9,807	9,607	- 200	- 2.04
Civil	8,054	8,260	+ 206	+ 2.56
Total	17,861	17,867	+ 6	+ .03
Terminated				
Criminal	8,677	8,333	- 344	- 3.97
Civil	7,172	6,696	- 476	- 6.64
Total	15,849	15,029	- 820	- 5.17
Pending				
Criminal	8,799	9,608	+ 809	+ 9.19
Civil	20,182	22,222	+ 2,040	+ 10.11
Total	28,981	31,830	+ 2,849	+ 9.83

Total case filings and terminations during October exceeded those for the preceding month, and reached the highest totals for any month since the beginning of fiscal 1962. Civil filings and terminations and criminal terminations rose, but criminal case filings were down almost 200 cases from the previous month. The steady upward trend in terminations, particularly the sharp rise of 19 per cent in October, is most encouraging. Set out below is an analysis by months of the number of cases filed and terminated.

	Filed			Terminated		
	Crim.	Civ.	Total	Crim.	Civ.	Total
July	1,819	1,886	3,705	1,732	1,500	3,232
Aug.	2,163	2,126	4,289	1,629	1,595	3,224
Sept.	2,910	1,989	4,899	2,263	1,650	3,913
Oct.	2,715	2,259	4,974	2,709	1,951	4,660

During the month of October 1961, United States Attorneys reported collections of $3,776,199. This brings the total for the first four months of fiscal 1962 to $12,135,977. This is $2,164,912, or 21.71 per cent more than the $9,971,065 collected in the first four months of fiscal 1961.

During October $1,563,621 was saved in 71 suits in which the government as defendant was sued for $2,404,262. 45 of them involving $1,276,270 were closed by compromises amounting to $477,822 and 16 of them involving $539,755 were closed by judgments against the United States amounting to $362,819. The remaining 10 suits involving $568,237 were won by the Government. The total saved for the first four months of the current fiscal year was $12,300,911 and is an increase of $4,229,881 over the $8,071,030 saved in the first four months of fiscal year 1961.

IMPORTANT NOTICE

The following correction should be made in pen and ink: delete the last sentence of paragraph 2 under "Habeas Corpus" on page 30 Title 10, United States Attorney's Manuals.

DISTRICTS IN CURRENT STATUS

As of October 31, 1961, the districts meeting the standards of currency were:

CASES

Criminal

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

CASES

Civil

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

MATTERS

Criminal

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

MATTERS

Civil

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

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ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

CLAYTON ACT

Monopoly; Lessening of Competition; Spark Plugs; Complaint Filed Under Section 7. United States v. Ford Motor Company and the Electric Autolite Company. (E.D. Mich.). On November 27, 1961, a complaint was filed in Detroit against Ford Motor Company and Electric Autolite Company charging that the April 12, 1961 acquisition by Ford of certain Electric Autolite assets substantially lessened competition and tended to create a monopoly in violation of Section 7 of the Clayton Act. Ford acquired the spark plug manufacturing facilities of Electric Autolite, a battery plant in Michigan, the famous trade name "Autolite", and Electric Autolite's entire sales and distribution organization including agreements with over 14,000 distributors, jobbers, etc. The complaint pointed out that Ford was already the most highly integrated automobile manufacturer in the United States producing substantial portions of its basic raw material requirements and most of its electrical parts and component requirements. Ford's sales for the year 1960 exceeded $5.2 billion and assets at the end of that year were more than $3.7 billion.

The complaint further alleges that Electric Autolite which was, prior to the sale, one of the nation's largest non-integrated suppliers of automotive parts and accessories, will be eliminated as an important competitive factor in the manufacture, distribution and sale of such automotive parts and accessories. The complaint states nineteen ways in which competition may be substantially lessened or a monopoly tend to be created, among them the allegation that the approximately 8,000 Ford Dealers have been foreclosed to independent suppliers of spark plugs, batteries, and other automotive parts as possible customers for their products. The complaint asks that Ford be required to divest itself of the Electric Autolite assets including specifically the trade name "Autolite."

Staff: William C. McPike and Arthur H. Kahn. (Antitrust Division)

CLAYTON ACT - SHERMAN ACT

Price Fixing; Boycotts; Brazing Alloys; Indictment Filed under Section 1 of Sherman Act and Section 14 of Clayton Act. United States v. Englehard-Hanovia Inc., et al. (S.D. N.Y.) On December 5, 1961, an indictment under Section 1 of the Sherman Act and Section 14 of the Clayton Act was filed naming as defendants five corporations engaged in the manufacture of brazing alloys, and eight of their officials.

Count one charged that defendants had been engaged, since at least January 1, 1955, in a combination and conspiracy consisting of a continuing agreement and concert of action, the substantial terms of which were (a) to fix and maintain uniform and non-competitive resale prices for

brazing alloys; (b) to require distributors to adhere to the agreed upon prices; (c) to boycott and refuse to supply brazing alloys to non-conforming distributors; and (d) to persuade other non-defendant manufacturers to boycott and refuse to supply such distributors.

Count Two of the indictment charged that the eight individuals named as defendants in Count One had also violated Section 14 of the Clayton Act.

Sales by manufacturers of brazing alloys amounted to approximately $16,000,000 in 1960. The corporate defendants accounted for approximately 92% of 1960 sales in brazing alloys.

Staff: Bernard M. Hollander and John T. Sharpnack.
(Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General William H. Orrick, Jr.

COURT OF APPEALS

CIVIL SERVICE

Action for Reinstatement Barred by Laches. Leland A. Chappelle v. Dudley C. Sharp, Secretary of the Air Force, et al. (C.A. D.C., Nov. 22, 1961). Chappelle was employed as a Fire Fighter (General) -- an excepted, permanent appointment -- by the Department of the Army at Anderson Air Force Base, Agana, Guam, until September 8, 1955 when he was removed from that position. This removal was reviewed by the Air Force Grievance Review Committee and plaintiff was ordered restored to his position or one of like seniority and status. His original position, which had been converted to the competitive service after his removal and before his reinstatement, had been filled by another, and he was given a temporary appointment as a Supervisory Fire Fighter (General) on February 26, 1957. He was removed in a reduction in force the next day, which removal he appealed. The final administrative action was taken when the Civil Service Commission Board of Appeals and Review decided adversely to his contentions on August 1, 1957.

Chappelle filed a complaint for declaratory judgment and mandatory injunction in the district court on June 17, 1960, 34½ months after the Civil Service Commission decision, claiming, inter alia, that he should have been placed in the competitive service upon his reinstatement. The lower court, however, refused to hear the merits of the case, and entered summary judgment on the basis of laches. The Court of Appeals affirmed, per curiam, citing Arant v. Lane, 249 U.S. 367, and subsequent cases.

Staff: United States Attorney David C. Acheson; Principal Assistant United States Attorney Charles T. Duncan; Assistant United States Attorneys Nathan J. Paulson and Doris H. Spangenburg (D. D.C.)

Evidence of Past Offenses Held Sufficient to Remove Probationer from Position and to Bar Him from Competitive Service for One Year. Joseph O'Leary v. John W. Macy, Jr., Chairman, Civil Service Commission, et al. (C.A. D.C., Nov. 16, 1961). O'Leary, a non-veteran, was a career-conditional appointee in the Bureau of Aeronautics, Department of the Navy, Akron, Ohio. His appointment was subject to the Civil Service Commission's investigation to determine his suitability for appointment in the competitive service in accordance with appropriate regulations. Cf. 5 C.F.R. 2.107(1961). As a result of such investigation the Commission found that O'Leary failed to meet the proper standards, based on evidence of past arrests for driving while intoxicated and of various other arrests. His appointment was disapproved,

his removal from the service was directed, and he was barred for one year from employment in the competitive Civil Service and from competition in Civil Service examinations.

After unsuccessfully pursuing his administrative remedies, O'Leary brought an action in the district court on the grounds that the offenses complained of were not sufficiently specified and that the grounds alleged were not sufficient to disqualify him from the competitive service. The district court granted summary judgment for the Government, and the Court of Appeals affirmed. Both courts found that the administrative determination was in substantial compliance with applicable procedures under valid regulations and that there was no abuse of discretion.

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

FEDERAL TORT CLAIMS ACT

Post Office Department Held Not Required Under New York Law to Remove Ice and Snow from Around Mailbox. Loretta Dix v. United States (C.A. 2, Nov. 21, 1961). Plaintiff slipped and broke her leg while depositing a letter in an outdoor mailbox. The box was one of two standing side by side on a lawn some ten feet in front of a building, a portion of which was occupied by the North Syracuse, New York, Post Office. The boxes faced the curb and were set back about 5 1/2 feet from the street. They were owned by the Post Office Department, which had leased a portion of the building and the area in front of it where the boxes were placed. There was no sidewalk parallel to the front of the building or leading to the boxes. A small paved path extended from the curb toward the building and branched into two paths leading, respectively, to the entrances of the Post Office and a Legion Hall. The mail boxes were some five feet south of this path. The accident occurred on an evening when the ground was covered with snow from severe earlier snowfalls. Plaintiff asked the driver of the car in which she was riding to stop in front of the Post Office. She alighted and walked in the roadway and across the ground toward the mailboxes. As she reached the mailboxes she slipped and fell. Plaintiff is unable to state the condition of the spot where she was standing or what caused her fall.

She brought suit in the district court under the Federal Tort Claims Act, alleging that the United States was negligent in not removing the snow from in front of the mail boxes and negligent in placing the mailboxes without any regular sidewalk leading thereto and without adequate illumination at night. The lower court decided for the Government.

On appeal plaintiff argued that while the Government might not be held to the standard of care she proposed for mailboxes having no connection with the Post Office Building, the location of these boxes in close proximity with a Post Office Building gave the Government a duty similar to that required of a store owner with regard to means of access to and exit from his property. The Court of Appeals, however, affirmed the lower court. It referred to the rule in New York that an abutting owner owes no duty to a passer-by to remove snow, etc., from the front of his building provided he does not intervene with what falls or accumulates. It then decided that this case was not analogous to the situation of a merchant who invites a person to enter and promises a safe means of access. Plaintiff had conceded that there was no duty on the Government to keep every mailbox accessible at all times to the public, and the Court found no reason why this rule should not apply, even though this particular box was placed in front of a Post Office building. It therefore found no affirmative duty on the part of the Government to remove the snow and ice on the lawn. One of the judges of the Court of Appeals dissented, holding that plaintiff was a business visitor and that the lower court had a duty to determine whether or not the Government had taken reasonable care for her safety.

Staff: United States Attorney Justin J. Mahoney; Assistant United States Attorney Edward J. McLaughlin (N.D. N.Y.).

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT

Prohibition Against Holding of Union Office by Persons Convicted of Certain Crimes Extends for Five Years After Termination of Parole Rather Than Five Years After Release from Actual Incarceration. Harry Serio v. Milton J. Liss, Local 478, International Brotherhood of Teamsters, and Arthur J. Goldberg, Secretary of Labor (C.A. 3, November 17, 1961). Harry Serio, the business agent of Teamsters Local 478 in Newark, New Jersey, brought suit against the president of the local union and the local in the New Jersey federal district for a judicial declaration that he was entitled to hold office notwithstanding the fact that his parole following incarceration for the crime of aggravated assault ended less than five years before the institution of suit. He had been released from a New Jersey state prison on parole more than five years before.

Section 504(a) of the LMRDA prohibits the holding of union office by persons convicted of certain crimes for a period of five years after the end of their "imprisonment". The Secretary of Labor, who was represented by the Department of Justice, intervened to assure that the Government's interests were adequately represented. The District Court ruled that it had jurisdiction over the matter, holding that the case "arises under" Section 504(a). The Court rejected the argument that the scope of the bar of 504(a) arose only by way of defense to a suit which in reality was founded upon whatever contractual rights Serio had to remain in office. On the merits, the District Court held that parole time under both federal and New Jersey law constituted "imprisonment" within the meaning of Section 504(a), and that therefore Serio was ineligible to hold union office until five years after the end of his parole period.

The Court of Appeals for the Third Circuit affirmed. The Court, Judge Hastie dissenting on this point only, agreed with the district court that the case "arises under" Section 504(a). The Court also agreed with the District Court's view that under both federal and New Jersey law parole time was "imprisonment". It was therefore unnecessary for the Court to decide which law governed. The Court did indicate, however, that federal law would probably govern if the state law of parole was "so unlike the federal law as to render the reach of Section 504(a) so variable or so limited that the cleansing period intended by Congress would be impaired".

Since parole is frequently of long duration because convicts are generally eligible for parole after completing one-third of their sentence and they then serve the balance of the sentence on parole, this decision gives the "five-year cleansing period" the full force which Congress intended.

Staff: Marvin S. Shapiro (Civil Division)

SOCIAL SECURITY

Court Upholds Referee's Decision That Claimant was Not Bona Fide Employee. Frances Stevenson v. Ribicoff (C.A. 2, Nov. 8, 1961). In 1956 the claimant filed an application with the Department of Health, Education, and Welfare for old age insurance benefits under the Social Security Act, 42 U.S.C. 402(a). Her claim was based on an alleged six quarters of service as a domestic for her brother, at a rate of $350 per month, or a total of $4200 per year, the maximum amount that could be credited as "wages" for the purpose of such benefits. Cf. 42 U.S.C. 409(a) (2). The claimant and her sister occupied an apartment in a building which their brother controlled and in which he also resided. They paid no rent because of a management contract between the sister and the brother. Although claimant was elderly and had no previous experience as a domestic she was hired by her brother for an 18 month period at a rate of $350 per month. For about 18 months before the claimant began to perform the alleged services the brother had employed domestics occasionally, seldom at a rate more than $10 per day, and had not reported any of these wages for Social Security purposes. Although claimant's "services" were terminated in June 1956 because of her inability to perform the work, no domestic help had been hired by the brother from that date until the time of the hearing before the referee in early 1958.

The referee found that there was no actual need on the part of the brother for these services, that such services as were actually performed were rendered because of the close relationship between the parties, that the brother, who earned less than $10,000 per year, was not financially capable of making payments of $350 per month, and that any services rendered were not reasonably related to the amount paid for them. He therefore denied the claimant benefits and the Appeals Council affirmed.

The district court found that there was substantial evidence for the inferences and conclusions made by the referee from the undisputed facts. The Court of Appeals affirmed. Cf. also Poss v. Ribicoff, 289 F. 2d 10 (C.A. 2, 1961, certiorari denied U.S. , and Barron v. Ribicoff (C.A. 2, 9 Atty's. Bulletin 669, Nov. 17, 1961).

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorney Robert M. Hausman (S.D. N.Y.).

DISTRICT COURT

FALSE CLAIMS ACT

Submission of Fraudulent Loan Papers to Bank Which Subsequently Makes Claim Against VA Under Loan Guaranty Program Creates Liability of Original Wrongdoer; Statute of Limitations Runs from Date of Presentation of False Claim by Bank to VA. United States v. Sydney Klein, et al. (W.D. Penna., May 25, 1961). In a civil suit under the False Claims Act, 31 U.S.C. 231, the defendant real-estate operator was charged with having presented fraudulent papers to a bank, whereby ineligible veterans obtained loans which were guaranteed by the Veterans Administration. There was subsequent default on the loans and claim made against the VA by the Bank. Defendant moved to dismiss the complaint on two grounds: 1. no cause of action exists because the Bank and not defendant presented the false claims to the VA and the Bank knew the loans were ineligible for VA guaranty, and 2. inasmuch as the defendant submitted the alleged false papers to the Bank in 1950, the action was barred by the six-year statute of limitations of the False Claims Act.

The District Court denied the defendant's motion to dismiss. With regard to defendant's first contention, the Court adopted the Government's position that causing of false claims to be presented to the Government, regardless of who actually presents such claims, is sufficient to create liability under the False Claims Act. As to the second contention, the Court ruled that the statute of limitations under the False Claims Act does not begin to run until a cause of action accrued in favor of the Government, i.e., at the time the Bank presented the claims on defaulted loans to the VA for payment.

Staff: Former United States Attorney Hubert I. Teitelbaum; Former Assistant United States Attorney George Sewak (W.D. Pa.); Victor S. Evans (Civil Division)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Parole Revocation Hearings - Assistance of Counsel. Reed v. Butterworth (C.A. D.C.) Appellee was arrested as a mandatory release violator and returned to the United States Penitentiary at Atlanta, Georgia in April 1960. At his revocation hearing he was offered the opportunity to retain counsel, pursuant to the decision in Robbins v. Reed, 269 F. 2d 242 (C.A. D.C. 1959). He at first indicated that he would retain counsel and also asked to present witnesses on his behalf. Subsequently, however, he advised that he was unable to afford the services of counsel, and was given his hearing without counsel and without witnesses. His mandatory release was thereafter revoked. Appellee filed a complaint for declaratory and injunctive relief alleging that the hearing was illegal because he was precluded from presenting witnesses. The District Court ordered the Board of Parole to hold a new hearing giving appellee the opportunity to present witnesses who would voluntarily appear on his behalf. The Government appealed, urging that the revocation statute, 18 U.S.C. 4207, should be construed so as to provide only the traditionally informal hearing.

On November 9, 1961, the Court of Appeals affirmed the lower court's order emphasizing that parole revocation hearings are not mere formalities whose results are a foregone conclusion. The Court indicated that it would order rehearings to cure procedural defects and, citing Glenn v. Reed, 289 F. 2d 462 (C.A. D.C. 1961), that in cases of "grievous injustice", it would order "such further relief as the circumstances may warrant." The Board of Parole has since adopted a new rule permitting the attendance of voluntary witnesses at all revocation hearings.

Staff: United States Attorney David C. Acheson; Former United States Attorney Oliver Gasch (Dist. of Col.); Harold H. Greene, Kenneth M. Levy and David Rubin (Civil Rights Division)

United States v. Ellett R. Dogan, et al. (N.D. Miss.). The United States, acting under the Civil Rights Acts of 1957 and 1960, has brought a suit against the Sheriff of Tallahatchie County, the Registrar of the County, and the State of Mississippi, to end discrimination against Negroes attempting to pay poll taxes and to register to vote in that county. Payment of poll taxes is one of the prerequisites for voting in Mississippi. The complaint, filed November 17, 1961, states that about 5,099 white persons and 6,489 Negroes of voting age reside in the County but that no Negroes are registered to vote there, while 4,309 white persons are registered to vote.

The complaint alleges, among other things, that defendant Dogan, the Sheriff, has continued the policy, in existence since 1946, of refusing

to permit Negroes to pay their poll taxes, and that defendant Harris, the Registrar, and the State of Mississippi have arbitrarily denied Negroes the opportunity to register, have refused to afford Negro applicants an opportunity to register equal to that afforded to white applicants, have unreasonably delayed the receipt of applications from Negro applicants, and have refused to register Negroes who possess the same or similar qualifications as white persons who have been registered to vote.

The suit seeks a preliminary and permanent injunction against the discriminatory acts and practices. The Court is also asked to make a finding that the deprivations were pursuant to a pattern and practice.

Staff: United States Attorney Hosea M. Ray;
John Doar (Civil Rights Division).

* * *

CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

FEDERAL RESERVATIONS

Jurisdiction of Offenses. When criminal cases are reported to United States Attorneys of offenses committed on lands occupied by Army posts, naval stations, air bases, post offices, veterans hospitals and other Federal installations, the first question to be determined is whether the lands are under the exclusive or concurrent jurisdiction of the United States within the purview of 18 U.S.C. 7(3).

There are three methods by which the United States obtains jurisdiction over Federal lands in a state; (1) a state statute consenting to the purchase of land by the United States for the purposes enumerated in Article 1, Section 8, Clause 17 of the Constitution of the United States; (2) a state cession statute; and (3) a reservation of Federal jurisdiction upon the admission of a state into the Union. In the absence of a consent or cession statute, or a reservation of jurisdiction, the possession of the United States is that of an ordinary proprietor save that the state cannot interfere with the effective use of the land for the purpose for which it was acquired. See Ft. Leavenworth R.R. Co. v. Lowe, 114 U.S. 525; United States v. Unzeuta, 281 U.S. 138; Surplus Trading Co. v. Cook, 281 U.S. 647; James v. Dravo Contracting Co., 302 U.S. 134; Collins v. Yosemite Park Co., 304 U.S. 518. Since February 1, 1940, the United States acquires no jurisdiction over Federal lands in a state until the head or other authorized officer of the department or agency which has custody of the land formally accepts the jurisdiction offered by state law. 40 U.S.C. 255; Adams v. United States, 319 U.S. 312. Prior to February 1, 1940, acceptance of jurisdiction was presumed in the absence of evidence of a contrary intent on the part of the acquiring agency or Congress. Ft. Leavenworth R.R. Co. v. Lowe, supra; Mason Co. v. Tax Comm'n., 302 U.S. 186.

If the question of Federal or state jurisdiction over a particular area has not been previously decided judicially, a determination of the jurisdictional question usually involves, among other things, a review of the history of the land and the applicable state consent and cession laws. There have been many new land acquisitions to Federal properties in recent years; thus part of an installation may be under the jurisdiction of the United States and the remainder under state jurisdiction. Information available in the local office of the Federal Agency which acquired the lands should be of assistance to United States Attorneys in arriving at a definite conclusion regarding jurisdiction. In cases of doubt, United States Attorneys should submit the results of their research to the General Crimes Section of the Criminal Division for instructions.

In 1954 there was organized an Interdepartmental Committee for the Study of Jurisdiction over Federal Areas within the States. This Committee made an exhaustive study of Federal-State Jurisdiction. Copies of Part I of the Committee Report, published in 1956, and Part II, published in 1957, have been sent to all United States Attorneys. We recommend that all United States Attorneys and their staffs review these publications, particularly Part II which contains an excellent text on the law of legislative jurisdiction. If copies are not now available in the office of a United States Attorney, copies may be obtained from the Executive Office for United States Attorneys.

BANK ROBBERY ACT

Occupancy of Bank Held Not Necessary Element of Entry or Attempted Entry Made Unlawful by 18 U.S.C. 2113(a). Victor Otto Oreskovich and Roger Wayne Williams v. United States (E.D. Wis., October 16, 1961). Defendants were indicted for unlawful entry of a bank with intent to commit larceny, and with conspiracy to violate 18 U.S.C. 2113. Oreskovich pleaded guilty to the substantive offense, and the conspiracy indictment was dismissed as to him. Williams pleaded guilty to both charges.

Having entered an office in the building housing the bank, defendants attempted during Halloween night of 1959 to cut a hole in the floor directly above the vault of the bank, but were unable to penetrate the concrete vault ceiling which they discovered beneath the floor. They were arrested in October, 1960 and admitted the attempted entry. In challenging their convictions by motions pursuant to 28 U.S.C. 2255, they contended that the entry declared unlawful by Section 2113(a) must be the entry or attempted entry of a bank occupied by other persons, i.e., attempted robbery under Section 2113(a), and that any other construction would permit imposition of the severe 20-year penalty for an offense not involving force or violence.

In the Court's opinion, the unlawful entry clause of subsection (a) is a burglary provision which the legislative history shows was placed in the statute by amendment to enlarge the scope of the bank robbery statute to include the crimes of larceny and burglary of banks covered by the Act. The Court held that there is no interdependence or interrelation between the two disjunctive clauses of subsection (a), and that the inclusion of robbery and burglary in one subsection of the statute does not support an inference that elements peculiar to one offense or to a degree of aggravation of one offense must by implication be read into the other. Burglary need not be committed in the presence of another or upon occupied premises to be unlawful under the Act. Moreover, there is no incongruity in the penalty scheme of the Act inasmuch as authorization of the

equal penalties for robbery and unlawful entry (burglary) indicates that Congress considered burglary as serious a threat to the safety of banks having custody of federally insured funds as that posed by robbery.

Staff: United States Attorney James B. Brennan; Assistant United States Attorney Louis W. Staudenmaier, Jr. (E.D. Wisc.).

PROBABLE CAUSE

Probable Cause to Arrest Individual, Who, Being with Others in Suspicious Circumstances, Refuses to Answer Police Inquiries to General Group. Dixon v. United States (C.A. D.C., October 19, 1961). Appellant was indicted with a co-defendant on three counts of violating the D. C. Code, and convicted on one count, the receipt of a stolen fur stole of a value of $225 in violation of 22 D.C. Code 2205. Appellant was sentenced to 12 to 40 months' imprisonment and appealed in forma pauperis on the grounds that there was no probable cause for his arrest, and, therefore, the property seized at the time of his arrest was inadmissible against him. The United States Court of Appeals for the District of Columbia affirmed the judgment of the District Court with the ruling that the sum total of circumstances at the time of arrest gave the arresting officers probable cause for appellant's arrest.

At 1:10 a.m. on the morning of August 24, 1960, two Washington policemen, while riding in an unmarked cruiser, noticed two men, one a known safecracker, in a 1960 Oldsmobile. After following this car for several blocks, they observed it pull over to the curb where a man beckoned. After a brief conversation the car moved and the pedestrian walked in the same direction down a side street. The police saw the Oldsmobile park on the street in front of a 1958 Plymouth. The officers drove around the block and entered the side street, where they saw the rear trunks of both the Oldsmobile and Plymouth open. Standing on the curb next to the Plymouth were appellant and the other three men. As the officers approached in their cruiser, one of the men threw an article to the ground. One of the officers alighted and saw in the Plymouth's lighted trunk a box containing a fur piece with a price tag or label on it. He also saw that the article thrown to the ground was a garment. He immediately asked to whom it belonged and received no reply. Upon picking it up he found it was a lady's two piece suit from which the price tags had not been removed. The Officer reinquired as to the owner of the suit and upon receiving no reply he arrested the four men, including appellant.

The appellate court, following the traditional line of cases from Brinegar v. United States, 338 U.S. 160 (1949), to Henry v. United States, 361 U.S. 98 (1959), stated that the applicable standard was whether or not the sum total of circumstances known by the officers at the moment of arrest were such as to convince a reasonably prudent police officer that there was a reasonable probability that a crime had been, was being or was about to be committed. The Court held the officers did have probable cause to arrest the appellant as well as the other defendants.

A factor in establishing probable cause to arrest was the failure of any defendant to answer the two police inquiries as to ownership of the garment. Appellant's only significant role in the incident was his physical presence. His failure to claim that his presence was not criminal justified the police in placing him under arrest with the other defendants. The Court, therefore, indicates in its opinion (by citing cases supporting the proposition) that in certain factual situations, such as presented in the instant case physical circumstances alone (without oral accusations) can have the legal effect of requiring an explanation by a person who wishes to avoid a legal arrest. Such physical circumstances require affirmative explanation in the same way that some oral accusations may require affirmative explanation.

Staff: United States Attorney David C. Acheson; Principal Assistant United States Attorney Charles T. Duncan; Assistant United States Attorney Doris H. Spangenburg (Dist. Of Columbia).

KIDNAPPING

Sufficiency of Indictment Which Did Not Charge Victims Were Held for Any Specific Reason; Voluntariness of Confession to County Police. Hiller Arthur Hayes v. United States (C.A. 8, Nov 21, 1961). Defendant appealed from a judgment of conviction and a sentence of imprisonment for a term of 99 years for violation of the Federal Kidnapping Act, 18 U.S.C. 1201, as charged in a three count indictment. Defendant's assignment of errors included an objection to the sufficiency of the indictment on the grounds that it did not charge that the defendant had held the victims for any specific reason, and that there can be no violation of the Act unless the kidnapped individual is "held for ransom or reward or otherwise." Citing authority to the effect that adding the words "for ransom or reward or otherwise" would not add anything to the indictment because the term "otherwise" comprehends any purpose at all, the Court concluded that the indictment sufficiently apprised the defendant of the charges he was required to meet and was not defective.

In addition, the defendant assigned as error the failure of the trial court (a) to determine whether Hayes' confession to the County Police, which was challenged by Hayes as having been procured by duress, was voluntary, and (b) to submit the issue of its voluntariness to the jury. Hayes, who acted as his own defense counsel, had objected at the trial to the admission of the confession as evidence on the ground that "it was taken under duress, and it was not taken by a federal officer." The Court treated defendant's assignment of error as an objection to the sufficiency of the evidentiary basis for admission of the confession, and held that the trial court had not erred in admitting the confession in evidence. The Court noted that there was

nothing in the testimony of the police captain to justify an inference that the confession was not voluntary. The mere fact that a confession is given to a police officer while a defendant is in custody does not make the confession involuntary. In the instant case there had been no long or continuous questioning of Hayes. Furthermore, Hayes chose to let the admissibility of the confession rest upon the police captain's testimony and offered no testimony himself to contradict it. Therefore, the Court found that the trial court had not erred in admitting the confession of Hayes in evidence or in failing to submit the question of its voluntariness to the jury.

Staff: United States Attorney D. Jeff Lance; Assistant United States Attorney John A. Newton (E.D. Mo.).

NATIONAL STOLEN PROPERTY ACT

Sufficiency of Indictment Under 18 U.S.C. 2315 Which Did Not Allege Specific Criminal Intent. Sherman Alphonse Gendron v. United States (C.A. 8, Nov. 8, 1961). Defendant was convicted in the Eastern District of Missouri of violating 18 U.S.C. 2315 by receiving and concealing certain securities, knowing they were stolen. On appeal the Eighth Circuit rejected defendant's contention that the indictment was fatally defective in that it failed to allege that the act charged was committed with a specific criminal intent. The Court noted that Section 2315 by its terms does not make any specific intent an element of the offense. Relying upon the fact that Congress in amending Sections 2314 and 2315, specifically required unlawful or fraudulent intent as an element under Section 2314, but did not add this requirement to Section 2315, the Court inferred that Congress in not providing for criminal intent in Section 2315 did so deliberately. The Court also noted that Sections 2312 and 2313, parallel sections dealing with transportation of and receipt of stolen motor vehicles, do not require fraudulent or felonious intent; and that the forms of indictment under Sections 2312 and 2313 in the Appendix to the Criminal Rules do not allege such intent. Judging by practical, and not by technical, considerations, the Court held the indictment sufficient.

In addition, the defendant asked the Court to note plain error under Rule 52(b) in reference to the search of defendant's car after he was arrested for unlawfully backing out of an alley and for not having a valid driver's license in his possession, and for the consequent seizure of the stolen bonds. Since there was evidence in the record that defendant consented to the search of his automobile; that the search was an incident of the arrest for a traffic violation; and, the defendant assigned no valid reasons why he failed to raise the issue below, the Court refused to invoke the plain error rule.

Staff: United States Attorney D. Jeff Lance; Assistant United States Attorneys Frederick H. Mayer and Harold F. Fullwood (E.D. Mo.).

MOTION TO VACATE SENTENCE
28 U.S.C. 2255

Sufficiency of Evidence Presented to Appellate Court to Support Finding of Petitioner's Past Competency; Use of Interrogatories in Hearing to Determine Merits of Motion to Vacate Sentence. David Holston Roddy v. United States (C.A. 10, Nov. 3, 1961). In 1947 appellant waived indictment and entered a plea of guilty to an information charging him with violating the Dyer Act (18 U.S.C. 2312). This 1947 conviction constituted one of the bases for his present sentence in the Kansas State Penitentiary as an habitual criminal. In March 1961 appellant attacked the Dyer Act conviction by a motion filed with the sentencing court under 28 U.S.C. 2255, which motion was denied following a hearing. On appeal appellant relied upon several grounds to substantiate the alleged illegal imposition of sentence. However, his basic complaint was that when he entered his plea of guilty in 1947 he was, in fact, mentally incompetent and should have been protected under Rule 11 of the Federal Rules of Criminal Procedure because he could not have understandingly and voluntarily entered a plea.

In affirming the lower court's denial of the petition, the appellate court made it clear that the issue of voluntariness and understanding in entering the plea was one of fact which the lower court after conducting a hearing had decided against appellant. The appellate court restricted its review to the question of whether the conclusion of the court below that appellant did not sustain his burden of proving incompetency was supported by the evidence. In finding such support the court underlined (1) the repeated conferences which appellant had with his experienced counsel culminating in the very sensible plea of guilty to the federal charge rather than the possible imposition of a much more severe state sentence; (2) the psychiatric reports introduced which indicated that from examinations made at the time of sentencing appellant was "neurotic but not psychopathic" and (3) the opinion of the sentencing judge who in answer to interrogatories stated that it did not appear that appellant was incapable of aiding counsel in the preparation of his defense by virtue of his mental condition.

Though not an issue discussed in the respective briefs or in the opinion of the Court it is, nevertheless, a noteworthy offshoot of this case that at the hearing held to decide the merits of the motion interrogatories were used to obtain the opinion of the sentencing judge. Section 2255 provides that "A court may entertain and determine such motion without requiring the production of the prisoner at the hearing." The landmark Supreme Court case in this area - United States v. Hayman, 342 U.S. 205 - clearly establishes that a proceeding under 28 U.S.C. 2255 is, like habeas corpus which it was enacted to simplify and largely supplant, a civil matter rather than criminal although it necessarily deals with criminal convictions. It flows from Hayman and the statutory language quoted that in questioning witnesses there is no absolute necessity whenever possible to have actual testimony rather than interrogatories.

However, Hayman does go on to state at 342 U.S. 220-221: "The very purpose of Section 2255 is to hold any required hearing in the sentencing court because of the inconvenience of transporting court officials and other necessary witnesses to the district of confinement." Therefore, absent unusual circumstances which must have existed in Roddy, this Supreme Court statement does not suggest the indiscriminate use of interrogatories, which might serve to emasculate "the very purpose" of Section 2255.

Further evidence of the Supreme Court's zealous safeguard of prisoner's rights when dealing with habeas corpus type proceedings may be seen from Smith v. Bennett, 365 U.S. 708, 712, 713.

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

EXCLUSION

Mandatory Injunction to Require Alien's Admission or Exclusion Hearing; Legal Standing of Plaintiff Outside United States; Indispensable Party. Pedro Estrada et al. v. Ahrens (C.A. 5, November 30, 1961.) Appellant, the former Chief of Police of Venezuela during the regime of General Marcos Perez Jiminez, arrived at Miami, Florida in March 1958 with members of his family and all applied for admission for permanent residence. They presented valid non-quota immigrant visas which had been issued in the Dominican Republic.

Because his arrival raised a question whether his admission might be prejudicial to the interests of this country his immigration inspection and that of the others was deferred to allow the Service time to conduct an investigation. He and the other members of his family were then paroled into the United States.

In May 1958, while still in that parole status, he left the United States for Switzerland without prior consultation with or notice to the Service, despite an oral understanding that he would keep the Service informed of his whereabouts. The Service then informed him telephonically that he should have obtained permission to leave the United States and that he could not return without first securing an immigrant visa. (The visa which he presented and surrendered on his arrival at Miami was issued to him in March 1958 and was valid for four months.) The Service also notified all sea and air carriers of the penalties in 8 U.S.C. 1323 should they bring him back to the United States without a visa.

Thereafter and while still in Europe, where the other family members had joined him, he sought judicial review of the case (Estrada et al. v. Ahrens, S.D., Fla.), a mandatory injunction to compel the defendant to either admit them to the United States or to afford them hearings before a special inquiry officer as provided in 8 U.S.C. 1225 and 1226, and for a temporary restraining order to prevent the defendant from interfering with their return to the United States and from imposing any penalty on a carrier bringing them back without visas. They contended, in effect, that they were in constructive possession of the visas they had presented on arrival in Miami, since they had not been acted upon, and that their applications for admission were still pending and unadjudicated.

The District Court ruled that it had no jurisdiction of the case "by virtue of the Plaintiffs' absence from the United States at the time of the filing of the complaint and thereafter" and dismissed the complaint on July 13, 1960. Plaintiffs appealed from that dismissal.

After a comprehensive discussion of cases relating to the legal standing of persons outside the United States to bring such an action as this, and to the indispensability of parties, the Court of appeals concluded that the court below erred in dismissing the complaint for lack of jurisdiction and that it should not be dismissed for lack of an indispensable party. (That point had been raised in the court below but not ruled on).

The case was reversed and remanded for proceedings in the District Court to determine whether, by their departure from the United States, plaintiffs withdrew their applications for admission thereby invalidating their visas, or whether they are entitled to pursue their rights under their existing visas.

Staff: Regional Counsel Douglas P. Lillis, I and N Service, Richmond, Virginia; United States Attorney E. Coleman Madsen and Assistant United States Attorney Lavinia L. Redd (S.D. Fla.) with him on the brief.

DEPORTATION

Declaratory Judgment - Review of Deportation Order; Passports; Evidence in Deportation Hearing. DeLucia v. Flagg (C.A. 7, December 4, 1961). For digest of District Court's opinion see sub nomine DeLucia v. Pilliod, Bulletin, Vol. 9, No. 6, p. 188.

DeLucia appealed from a summary judgment sustaining an order for his deportation. The Court of Appeals agreed with the court below on all points raised and affirmed its judgment.

Staff: Assistant United States Attorney R. N. Caffarelli; (N.D. Ill.) United States Attorney James T. O'Brien and Regional Counsel Charles Gordon, I and N Service, St. Paul, Minnesota, with him on the brief.

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Subversive Activities Control Act of 1950; Registration of Communist-action Organizations. United States v. Communist Party, United States of America (Dist. Col.). On December 1, 1961, a Grand Jury in the District of Columbia returned a 12 count indictment against the Communist Party, charging that it failed to register with the Attorney General as a "Communist-action" organization in accordance with an order of the Subversive Activities Control Board and in violation of 50 U.S.C. 786 and 794. The Act provides that registration must be accomplished within 30 days after the Board's order becomes final, and each day of failure to register thereafter is a separate offense. The Board's order became final on October 20, 1961 (see United States Attorneys' Bulletin, Volume 9, No. 22, p. 652). Accordingly, the first count of the indictment charges that the Party failed to register on or before November 20, 1961 (November 19 being a Sunday) and the next 10 counts charged failure to register on each of the ten days from that date to the date of the indictment. The last count charges failure to file a registration statement which the Act requires to be submitted upon registration.

On December 8, 1961, the Communist Party, through its attorneys, entered a plea of not guilty and moved for 30 days to present motions. This motion was granted and trial was set for February 1, 1962.

Staff: F. Kirk Maddrix and Robert L. Keuch
(Internal Security Division)

Contempt of Congress. United States v. Jose Enamorado Cuesta, et al., (D. P.R.) On November 30, 1961, a federal grand jury in the District of Puerto Rico returned twelve separate indictments charging the twelve defendants in one or more counts with contempt of Congress in violation of 18 U.S.C. 192.

The circumstances which led to this prosecutive action by the Government arose out of hearings conducted by a subcommittee of the Committee on Un-American Activities in San Juan, Puerto Rico, which began on November 18,1959. The subjects under inquiry by the Committee were: entry and dissemination in Puerto Rico of foreign Communist Party propaganda; receipt of information relating to persons engaged in foreign travel; the extent, character and objects of Communist infiltration and Communist Party propaganda activities in Puerto Rico; and, the execution by the administrative agencies concerned of all laws and regulations relating to the Internal Security Act, the Communist Control Act, the Foreign Agents Registration Act, passport regulations, and all other laws the subject matter of which is within the jurisdiction of the Committee.

Each defendant was subpoenaed to give testimony before the subcommittee, and having appeared, refused to testify after having taken the oath. All based their refusal on the grounds that the House Committee had no jurisdiction to conduct hearings in Puerto Rico. Arraignment in these cases has been set for December 8, 1961.

Staff: United States Attorney Francisco A. Gil, Jr. (D. P.R.); Paul C. Vincent (Internal Security Division)

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Indians; Removal of Restrictions; Conveyance of Restricted Estate Without Secretarial Approval Invalid. John J. Spriggs, Sr. v. United States (C.A. 10, November 18, 1961). Mary Bradford, an Indian, was named in her husband's will as a devisee of an undivided interest in certain trust allotments. Mary retained appellant Spriggs as counsel and agreed to convey one-half of her inheritance to him if the will were sustained. This was ultimately accomplished in proceedings before the state court and in the Department of the Interior. The agreement and subsequent deeds executed by Mary in favor of Spriggs were not approved by the Secretary as required by applicable statutes concerning conservation of restricted estates where conveyance is made by an Indian of an interest in a trust allotment. Believing Mary to be a white woman, the Department of the Interior initially informed Spriggs that Mary's interests were unrestricted and that Secretarial approval was unnecessary to validate Mary's conveyances. This opinion, however, was subsequently corrected and Spriggs was requested to convey all the interest he had received from Mary back to the United States to be held in trust for her. Spriggs complied with this request in 1930.

The present suit represents the culmination of litigation begun in the District of Columbia courts in 1952 by Spriggs seeking a cancellation of the 1930 deed on the ground that Mary's status as an incompetent Indian had been fraudulently misrepresented to him by an official in the Department of the Interior and that her interests were actually unrestricted. Spriggs v. McKay, 119 F.Supp. 232, aff'd 228 F.2d 31; Spriggs v. Seaton, 271 F.2d 583. In a decision on the merits of his claim in the present proceeding, the lower court entered judgment against Spriggs. This decision was affirmed on appeal, the Court holding that restrictions on alienation of trust patents are not personal to the allottee, but run with the land and are binding upon the heirs. The Court went on to hold that neither the Secretary's approval of the will nor the grant of citizenship to the Indians effected a removal of the restrictions on trust property. Therefore, since the conveyance by Mary to Spriggs was without Secretarial approval as required by statute, the deeds conveyed no interest to him and the reconveyance by Spriggs in 1930 to the United States was not the result of fraud.

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

Administrative Law; Mineral Leasing Act; Oil Shale Locations. Gabbs Exploration Company v. Udall, (D.C. D.C., December 4, 1961). Oil shale was one of the six minerals withdrawn from further location and patent when the Mineral Leasing Act was passed in 1920. That Act, however, contained a savings clause with respect to mineral locations made prior to 1920. Because no commercially feasible process for the production of petroleum from oil shale had been developed, many of the

pre-1920 locators ceased doing annual assessment work on the locations. In the late 1920's, the Department of the Interior took the position that failure to perform annual assessment work would, in itself, invalidate a claim. It therefore instituted hundreds of contests against these early locations to establish their invalidity. However, in Wilbur v. Krushnic, 280 U.S. 306 (1930), and Ickes v. Development Corp., 295 U.S. 639 (1935), the Supreme Court held that failure to do annual assessment work was not a ground for cancellation of otherwise valid mineral claims.

The captioned case involved twenty-six oil shale placer mining claims originally located in 1918. Early in 1930, contests against these claims had been instituted by the Department of the Interior to have them declared invalid on the grounds (a) that no assessment work had been performed and (b) that the claims had been abandoned. When the locators failed to answer, all the claims, early in 1930, were declared null and void by the Commissioner of the General Land Office.

In 1956, plaintiff purchased whatever rights the original locators had and filed patent applications. It contended that in the 1930 proceedings the charge of abandonment was merely another way of charging failure to do assessment work and, in addition, that the Department of the Interior had failed to follow its own rules of procedure. The Secretary denied the applications. He held that a charge of abandonment was a separate charge which would support a finding of invalidity without reference to the charge of failure to do annual assessment work. He also held that the contest notice served in the 1930 contest was a proper one which satisfied the requirements of due process. He concluded that since the claims had been properly declared null and void in 1930 they could not be made the basis of a patent application filed at any time thereafter.

Plaintiff then filed this action in the United States District Court for the District of Columbia to obtain judicial review under the Administrative Procedure Act. The case was submitted on cross-motions for summary judgment. On December 4, 1961, Judge Matthews sustained the defendant's motion and entered judgment dismissing the complaint. Plaintiff's counsel has indicated that an appeal will be filed. Renewed interest in Government-owned oil shale deposits in Colorado has resulted in the presentation of a variety of legal issues in current Department of the Interior proceedings. This case is the second to reach the litigation stage. See Union Oil Co. v. Udall, F.2d (C.A. D.C., Mar. 23, 1961).

Staff: Thos. L. McKevitt (Lands Division).

Administrative Law; Department of Interior Regulations; Abuse of Discretion. Garthofner v. Udall (D.C. D.C., Nov. 27, 1961). In Pressentin v. Seaton, 284 F.2d 195 (1960), 8 U.S. Attorneys Bulletin No. 19, pp. 610-611, the Court of Appeals for the District of Columbia Circuit considered but refused to enforce a regulation of the Secretary of the Interior requiring that briefs in support of administrative appeals in mineral land contests be filed in the office of the Director, Bureau of Land Management, in Washington within thirty days from the

date of the hearing examiner's opinion. Pressentin mailed his brief on time in the West but it was one day late in arriving in Washington. The Secretary refused to consider the appeal. In doing so, he also refused to apply an amended regulation, adopted after Pressentin had filed an appeal, giving an additional ten days whenever it could be established that a brief had been mailed within the original thirty-day period.

The captioned Garthofner case arose in connection with an appeal from a hearing examiner's denial of a claim of grazing privileges. The regulations referred to in the Pressentin case did not apply to grazing appeals. Although the applicable appeal regulations were similar, including the requirement that appeal papers be filed within thirty days, they did not include the special ten-day grace period for material mailed on time. Garthofner mailed his appeal within the thirty days but it was one day late in arriving in Washington. The Secretary sustained a decision by the Director, Bureau of Land Management, refusing to consider the appeal. On November 27, 1961, Judge Holtzoff held that the case was ruled by the Pressentin action and that the Secretary was arbitrary and capricious in applying his regulation. Accordingly, the case was sent back to the Secretary for review on the merits.

Staff: Thos. L. McKevitt (Lands Division).

Condemnation; Liability of United States to Pay Enhancement Resulting to Property It Leased When Fee Title Is Condemned; Meaning of "Rental" Under Economy Act of 1932. United States v. Certain Space in Building Known as Rand McNally Building in Chicago, Illinois (C.A. 7). The United States first occupied the Rand McNally Building in Chicago in 1951 under a five-year lease renewable for five years which provided, inter alia, that the Government could make alterations or additions, and that additions if removable without damage to the realty could be removed "provided, however, that no structural alterations shall be removed at any time." Alterations costing some $2,370,000 were made which, in substance, converted the property from a warehouse and loft building to an office building. Proceedings to take a fee title were filed in December 1955 and a declaration of taking in 1956. The district court rejected the Government's contention that valuation in 1956 should be based on the physical condition of the building in 1951 prior to the conversion of the building to a more valuable use. The result, according to the Government's offer of proof was to enhance the award by some $1,426,000. The Court of Appeals affirmed this ruling. It first distinguished some of the authorities cited by the Government either because they did not involve a lease, or because of the terms of the leases there involved. It then stated its holding in three sentences as follows:

> From the terms of the lease here involved it is abundantly clear that alterations and improvements were contemplated and that the structural alterations, as therein defined, were not to be removed but the premises surrendered at the termination of the lease in its converted form "in good and tenantable condition for office and related warehouse use." The intention here is

> clearly expressed. The rights of the parties are to be controlled thereby and in our opinion the rationale of United States v. Five Parcels of Land, Etc., 180 F.2d 75 applies.

The Court concludes:

> We conclude that the District Court did not err in refusing to exclude the non-removable improvements from consideration in the determination of the compensation to be awarded. When made they became the property of the landowner by the contract of the parties and the property rights of the landowners therein were taken and extinguished by the government's exercise of its power of eminent domain.

The United States had also contended that under the Economy Act of 1932 limiting rentals to 15% of the value of the property, the lease, as construed by the Court of Appeals, would be illegal. The Court of Appeals held, however, that the possibility of enhancement because of improvements was an "inducement" to lease but was not part of the rental. The Court also held that creation, as authorized by statute, of an exception to another limitation of the Economy Act "removed [this lease] from the limitations imposed by the" Act.

The question whether certiorari will be sought is now under consideration. In our view this decision is an attempted revival of the Five Parcels decision which the Fifth Circuit had silently buried by the later decisions in Anderson-Tully Co. v. United States, 189 F.2d 192, and Bibb County, Georgia v. United States, 249 F.2d 228. The Third Circuit has expressly referred to the "erroneous result" of the Five Parcels case.

Staff: Roger P. Marquis (Lands Division).

Indians and Natives - Effect of Admission of Alaska to Statehood Upon Fishing Rights. Metlakatla Indian Community v. Egan; Organized Village of Kake, et al. v. Egan (S.Ct. Nos. 2 & 3). Before Alaska was admitted to the Union, the Secretary of the Interior permitted the use of fish traps for the Alaskan salmon industry by both whites and natives. The traps are large structures fixed in place which capture the salmon as they move in large schools near the shores of Alaskan islands and inlets. The Constitution of Alaska has outlawed fish traps. The Secretary of the Interior has contended that because of the terms of admission of Alaska as a State, that prohibition does not apply to traps of native villages on Annette Island and at other locations. The Department of Justice has supported that position and has three times appeared amicus curiae to urge it. The case will be heard by the Supreme Court in December.

The history of the case is briefly this. In 1959, when the State threatened enforcement of the fish trap bar, three native villages

brought injunction proceedings. The district court denied all relief. Appeal was taken to the United States Supreme Court since the Supreme Court of Alaska was not then functioning. Mr. Justice Brennan granted an injunction pending appeal. After full argument, in which the United States participated as amicus curiae, an opinion was announced in Metlakatla Indians v. Egan, 363 U.S. 555. It stated that there were present issues of state law as well as federal questions, and that the Supreme Court of Alaska had been organized and the appellants had taken action to preserve a right to appeal to that court. The Court concluded that the present cases should be held in abeyance pending those proceedings. The Chief Justice, Mr. Justice Black and Mr. Justice Douglas dissented from remitting the parties to the Alaska Supreme Court, being of the view that the controlling questions were federal to be resolved by the Supreme Court.

After argument, in which the United States participated as amicus curiae, the Supreme Court of Alaska sustained application of the prohibition to native fishing in a lengthy (63 printed pages) opinion discussing many subjects relating to the rights of the State of Alaska upon admission to the Union and to the rights of natives in Alaska. Appeals were later taken and the cases will again be argued in the Supreme Court on December 13, 1961. The United States has filed a brief amicus curiae supporting the natives' position and will appear at the oral argument. Its position, in short, is that in the Act providing for the admission of Alaska as a State, Congress expressly preserved the status quo as to Indian fishing, leaving for future determination the issues as to whether any rights, legal or equitable, existed as against the United States and that Congress had authority so to do under its power to take appropriate steps for the protection of Indians and other natives.

Staff: Supreme Court of Alaska, Roger P. Marquis (Lands Division).

Argument in the United States Supreme Court will be presented by Oscar Davis, First Assistant to the Solicitor General.

* * *

TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CRIMINAL TAX MATTERS
Appellate Decision

Evasion; Willful Attempt to Evade Corporate Tax; Introduction Into Evidence of Hearsay Testimony of Special Agent and Failure to Give Requested Charge on Bank Deposits Theory Held Reversible Error. Greenberg v. United States (C.A. 1, November 7, 1961). Taxpayer was convicted of willfully attempting to cause a small drugstore corporation, of which he was president, treasurer and sole stockholder, to file false and fraudulent income tax returns for the years 1952 through 1954. The Government, in utilizing the bank deposits method, sought to establish the understatement of corporate gross receipts by deducting, from the merchandise expense items on the returns, the amount paid for merchandise by check and attributing the balance to non-bank-account cash, which in turn was considered to be additional gross receipts, on the ground that the cash used for the purchases came from current income which was not deposited in the bank. To establish the number of checks used for the purchase of merchandise, the special agent testified that he had made an analysis of some 2100 corporate checks for the years involved, and thereupon proceeded to classify these checks as "deductible," "nondeductible," or "doubtful," resolving these items marked "doubtful" in favor of the taxpayer and classifying these checks as deductible. In giving the basis of his analysis, the agent relied upon his own knowledge of the payees' business activities, his interpretation of the check stubs, the checks themselves and endorsements, independent inquiry of his own (presumably by interviews with certain payees), and resorting to "directory services and yellow page listings in the telephone books to determine the type of business" of the payees. The Court of Appeals, in reversing the conviction because of the hearsay nature of this testimony, indicated that the Government could have established the purposes for which the checks were issued only by the testimony of the payees of the checks or other third parties, or by records or admissions of the defendant which would have corroborated the testimony of the special agent. See also the same case on a prior appeal in Greenberg v. United States, 280 F. 2d 472 (C.A. 1), in which the Court reversed on substantially identical grounds.

In addition, the Court also based its reversal on the failure of the trial court to give defendant's requested instructions on the nature of the bank deposits method and the assumptions on which it is based. The Supreme Court, in the Holland case, 348 U.S. 121, at p. 129, clearly held that in a net worth case the taxpayer is entitled to a formal jury instruction on the nature of the net worth method and the assumptions on which it rests. We believe that the rationale of the Holland case would

cover a bank deposits case, since both methods involve indirect means of determining income. For the type of instruction to be given in these cases, see the Tax Division Manual, the Trial of Criminal Tax Cases, at pp. 198-200.

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CIVIL TAX MATTERS
District Court Decisions

Summons - IRS - Judicial Enforcement; Showing of Necessity of Investigation and Relevancy of Information Not Government's Burden - Section 7605 (b), IRC of 1954, Places Burden of Showing Examination or Investigation Unnecessary Upon Taxpayer or Witness Asserting Defense; Amount of Fees and Dates Paid by Taxpayers to Attorneys Not Within Attorney - Client Privilege. In the Matter of Jack Wasserman and David Carliner, CCH 61-2 USTC par. 9730. (D. D.C. October 30, 1961). This was a proceeding brought by the Commissioner of Internal Revenue for judicial enforcement of an administrative summons issued by the Internal Revenue Service directing respondent attorneys to disclose the dates and amounts of fees paid to them by Carlos Marcello and Vincent Marcello as their counsel for legal services, and by and through whom the payments were made.

The attorneys had refused to give such information on the grounds that it was a confidential communication falling within the attorney-client privilege, and furthermore that the Government in its application had failed to sustain its burden, under Section 7605 (b), IRC of 1954, of showing that the investigation was necessary and that the information sought was relevant to the inquiry. The Court rejected both of these defenses.

As to the payment of legal fees falling within the attorney-client privilege, the Court after indicating that there were very few decisions on this point held that "the purpose of the privilege is to prevent the disclosure of any communication or information conveyed between attorney and client in connection with the rendition of legal services /and that/ The fact of employment is not a confidential communication, nor is the amount of fee paid within the basic philosophy of the privilege." The Court further held that, under Section 7605 (b), which deals with unnecessary examination or investigation, "this provision is a matter of defense to the inquiry and that the burden is on the taxpayer or the witness, as the case may be, to show that the examination or investigation is unnecessary, and that one inspection of the taxpayer's books for each taxable year has already been made." However, irrespective of this holding the Court found that the Government had set forth sufficiently both the necessity of the investigation and relevancy of the information desired from these respondents in that it alleged that the Commissioner of Internal Revenue had been investigating the tax liability of Carlos Marcello and Vincent Marcello for the years 1956-1959, inclusive. Moreover, as to materiality of information the Court found that payments of legal fees by a taxpayer are

necessarily relevant to an investigation of the accuracy of his income tax returns, giving some examples of the relevancy of such information.

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