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DEPARTMENT OF JUSTICE

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UNITED STATES ATTORNEYS

BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 10 February 9, 1962 No. 3

NEW APPOINTMENTS

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

Arkansas, Eastern - Robert D. Smith, Jr.

Mr. Smith was born July 5, 1914 at Marianna, Arkansas, is married and has two children. He attended the University of Arkansas from September 1933 to June 6, 1938 when he received his LL.B. degree. He was admitted to the Bar of the State of Arkansas that same year. From 1938 to 1941 he engaged in the practice of law in Marianna. He served in the United States Army from January 6, 1941 to February 18, 1945 when he was honorably discharged as a Captain. Since that time he has been in private practice in Marianna with the exception of the period from May 1, 1951 to January 31, 1953 when he was an Assistant United States Attorney for the Eastern District of Arkansas. He has also been a State Senator from 1949 to 1951; Assistant Prosecuting Attorney for the First Judicial District of Arkansas from 1950 to 1951; and Deputy Prosecuting Attorney for Lee County from 1953 until his appointment as United States Attorney.

Arkansas, Western - Charles M. Conway

Mr. Conway was born May 5, 1925 at Texarkana, Arkansas, is married and has one son. He served in the United States Navy from June 15,1943 to September 29, 1945 when he was honorably discharged as an Aviation Cadet. He entered the University of Arkansas on January 28, 1946 and received his B.S. degree in Business Administration on February 1, 1948 and his LL.B. degree on January 28, 1950. He was admitted to the Bar of the State of Arkansas in 1949. From 1949 to 1953 he was an associate attorney with Shaver, Stewart and Jones; and from 1953 to 1961 he was a partner in the firm of Conway and Webber, both in Texarkana. For approximately six months in 1950 he served as Deputy Prosecuting Attorney for Miller County, Arkansas and from 1953 to 1956 he was City Attorney for Texarkana. On December 8, 1961 he was appointed, by the court, United States Attorney for the Western District of Arkansas.

Florida, Northern - Clinton N. Ashmore

Mr. Ashmore was born January 12, 1912 at Benhaden, Florida, is married and has one child. He attended the University of Florida for one year and Cumberland University Law School at Lebanon, Tennessee

from September 19, 1932 to May 31, 1933 when he received his LL.B. degree. He was admitted to the Bar of the State of Florida in 1934. From 1934 to 1939 he served as law clerk to the Honorable B. K. Roberts of the Florida Supreme Court and then practiced law in Tampa for about one year. From 1940 to 1943 he engaged in the practice of law in Tallahassee and from March 3, 1943 to July 1945 he was Prosecuting Attorney for Wakulla County, Florida. He returned to the private practice of law in Tallahassee until 1949 when he became Prosecuting Attorney for Leon County, Florida. He served in this capacity until 1957 when he was made Clerk of the State District Court of Appeals at Tallahassee, which post he held until his appointment as United States Attorney.

Oklahoma, Northern - John M. Imel

Judge Imel was born August 4, 1932 at Cushing, Oklahoma, is married and has two children. He attended the University of Oklahoma from September 14, 1950 to August 8, 1954 when he received his B.S. degree in Geology. He served in the United States Navy from July 12, 1954 to August 21, 1956 when he was honorably discharged as a Lieutenant, Junior Grade. He returned to the University of Oklahoma Law School in September 1956 and received his LL.B. degree on January 24, 1959. He was admitted to the Bar of the State of Oklahoma that same year. From February 1, 1959 to July 11, 1960 he was Assistant County Attorney for Tulsa County, after which he served as Judge of the Tulsa Municipal Court until his appointment as United States Attorney.

Wisconsin, Western - Nathan S. Heffernan

Mr. Heffernan was born August 6, 1920 at Fredric, Wisconsin, is married and has three children. He attended the University of Wisconsin from September 1938 to June 1, 1942 when he received his A.B.degree. He served in the United States Navy from December 7, 1942 to April 25, 1946 when he was honorably discharged as a Lieutenant. He re-entered the University of Wisconsin in 1946 and received his LL.B. degree on February 12, 1948 and was admitted to the Bar of the State of Wisconsin that same year. From February 1948 to February 1949 he was an attorney for Schubring, Ryan, Petersen and Sutherland in Madison, and from March 14 to November 5, 1949 he was a research worker on state government operations for the State of Wisconsin. From 1950 to 1953 he was assistant district attorney for Sheboygan County, Wisconsin and also lectured part time at the Sheboygan Business College. From 1950 to 1955 he engaged in the private practice of law, and from 1953 to 1958 he was City Attorney for Sheboygan. From 1955 on he has been a partner in the firm of Buchen and Heffernan in Sheboygan; and from February to June 1961 he lectured at the University of Wisconsin Law School. From January 5, 1959 until his appointment as United States Attorney he was Deputy Attorney General of Wisconsin.

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

Virgin Islands - Almeric L. Christian

As of February 6, 1962, the score on new appointees is: Confirmed - 78; Nominated - 5.

MONTHLY TOTALS

Totals in all categories of work pending in United States Attorneys' offices, with the exception of criminal matters, were reduced during the month of December. The aggregate of pending cases and matters showed a decrease for the first time in the 1962 fiscal year, and the third time in the past calendar year. Despite this reduction, however, the total of all cases and matters pending still 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:

	November 30, 1961	December 31, 1961	
Triable Criminal	8,100	7,808	- 292
Civil Cases Inc. Civil Less Tax Lien & Cond.	15,443	15,294	- 149
Total	23,543	23,102	- 441
All Criminal	9,712	9,377	- 335
Civil Cases Inc. Civil Tax & Cond. Less Tax Lien	18,374	18,235	- 139
Criminal Matters	12,039	12,089	+ 50
Civil Matters	14,597	14,510	- 87
Total Cases & Matters	54,722	54,211	- 511

Criminal and civil filings showed an increase over the comparable period of the previous fiscal year. Civil filings, particularly, continued to show an encouraging upturn. Terminations, however, still lag behind those for the prior year. As of December 31, a slight reduction had been made in the pending caseload but it is still over 10 per cent higher than a year ago. Triable criminal cases pending were higher than at the beginning of the backlog drive in August 1954. Pending civil cases including condemnation but less tax lien continued to show the highest total for the past five and one half years. The pending case load is now 10 per cent higher than for the first six months of fiscal 1961. The breakdown below shows the pending totals on the same date in fiscal 1961 and 1962.

	First 6 Mos. F.Y. 1961	First 6 Mos. F.Y. 1962	Increase or Decrease Number	%
Filed				
Criminal	14,820	14,842	+ 22	+ .15
Civil	11,696	12,083	+ 387	+ 3.31
Total	26,516	26,925	+ 409	+ 1.54
Terminated				
Criminal	14,026	13,801	- 225	- 1.60
Civil	10,615	10,337	- 278	- 2.62
Total	24,641	24,138	- 503	- 2.04

	First 6 Mos. F.Y. 1961	First 6 Mos. F.Y. 1962	Increase or Decrease Number	%
Pending				
Criminal	8,416	9,377	+ 961	+ 11.42
Civil	20,346	22,361	+2,015	+ 9.90
Total	28,762	31,738	+2,976	+ 10.35

Total case filings during December fell below those for the preceding month, but terminations were higher than during November. Criminal terminations reached the highest total for the fiscal year so far, and civil terminations reached the second highest total for fiscal 1962. 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
Nov.	2,806	2,002	4,808	2,702	1,800	4,502
Dec.	2,429	1,821	4,250	2,766	1,841	4,607

In sharp contrast with the litigation record, which shows a generally poor record compared with the prior fiscal year, the collection record is so good that, if continued, it will culminate in a record-breaking total for the fiscal year. For the month of December 1961, United States Attorneys reported collections of $10,776,704. This brings the total for the first six months of fiscal year 1962 to $25,803,422. Compared with the first six months of the previous fiscal year this is an increase of $10,047,209 or 63.77 per cent over the $15,756,213 collected during that period.

During December $12,686,901 was saved in 95 suits in which the Government as defendant was sued for $13,906,734. 48 of them involving $1,357,352 were closed by compromises amounting to $220,547 and 22 of them involving $1,365,951 were closed by judgments amounting to $999,286. The remaining 25 suits involving $11,183,431 were won by the government. The total saved for the first six months of the current fiscal year aggregated $27,202,233 and is an increase of $12,972,398 over the $14,229,835 saved in the first six months of fiscal year 1961.

DISTRICTS IN CURRENT STATUS

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

CASES

Criminal

Ala., M.	Alaska	Ark., W.	Colo.	Del.
Ala., S.	Ariz.	Calif., S.	Conn.	Dist. of Col.

CASES

Criminal

Fla., N.	Ky., E.	N.H.	Okla., W.	Wash., E.
Ga., N.	Ky., W.	N.J.	Ore.	Wash., W.
Ga., M.	La., W.	N.M.	Pa., E.	W.Va., N.
Ga., S.	Maine	N.Y., N.	Pa., W.	W.Va., S.
Idaho	Mass.	N.Y., S.	P.R.	Wis., E.
Ill., N.	Mich., E.	N.Y., W.	R.I.	Wis., W.
Ill., E.	Minn.	N.C., E.	S.D.	Wyo.
Ill., S.	Miss., N.	N.C., M.	Tenn., E.	C.Z.
Ind., N.	Miss., S.	N.D.	Tex., W.	Guam
Ind., S.	Mo., E.	Ohio, N.	Utah	
Iowa, N.	Mo., W.	Ohio, S.	Vt.	
Iowa, S.	Mont.	Okla., N.	Va., E.	
Kan.	Neb.	Okla., E.	Va., W.	

CASES

Civil

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

MATTERS

Criminal

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

MATTERS

Civil

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

* * *

ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

Book Requisitions

Many requisitions for books from United States Attorneys are not accompanied by a proper explanation as to the actual necessity for the books, as required by paragraph 3, Title 8, page 85, U. S. Attorneys Manual. The justification must be more than a statement that the item is needed in the library.

Order No. 256-62

All United States Attorneys are requested to give special attention to Department Order No. 256-62, dated January 5, 1962, relating to the required procedure for answering certain circular questionnaires addressed to their offices. Proposed answers to questionnaires or inquiries, together with the entire correspondence, should be forwarded to the Deputy Attorney General for further handling.

Forwarding Remittances on G.A.O. Claims

Memo No. 207, Second Revision, provides that remittances received by United States Attorneys will be transmitted to the agency twice each week (see page 5 of the Memo). However, some United States Attorneys allow remittances on General Accounting Office claims to accumulate, and forward the remittances to the GAO near the end of the month, which practice causes irregularities in the GAO workload. Therefore, all United States Attorneys are urged to forward such remittances in accordance with instructions in the above Memo.

Delay in forwarding remittances in the form of personal checks results in the checks being returned by banks for such reasons as "Account Closed," "Insufficient Funds," etc. Remittances in the form of personal checks should be forwarded as soon as practicable after receipt.

Many times the date shown in the lower left corner of Form No. USA-200 ranges from two days to four weeks after the date appearing on the remittance. The GAO posts remittances and computes interest (in interest bearing cases) by the date appearing on the receipt form. The "date payment received" should be the date the remittance was actually received, otherwise the debtor may be assessed interest for a period after his payment was received by the Government.

Some personal checks bear a printed legend to the effect that the check must be presented within 30 days. Such a limitation does not afford sufficient time to process payments through the United States Attorney's office,

the GAO, and the agency involved. When such checks are received, efforts should be made to arrange with the debtor to extend the limitation period to at least 60 days.

In a few instances there have been wide variances between the date of the check and the "date payment received" appearing on Form No. USA-200. This indicates that postdated checks are being accepted, or that receipts for personally delivered payments are being prepared at a later date and mailed to the debtor. In either case it would be difficult to make accurate interest computations.

All United States Attorneys are urged to see to it that personnel responsible for handling collections are familiar with the provisions of Memo No. 207, Second Revision.

Memos and Orders

The following Order applicable to United States Attorneys' Offices has been issued since the list published in Bulletin No. 2 Vol. 10 dated January 26, 1962.

ORDER	DATED	DISTRIBUTION	SUBJECT
260-62	1-19-62	U.S. Attys. & Marshals	Regulations relating to production or disclosure of material or information in Department files.

* * *

ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

SHERMAN ACT

Court Denies Individuals' Motion to Dismiss. United States v. North American Van Lines, Inc., et al. (D. D.C.). On January 29, 1962, Judge Burnita Shelton Matthews denied a motion to dismiss filed by the individual defendants, contrary to the result reached in five previous cases where similiar motions to dismiss were granted. The motions were based on the ground that (1) the individuals were charged only in their capacity as corporate officers; (2) the acts alleged in the indictment to have been authorized, ordered or done by them in their capacity as corporate officers do not constitute offenses under Sections 1 and 3 of the Sherman Act; and (3) a corporate officer, director, or agent may only be indicted for such acts under Section 14 of the Clayton Act. The indictment charged four corporate defendants, five officers thereof, and a trade association with engaging in a conspiracy in restraint of trade in violation of Sections 1 and 3 of the Sherman Act.

The Government took the position that the individual defendants were charged in the indictment in a dual capacity, namely, as representatives of their corporations in their corporate capacity and at the same time as individuals acting in a personal capacity. The Court stated that the indictment does not restrict the charges to acts done in a corporate capacity; that bills of particulars or statements of the parties should not be considered as part of an indictment; and that it accepted the indictment as written.

With respect to defendants' argument that the legislative history of Section 14 of the Clayton Act showed that Congress intended to establish Section 14 as the sole statutory basis for prosecuting individual corporate executives acting in a representative capacity, the Court held that the legislative history of the Clayton Act makes it abundantly clear that Congress did not intend by Section 14 "to supplant the penal provisions of the Sherman Act, or to relieve from liability any violators of such provisions." To the contrary, the Court noted, the legislative history "makes it plain that it was the purpose of Congress to maintain all the provisions of the Sherman Act in undiminished force."

The Court noted that both prior and after the passage of Section 14 it had been held that corporate officers might be charged with conspiracy in direct violation of the Sherman Act. The concept that Sections 1 and 3 of the Sherman Act apply to individuals acting in their individual capacity but not to corporate officers acting in their corporate capacity is one, the Court said, "to which this court cannot subscribe."

In discussing the scope of Section 14 as distinguished from Sections 1 and 3, the Court noted that a corporate officer may have become liable under Section 1 or 3 of the Sherman Act by engaging in a conspiracy, and if he were acting within the scope of his duties his guilt could be imputed to the corporation. In such a situation, the Court noted, he would also have committed an offense under Section 14, although the two offenses would not necessarily be identical. The Court reasoned that in order for an individual to be guilty under Section 14 the Government must prove that

the corporation had violated a penal provision of the antitrust laws and the individual had contributed towards the violation. On the other hand, an officer could be found guilty under Section 1 or 3 of the Sherman Act although it need not be proved that his corporation was guilty.

The Court stated that it disagreed with the decisions in the five previous cases in which motions to dismiss the individuals were granted, enumerating United States v. National Dairy Products Corp., W.D. Mo., 1961, 196 F. Supp. 155; United States v. A. P. Woodson Company, D. D.C., 1961, 198 F. Supp 582; United States v. American Optical Company, E.D. Wisc., 1961, Crim. Action No. 61-CR-82; United States v. Milk Distributors Association, Inc., D. Md., 1961, Crim. No. 26658; and United States v. General Motors Corp., S.D. Cal., 1962, No. 30,132-Crim. The Court added that, assuming arguendo that the instant indictment restricts the charges against the individual defendants to acts allegedly done in a corporate capacity, the five enumerated cases were nevertheless not "persuasive."

Staff: Margaret H. Brass, Willard Memler, Joseph Gallagher (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General William H. Orrick, Jr.

COURT OF APPEALS

FHA

Validity of Agreement for Use of Excess FHA Insured Mortgage Funds Not Affected by IRS Determination of Tax Consequences of Transaction. United States v. Cecils Land Improvement Co., et al. (C.A. 4, October 9, 1961). Cecil, Inc. agreed to construct a number of apartments to be owned by Crystal, the project to be financed by a loan secured by an FHA insured mortgage. Crystal overpaid Cecil $218,000 which Cecil refunded to Crystal and Crystal then loaned to a third corporation controlled by stockholders of Cecil and Crystal.

Upon objection by FHA defendants agreed to prepay $55,000 on the mortgage and to make certain improvements to the mortgaged property. The Court of Appeals affirmed the district court's holding that this agreement was not invalidated by an Internal Revenue Service determination that the $218,000 overpayment to Cecil constituted income to it.

Staff: United States Attorney John C. Williams and Assistant United States Attorney James D. Jeffries (W.D. S.C.)

HATCH ACT

State Department of Conservation Director Engaged In Political Activities Violated Section 12 of Hatch Act Where During His Tenure State Conservation Department Received Federal Funds Under Three Different Federal Aid Programs. Glen D. Palmer, et al. v. United States Civil Service Commission. (C.A. 7, January 8, 1962). During the time that Palmer was employed as Director of the Department of Conservation of the State of Illinois he had also served "actively" as Precinct Committeeman and Chairman of Kendall County Republican Committee. Over the same period of time, $2,263,661.20 of federal funds under three different federal aid programs were paid to Illinois for conservation purposes. The Civil Service Commission found that Palmer had violated Section 12 of the Hatch Act which in pertinent part provided that no officer or employee of the State "whose principal employment is in connection with any activity which is financed in whole or part" by federal funds "shall take any active part in political management or in political campaigns. The district court in a 43 page opinion strongly critical of the Supreme Court decision in Oklahoma v. United States Civil Service Commission, 330 U.S. 127, directed the Commission to set aside its determination and dismiss the letter of charges. The Court of Appeals reversed and remanded holding that the case was controlled by the Oklahoma decision of the Supreme Court. The Court noted that the Supreme Court there had rejected the same arguments put forward by Palmer as to the unconstitutionality of the Hatch Act, viz

1) that it was an invasion of the sovereignty of the State in violation of the United States Constitution, and further, that the Act was invalid as an unlawful delegation of power; 2) if valid, the Act applies only to "active" participation in political management or political campaigns, and that "active" participation had not been shown; and 3) if valid, the Act did not warrant the United States Civil Service Commission in ordering the removal of the state official or alternately, the application of a penalty to the State of Oklahoma.

The Court also rejected the district court's contention that the Civil Service Commission decision violated "our Republican form of Government".

Staff: Anthony L. Mondello (Civil Division)

NATIONAL BANK ACT

Authority of Comptroller of Currency to Charter New National Bank, Affiliated With Existing National Bank, Upheld. Camden Trust Co. v. Gidney (C.A. D.C., January 18, 1962). Camden Trust Company, a New Jersey State Bank, brought suit to restrain the Comptroller of the Currency from authorizing the Delaware Valley National Bank, to which he had granted a charter, to commence the business of banking. Camden argued that Delaware Valley was, in substance and effect, and was intended to be a "branch bank" of Haddonfield National and that the branch banking limitations in the National Bank Act (12 U.S.C. 36) and New Jersey law deprived the Comptroller of all authority to issue a charter to Delaware Valley. The combined operative effect of 12 U.S.C. 36(c) and the New Jersey statute is to preclude the establishment of a branch bank in the proposed location of Delaware Valley because Camden Trust presently operates a branch in the same vicinity.

A divided Court of Appeals for the District of Columbia Circuit upheld the authority of the Comptroller to charter Delaware Valley. The majority of the Court, accepting the Government's arguments, held that 12 U.S.C. 36(c) was inapplicable to the case. Delaware Valley was not, the Court held, a "branch" within the meaning of that term as it is used in 12 U.S.C. 36; that the common directorships of Haddonfield National and Delaware Valley and the common stock ownership of the two banks did not make it a branch, since by the terms of the National Bank Act, Delaware Valley is a completely separate entity and must operate wholly independent of Haddonfield National. Further, the Court held, that the desirability of permitting national banks to have affiliates was not for it to decide since Congress has not clearly said they cannot. The dissenting judge regarded Delaware Valley as a subterfuge by Haddonfield National to evade the branch banking limitations in New Jersey law, made applicable to national banks by 12 U.S.C. 36(c).

Staff: John G. Laughlin and Jerry C. Straus (Civil Division)

RENEGOTIATION ACT OF 1951

Court of Appeals Upholds Renegotiation Board's Retroactive Application of Regulations, Exempting Certain Contracts From Renegotiation, (1) By Reason of Express Provision in Act Barring Judicial Review, and (2) on Ground That Retroactive Application Was Valid Under Act. Litton Industries of Maryland, Inc. v. Renegotiation Board (C.A. 4, January 5, 1962). The Court of Appeals upheld the decision of the Tax Court that under Section 106(a)(6) of the Renegotiation Act of 1951, there is no jurisdiction in any court to review determinations of the Renegotiation Board that a contract with the Government under that Act is exempt from renegotiation for lack of a vital connection with the national defense. The contractor here, by virtue of having a 1951 Government contract, on which it lost $100,000, ruled exempt from renegotiation under a 1953 regulation, lost the benefit of offsetting that loss against the profits made on other renegotiable contracts. Its challenge: (a) to the non-reviewability feature of Section 106(a)(6), and (b) to the retroactive application of the regulation, was rejected by the Tax Court on the basis of non-reviewability. The Court of Appeals affirmed, holding (1) that where the United States creates rights against itself, it need not provide for judicial review, and (2) that, in any event, the retroactive application of the regulation was completely valid in the context of renegotiation legislation.

Staff: Herbert E. Morris (Civil Division)

SOIL BANK ACT

Farmers Not Entitled to Judicial Review of State ASC Committee Decision Which Required Forfeiture of Government Cost-Share Payments Under Conservation Reserve Contracts. Holden v. United States (C.A. 8, January 23, 1962). The Court of Appeals affirmed the district court holding that two farmers, who had entered conservation reserve contracts under the Soil Bank Act, 7 U.S.C. 1801 et seq., could not obtain review in a district court of the State ASC Committee's decision that the farmers had misused purchase orders and filed false claims, and requiring the farmers to forfeit the particular Government cost-share payments involved in the misused purchase orders and false claims. The Court held that under the judicial review provisions of the Act, 7 U.S.C. 183(d), court review is obtainable only where the State Committee's decision involves termination of the contracts, and that in the instant case, there was no termination but rather only a forfeiture of part of the benefits otherwise due the farmers.

Staff: John C. Eldridge (Civil Division)

VETERANS ADMINISTRATION

State Court Decision Overruling Previous Decision Invalidating Ordinance Does Not Affect Action in Federal District Court to Recover Overpayments Based On Ordinance's Invalidity. City of Covington v.

United States. (C.A. 6, January 17, 1962). The City of Covington supplied water to a Veterans Administration hospital located at Fort Thomas, Kentucky, outside the city limits. The sales were made pursuant to a contract between the United States and the municipality and the rate was set at 15 cents per hundred cubic feet of water. However, the contract provided that the set rate was "subject to any changes made by a duly authorized State or Government Commission * * *."

In 1952, the City enacted an ordinance which purported to increase the rate for the class of service enjoyed by the Veterans Administration hospital (i.e., non-resident consumers) from 15 to 20 cents, and the United States began making payments at the increased rate. Such payments were made until 1955, when the Kentucky Court of Appeals, in a suit brought by another "non-resident consumer" of Covington water, the Sohio Petroleum Company, invalidated the ordinance. The Court held that the City could not increase its non-resident rates without the approval of the State Public Service Commission.

After the state court's decision in the Sohio case, the Veterans Administration sought to recover back its "overpayments" under the invalidated ordinance by administrative set-off against later invoices. The City brought this suit on these invoices, and the Government counterclaimed for the alleged overpayments. The basis for the counterclaim was the Government's contention that the ordinance, having been invalidated, was void ab initio, so that any payments made pursuant thereto were by "mistake of law," and recoverable under the applicable law.

While the Covington suit was under submission in the federal court, the State Court of Appeals had occasion to re-examine its prior decision in the Sohio case, in a suit involving a Louisville rate ordinance similar to the Covington ordinance previously invalidated. This time, the Court of Appeals sustained the ordinance on a ground it had expressly rejected in Sohio and other cases in the past. It stated that "insofar as the above-cited cases [Sohio] are in conflict with this opinion, they will no longer be followed."

Despite this most recent statement of the State high court, the federal court entered an order giving a judgment to the United States on its counterclaim in the Covington case. The Court reasoned as follows:

> It is the law of this case that the ordinance under which this recovery against the United States is sought, having been declared invlaid [in Sohio], the [Louisville] case is not retroactive or authority to restore the rate. A void ordinance cannot be revived or have new life breathed into it by a later decision of the same court that has declared it invalid on a previous occasion. There must be enacted a new ordnance.

Staff: United States Attorney Bernard T. Moynahan and Assistant United States Attorney George I. Cline (E.D. Ky.)
Donald B. MacGuineas and Charles Donnenfeld (Civil Division)

Employee Who Enters Military After Being Laid Off by Operation of Seniority System Entitled to Restoration With Seniority Under Reemployment Provision of Universal Military Training and Service Act. Kelly v. Ford Instrument Co. (C.A. 2, January 11, 1962). Kelly entered the military service after he had been laid off by Ford by operation of a seniority system. When he enlisted, he had, under the collective bargaining agreement, a right to be recalled in seniority order and a right to continue to accrue seniority while laid off for approximately 2 years. While he was in the service, and during the time in which he was entitled to recall and to accrue seniority while laid off, he actually received a notice of recall. Upon his discharge from the service, Ford rehired Kelly but, as to seniority, treated him as a new employee. Kelly then brought this suit seeking seniority for the period of his original employment, the period he was laid off, and the period of his military service. The district court dismissed the complaint on the ground that a laid off worker is not protected by the Act. The Court of Appeals reversed and ordered summary judgment for Kelly. The Court held that a laid off employee who is entitled to recall and seniority has an employment relationship with his employer. Since the purpose of the Act is to restore the veteran to the position he would have held had he not been in the service, the Court ruled that when Kelly's name was reached for recall, he should have been removed from the roster of laid off employee and placed on military leave of absence.

Staff: Edward A. Groobert (Civil Division)

COURT OF CLAIMS

ADMIRALTY

Primary Jurisdiction; Court of Claims Suspends Proceedings to Permit Administrative Recomputation of Trade-in Allowances. Farrel Lines, Inc. v. United States (C. Cls., January 2, 1962). Plaintiff applied to the Maritime Commission, pursuant to the Merchant Ship Sales Act of 1946, for an adjustment in the price of eight vessels purchased during the period 1942-1947. Following determination of the adjustment, plaintiff and the Commission entered into an adjustment agreement. Thereafter, alleging that the adjustment was in contravention of the statute, plaintiff brought suit to recover additional adjustment allowances. The Government counterclaimed for allegedly excessive allowances granted by the Maritime Commission on vessels traded in by plaintiff. Plaintiff moved to strike the Government's counterclaim and for summary judgment. The Government moved to have its counterclaim remanded for a recomputation of trade-in allowances by the Maritime Administration, successor to the Maritime Commission.

Plaintiff's motions were denied as premature, the Court agreeing that it must first determine the merits of the Government's counterclaim. Since, however, the computation of trade-in allowances is committed by law to the Maritime Administration, the Court directed that further

proceedings be held in abeyance in order to afford the Maritime Administration a reasonable opportunity to recompute the trade-in allowances.

Staff: Clare E. Walker (Civil Division)

DISTRICT COURT

LABOR MANAGEMENT RELATIONS ACT

NLRB Held Without Authority to Conduct Elections For Collective Bargaining Purposes Among Foreign Seamen Manning Vessels Flying Foreign Flags, and Employed Under Contracts Executed in Foreign Country Pursuant to Foreign Law. Sociedad Nacional de Marineros de Honduras v. McCulloch, et al. (D. D.C., January 18, 1962). The NLRB, on November 15, 1961, rendered a decision and issued a direction that an election be conducted among seamen employed on certain merchant vessels flying the flag of Honduras and owned by Honduran and Panamanian corporate subsidiaries of United Fruit Company, an American corporation. Plaintiff, the Honduran labor union certified as the bargaining agent of these seamen under Honduran law, brought this action to enjoin and restrain the members of the NLRB from conducting the election on the ground that, in ordering it, the Board had exceeded its legal authority. The National Maritime Union of America, AFL-CIO, which together with another Honduran labor union would have been the two union choices on the ballot, was permitted to intervene at the argument on plaintiff's motion for preliminary injunction and defendant Board's cross-motion for dismissal.

Judge Holtzoff requested the views of the Department of State on the merits of a formal written protest against the Board's decision submitted by the Government of Honduras to the Department of State on November 29, 1961. On January 10, 1962, Assistant Attorney General Orrick advised the Court that he had been informed by the Department of State that although that Department did not support all the statements in the Honduran protest, it agreed with the conclusion that jurisdiction of the NLRB should not attach in this case.

Applying canons of statutory construction to the effect that a statute should be construed, if at all possible, so as not to give rise to a constitutional question (Crowell v. Benson, 285 U.S. 22, 65; I.C.C. v. Oregon-Washington Ry Co., 288 U.S. 14, 40); so as not to violate principles of international law (The Charming Betsy, 2 Cranch 64, 118); so as not to affect the provisions of an earlier treaty (Chew Heong v. United States, 112 U.S. 536, 549; Cook v. United States, 288 U.S. 102, 121; Pigeon River Co. v. Cox Company, 291 U.S. 138, 160); and so that the scope of its terms might be confined in its operation and effect to the territorial limits of the United States, unless the contrary intention is clearly and affirmatively expressed (American Banana Co. v. United Fruit Company, 213 U.S. 347, 357; Sandberg v. McDonald, 248 U.S. 185, 195; Foley Bros v. Filardo, 336 U.S. 281, 285; Air Line Dispatchers Ass'n. v. National Mediation Board, 189 F. 2d 685, 690), Judge Holtzoff concluded:

"that the Labor Management Relations Act of 1947 should be construed as not conferring any authority or power on the National Labor Relations Board to conduct elections for collective bargaining purposes among foreign seamen manning vessels flying a foreign flag, and employed under contracts executed in a foreign country pursuant to foreign law. The fact that the corporation that owns the ship may be a subsidiary of an American corporation does not effect this result."

The Court relied specifically on Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, distinguishing the cases relied on by the defendants and intervenor, Marine Cooks v. Panama S.S. Company, 362 U.S. 365, and Vermilya-Brown Company v. Connell, 335 U.S. 377.

[The Second Circuit (per Judge Friendly) reached the same result, limited to the facts of the case, in a related proceeding brought by the shipowner against the Regional Director in the Southern District of New York. Empresa Hondurena de Vapores, S.A. v. McLoed.]

Staff: Assistant Attorney General William H. Orrick, Jr. and Andrew P. Vance (Civil Division)

SOIL BANK ACT

Grant or Denial of Grazing License by Federal Agents Within Discretionary Function Exception of Tort Claims Act. Charles E. Kunzler v. United States (D. Utah, December 11, 1961). Plaintiff was the owner of grazing land in Box Elder County, Utah, and was also the lessee from the State of other grazing land adjoining his own land. This land was in a checkerboard pattern wherein federal grazing lands, state and privately owned grazing lands were intermingled, thus making it virtually impossible for the land to be used for grazing purposes without occasional trespass by cattle on adjoining lands. The custom in the area was for the federal authorities to grant "Exchange of Use" permits whereby users of state and privately owned grazing lands could graze federal lands on an exchange basis within the area designated by the Bureau of Land Management, Department of the Interior. Plaintiff had been denied an "Exchange of Use" agreement because he proposed to graze an excessive number of cattle. Plaintiff sought to recover damages under the Federal Tort Claims Act because federal employees granted grazing permits for federally owned grazing lands in Box Elder County and thereby allegedly encouraged trespass upon plaintiff's land by the cattle of the permittees upon the federal grazing land. The Court in ruling in favor of the United States held that the granting of a federal grazing permit under the Taylor Grazing Act was a discretionary function under 28 U.S.C. 2680(a) of the Federal Tort Claims Act and that the refusal to grant such permit was likewise covered by the discretionary function exception. The Court further held that any determination on the part of federal agents with respect to the building of fences to enclose federal lands, thereby preventing cattle trespassing on private lands, was also

the exercise of a discretionary function. The Court distinguished Oman, et al. v. United States, 179 F. 2d 738 (C.A. 10, 1949), because in that case there was an outright interference by Government agents with plaintiff's grazing rights while their permits remained valid and outstanding.

Staff: United States Attorney William T. Thurman and Assistant United States Attorney Llewellyn O. Thomas (D. Utah)
Irvin M. Gottlieb (Civil Division)

FOREIGN COURTS

SOVEREIGN IMMUNITY

Defense Agreement Between United States and Iceland Does Not Subject United States to Jurisdiction of Local Courts. Brandsson v. Comdr. of U.S. Defense Forces (Supreme Court of Iceland, October 4, 1961). Plaintiff, a former employee of the U.S. Defense Forces in Iceland, sued the American Commander on behalf of the Defense Forces for fringe benefits allegedly due under Icelandic labor legislation. The trial court overruled the Government's jurisdictional objection on the grounds that in Art. 6(4) of the 1951 Annex to the Defense Agreement with Iceland (2 UST 1533; TIAS 2295) the United States had impliedly waived its immunity from suit. The Government contended that the treaty provision was merely an undertaking by the United States to pay wages comparable to those paid by local employers, but did not subject the Government to the procedural provisions of the local labor code.

On appeal, the Supreme Court of Iceland reversed in a short per curiam opinion stating that "The Defense Agreement * * * contains no provisions from which it may be gathered that the military authorities of the United States in Iceland shall be subject to the jurisdiction of Icelandic law courts concerning their dealings with persons in this country." Adverting to rules of customary international law, as distinguished from treaties, the Court stated that there is equally "no rule at hand * * * that puts the military authorities [of the sending state] under the jurisdiction of Icelandic law courts."

Staff: Bruno A. Ristau (Civil Division);
Benedikt Sigurjonsson, Esquire (Reykjavik, Iceland).

SUPREME COURT

AGRICULTURE ADJUSTMENT ACT

Local ASC Review Committee's Decision Under Agriculture Adjustment Act Involving Division of Tobacco, Cotton and Wheat Allotments Between Two Farmers Upheld. Mason v. Renn (Supreme Court of North Carolina, December 14, 1961). Plaintiff, a North Carolina farmer, had sold a portion of his farm, thus necessitating a redetermination of his cropland for purposes of awarding acreage allotments under the Agriculture

Adjustment Act. The ASC Review Committee redetermined his cropland and divided his previous tobacco, cotton and wheat allotments in half. Plaintiff sought judicial review of this action in the state courts, contending that the Committee's determinations with respect to the amount of the remaining cropland were unsupported by substantial evidence, and that the manner by which the crop allotments were divided was not in accordance with applicable regulations. However, the state trial court upheld the Committee's decision as being supported by evidence and consistent with the regulations, and the Supreme Court of North Carolina affirmed.

Staff: John C. Eldridge (Civil Division)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Military Prisoner While Serving Sentence Imposed by Court-Martial Held Subject to Military Law and Trial by Court-Martial for Offenses Committed During Imprisonment, Even Though Prisoner Was Discharged from Service. Simcox v. Madigan (C.A. 9, January 23, 1962). Appellant was sentenced by court-martial to be dishonorably discharged and to a term of confinement in a military disciplinary barracks. The discharge was executed. While serving his term of confinement, he was tried and sentenced by court-martial for offenses committed while so confined. He filed a petition for habeas corpus with the District Court for the Northern District of California, alleging that his original sentence had expired; that his subsequent sentences were invalid because inter alia, the military lacked jurisdiction to try him by court-martial, and that therefore he was being held in custody illegally. On appeal from denial of the habeas corpus petition, the Ninth Circuit affirmed. In an opinion by Judge Hamlin, the Court concluded that Kahn v. Anderson, 255 U.S. 1 (1920), which held that a military prisoner serving a sentence imposed by court-martial was, even though discharged, subject to military law and trial by court-martial for offenses committed during such imprisonment, was dispositive and that the basis of the Kahn decision had not subsequently been repudiated by the Supreme Court in Toth v. Quarles, 350 U.S. 11 (1955); Reid v. Covert, 354 U.S. 1 (1957); or Kinsella v. Singleton, 361 U.S. 234 (1960). Judges Duniway and Solomon, concurring, stated that Kahn v. Anderson had not been overruled, although some of the rationale of the case seemed inconsistent with the Toth case. If Kahn is to be overruled, said these judges, "such overruling must come from the Supreme Court and not from us".

Staff: United States Attorney Cecil F. Poole (N.D. Calif.); Harold H. Greene, David Rubin (Civil Rights Division).

* * *

CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

APPEALS IN CRIMINAL CASES

Forwarding of Briefs and Record. The attention of all United States Attorneys is directed to instructions in the United States Attorneys Manual, Title 6, pp. 6 and 8.02, with reference to Criminal Division cases on appeal to the courts of appeals. It is requested that two copies of the record when printed and two copies of all printed briefs filed by either side be forwarded to the Department promptly. Typewritten copies of the record and briefs, if available, should also be forwarded in forma pauperis cases.

MAIL FRAUD STATUTE

(18 U.S.C. 1341)

Insurance Scheme. United States v. William Barnes Landwehr (E.D. Mo.). On December 15, 1961, a grand jury in St. Louis, Missouri returned a nine-count indictment against William Barnes Landwehr in connection with the operation of an illegal insurance business dating from August, 1955. Operating through such companies as Capacity Assurance, Inc. and Standard Insurors, Inc., chartered to sell the insurance of other companies, and National Adjustment Company, a company formed ostensibly to settle claims, Landwehr solicited brokers and insurance agents throughout the country via the mails for surplus and excess insurance. Landwehr caused policies for liability insurance on automobiles to be issued under the name of Farmers and Mutual Fire Insurance Company, an extinct firm having no assets and whose charter had been revoked in 1950 by the State of Missouri. Landwehr also indicated he represented foreign insurers but had no such authority. Substantial business was obtained and premium payments were received at the company office in Clayton, Missouri. When claims were ultimately received, claimants were stalled by lulling letters and in some instances advised to have property damage repaired. However, claims were never paid.

Staff: United States Attorney D. Jeff Lance;
Assistant United States Attorney Frederick H. Mayer, (E.D. Mo.).

FAIR LABOR STANDARDS ACT

Substantial Restitution Ordered by Court in Overtime Violations of Fair Labor Standards Act. United States v. Swanson & Youngdale, Inc. (D. Minn.). On December 26, 1961, Swanson & Youngdale, Inc., a Minneapolis painting contracting firm, entered a guilty plea to the charge of failure to pay compensation for overtime work. The defendant corporation was fined $1,000 by the District Court and placed on probation for one year. As a condition of the probation, the corporation was ordered to pay back wages in the sum of $20,516.49 to fifty employees. The Government considered

it highly significant that the Court included in its order of sentence that full restitution be made a condition of the probation. Also, most of the violations occurred from 1957 through 1959 and claims by employees for such overtime wages (29 U.S.C. 255) would be barred by the statute of limitations.

Staff: Assistant United States Attorney John J. Connelly (D. Minn.).

CONTEMPT

Wilful Intent Immaterial in Criminal Contempt Proceedings for Violation of Food and Drug Injunction. United States v. Wilson Williams, Inc., Fisk Research Inc., and Jack Elliott (S.D. N.Y.). Following a 4-day hearing last October, Judge Thomas F. Murphy on December 29, 1961 adjudged the three defendants guilty of criminal contempt. The case is significant on the question of wilfullness.

On July 30, 1959 a restraining order was issued against defendants and on October 2, 1959 an injunction pendente lite was issued enjoining defendants from shipping in interstate commerce an article or drug designated as RX 120 or any similar article, accompanied by any claim that the article depresses the appetite, causes weight reduction without a special diet; that the drug is a new wonder drug, etc. Proof showed that defendant Elliott was the active agent for both corporate defendants and that between August, 1959 and January, 1960 he caused the interstate shipment of RX 120 accompanied by printed matter representing the article as a wonder drug and appetite depressant, etc. Elliott contended he did not intend to violate the Court orders; that he had relied on the advice of counsel that the Court had stated that if the phrase "to relieve obesity" were deleted from the label it would not be in violation of the orders. The Court found, however, that the restraining order and injunction were wilfully, knowingly and intentionally violated and adjudged each defendant guilty of criminal contempt.

Although the Court found as a fact that wilfullness was proved, it discussed the necessity of the Government proving wilfullness since so much of the defense was devoted to that argument. While no case squarely in point was found, the Court stated: "It seems to us that to require proof of wilfullness in a criminal contempt proceeding brought under §332(b) of Title 21 U.S.C., where the same acts, without proof of intent, are also crimes under §333 of Title 21, would create an anomalous situation obviously not contemplated by the Congress. In other words, if defendants' argument was to be accepted, what would be a crime without proof of intent would not be a contemptuous violation of a court order prohibiting the acts."

(The Editor of the Federal Supplement has been requested to publish this opinion.)

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

SEARCH AND SEIZURE

Legality of Warrant; Use of Telephonic Communication by FBI Agent to Obtain Approval of U.S. Commissioner to Insert in Warrant Address of Premises to Be Searched. United States v. Ferris Alexander, Kenneth LaLonde and Edward J. Alexander (D. Minn., Dec. 12, 1961). On October 6, 1961 an FBI agent appeared before the United States Commissioner and presented him with a signed affidavit to the effect that an airline official had informed him that his airline handled a certain shipment of cardboard cartons sent by a named individual from Las Vegas, Nevada to defendant Kenneth LaLonde at a St. Paul, Minnesota depot with instructions to call a certain telephone number on arrival. In the process of handling these cartons one was damaged and its contents - pictures and films - were exposed. The airline official considered the films obscene and on that basis, together with defendants' past obscenity violations, the FBI agent requested a warrant to pursue a violation of 18 U.S.C. 1462. The premises to be searched were not identified in the affidavit. The FBI agent orally explained to the Commissioner that the obscene material might be taken to any one of three store addresses operated by defendants, but that he was not in fact certain which of the three it might be. It was therefore agreed that a warrant would issue signed on October 6, 1961, by the Commissioner with the address of the place to be searched left in blank. The agent was instructed to telephone the Commissioner when he was certain of the correct address. Four days later, on October 10, 1961, another agent of the FBI, who had been assigned to the case, observed two of the defendants transporting the cartons to one of the stores. The agent immediately called the Commissioner at his home and the latter agreed to the insertions of the address in the warrant as well as the docket number and case number in both the warrant and affidavit. [The address was not inserted in the affidavit.] Armed with the search warrant the agent seized the property in question. Defendants filed a motion to suppress.

In opposing defendants' motion the Government argued that under Lowrey v. United States, 161 F. 2d 30 (C.A. 8, 1947), the affidavit need not recite the address of the premises to be searced; and that there was a necessity for this immediate, if unusual, action in order to apprehend the defendants with the objectionable goods. The Court rejected these arguments and granted defendants' motion. The Court distinguished this case from Lowrey by noting that here unlike Lowrey there was an "utter absence" of information in the affidavit relating to the premises to be searched "capable of being particularly described in the warrant." The Court emphasized that here the first and only specific address mentioned was by telephone call from another agent not under oath or affirmation. Such a "shortcut", notwithstanding the necessity for immediate action, violated the fourth amendment according to the Court.

In view of this opinion it is advisable in any future multi-address situation to obtain a separate warrant for each of the premises which might harbor the goods to be seized.

Staff: United States Attorney Miles W. Lord;
Assistant United States Attorney Murray L. Galinson
(D. Minn.).

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Subversive Activities Control Act of 1950; Grand Jury Investigation of Possible Violations Thereof (District of Columbia). As previously reported in this Bulletin, Vol. 9, p. 652, dated November 3, 1961, the Supreme Court's mandate in the case of Communist Party v. Subversive Activities Control Board issued on October 10, 1961, and the order of the Board became "final" within the meaning of the statute on October 20, 1961. The Communist Party had until November 20 to register and file its registration statement, after which time certain designated officers of the Party became criminally liable under Section 786(h) of Title 50, United States Code, to cause the Party's registration in the event of a default by the organization itself. The organization defaulted, and on December 1, 1961, a Grand Jury in the District of Columbia returned a 12-count indictment against the Party charging that it failed to register with the Attorney General as a "Communist-action" organization in accordance with the Board's order and in violation of 50 U.S.C. 786 and 794 (See Bulletin, Vol. 9, p. 731, dated December 15, 1961). The Party entered, through its attorneys, a plea of not guilty and the case has been set for trial.

A separate Grand Jury in the District of Columbia is now hearing evidence concerning other possible violations of the Subversive Activities Control Act of 1950 and other criminal laws of the United States. These include possible violations of Sections 784, 785, 786(h), 787, 789, and 790 of Title 50, United States Code, and Sections 2 and 371 of Title 18, United States Code.

Staff: Assistant Attorney General J. Walter Yeagley; Oran H. Waterman and James A. Cronin, Jr., (Internal Security Division)

Unlawful Exportation of Ammunition; United States v. Martin Castilla and Efrain Garcia (E.D. La.). On September 26, 1961, the grand jury at New Orleans, Louisiana returned an indictment charging Castilla and Garcia, nationals of Colombia, with attempting to export 15,000 rounds of .38 caliber ammunition without having obtained an appropriate export license as required by the regulations issued pursuant to Section 414 of the Mutual Security Act of 1954 (22 U.S.C. 1934). On December 6, 1961 the defendants entered pleas of guilty and were sentenced to one year in the custody of the Attorney General. The execution of the sentence was suspended and defendants were placed on inactive probation, with special instruction by the Court that they be deported immediately.

Staff: Former United States Attorney M. Hepburn Many and Assistant United States Attorney Louis R. Lucas, (E.D. La.); Joseph T. Eddins (Internal Security Division)

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Judicial Review of Order of Deportation; Constitutionality of Quota System. Rozenberg et al. v. Esperdy (S.D. N.Y., January 4, 1962.) Plaintiff, married to a resident alien and concededly deportable as an overstayed non-immigrant, brought this action for a declaratory judgment to annul the order of deportation against her. She sought the convocation of a three-judge court to test the constitutionality of the immigration quota system (8 U.S.C. 1151-1153) and for injunctive relief.

She contended that those statutory provisions are unconstitutional as in violation of due process because they are arbitrary and capricious and without rational relation to any lawful Congressional purpose; that while aliens abroad have no standing to complain against Congressional regulation of immigration, her presence here (even if illegal) gives her that standing and she may so complain.

The Court held that she stands in no better position to challenge the quota system than the countless aliens abroad awaiting their turn for immigrant visas, that her continued illegal presence here does not improve that position, nor does her marriage to a resident alien except to the extent that it gives her a third preference status under the quota.

The Court construed her pleadings to mean that if the quota to which she is chargeable (Israel) were not oversubscribed or if she were entitled to a nonquota status she would not consider the quota system arbitrary or capricious.

As to her husband (co-plaintiff), the Court said that he took his wife as he found her, with whatever legal disabilities to which she was then subject (they were married after her arrival in the United States as a temporary visitor). Whatever he is being deprived of under the facts of this case it is being done with due process of law.

There being no substantial federal question involved, the Court denied her motion for a three-judge court and granted defendant's motion for summary judgment.

(Defendant's motion was heard before the effective date of section 5(a) P.L. 87-301 (8 U.S.C. 1105a)).

Staff: Special Assistant United States Attorney Roy Babitt (S.D. N.Y.)

Alienage; Evidence - Unverified and Unauthenticated Documents. McNeil v. Kennedy, (C. A. D.C., January 4, 1962.) McNeil was found to be an alien illegally in this country and was ordered deported. Maintaining that he is not an alien he sought judicial review of the deportation proceedings and order. The case was submitted to and decided by the district court on the

administrative record and the court concluded that the findings upon which the order rested were supported by reasonable substantial, and probative evidence (8 U.S.C. 1252(b)(4)). From the dismissal of his complaint McNeil appealed.

In a per curiam opinion, the Court of Appeals said that the principal evidence of alienage consisted of Calcutta baptismal and school certificates and a Hawaii hospital record. None of those documents were verified or authenticated.

The Court said it would be unwise to adopt a rule which would permit the deportation of a person on the basis of these unverified and unauthenticated documents. It could not say that the Service would have reached the conclusion it did (alienage) except for those documents; it is not for the appellate court to make the decision as an initial matter on the basis of other evidence.

Reversed and remanded with directions that the case be remanded to the Service for further proceedings.

Staff: Assistant United States Attorney John R. Schmertz, Jr.; with him on the brief, United States Attorney David C. Acheson, Principal Assistant United States Attorney Charles T. Duncan, Assistant United States Attorneys Sylvia A. Bacon and Nathan J. Paulson.

EXCLUSION

Grounds for Exclusion - Conviction of Crime; Conviction While in Parole Status; Service Jurisdiction Over Paroled Alien. Klapholz v. Esperdy (S.D. N.Y., December 30, 1961.) In July 1956, plaintiff arrived at the port of New York with a valid immigrant visa and sought admission for permanent residence. The examining immigration officer, alerted that this alien may have been involved in diamond smuggling, deferred completion of his inspection and telephoned the United States Attorney. In a short time a United States Marshal appeared, removed plaintiff from the ship and lodged him in the Federal House of Detention. Later he was formally notified that he was paroled pursuant to 8 U.S.C. 1182(d)(5) pending completion of his primary inspection.

On October 29, 1956 he pleaded guilty to an information charging him with violations of 18 U.S.C. 2 and 545 (smuggling diamonds at New York International Airport in 1954) and was sentenced to 15 months imprisonment. While serving his sentence he was ordered excluded under 8 U.S.C. 1182(a)(9) as an alien who had been convicted of a crime involving moral turpitude.

When that order became final he brought an action for a declaratory judgment to annul the order. He advanced several contentions, the principal ones being that the Service lost jurisdiction to exclude him when it turned him over to the Marshal on his arrival and the Government then exercised criminal jurisdiction over him and, that even if such jurisdiction was not lost, that his admissibility should be determined as of the date of his arrival and not at some later date after he had been convicted.

The Court found the first contention to be contrary to almost all of the cases that have considered the problem (citations) and that the legislative history of 8 U.S.C. 1182(d)(5) clearly shows that one of the purposes that Congress envisaged in permitting the parole of aliens into the country "in the public interest" was for the purposes of "prosecution", and that the statute prescribes that when the purposes of the parole shall have been served the alien shall be returned to the custody from which he was paroled and shall then be dealt with as any other alien applying for admission.

As to the second contention, and again relying on the language of the parole statute, the Court said that when plaintiff was given an exclusion hearing in 1957 his admissibility was considered and determined as if he were still on the vessel on which he arrived in 1956 and that his conviction while on parole made him excludable. "If admission or exclusion is to be based on facts in existence at the time the alien first arrives it would be contrary to Congressional intent," the Court said.

Summary judgment for defendant.

Staff: United States Attorney Robert M. Morgenthau; Special Assistant United States Attorney Roy Babitt (of counsel) (S.D. N.Y.)

* * *

LANDS DIVISION

Assistant Attorney General Ramsey Clark

Eminent Domain; Administrative Discretion to Condemn: Lack of Court Authority to Compel Exercise of Administrative Discretion; Mandamus. Basil M. Western, Sr. v. Eugene M. Zuckert, Secretary of the Air Force (Dist. Col. Jan. 8, 1962). Injunction against the flying of aircraft to and from Andrews Air Force Base unless the Secretary of the Air Force requests the initiation of proceedings to condemn avigation easements over plaintiffs' properties was sought by the complaint in this case. Plaintiffs' properties lie within the approach zone of the principal jet plane runway. Plaintiffs asserted that the frequent and low flights from the Base over their properties have resulted in the taking of an avigation easement by the United States. They further contended that despite this taking the United States had instituted a condemnation proceeding in the United States District Court for the District of Maryland only for the purpose of acquiring a clearance easement over their land. Plaintiffs claimed that since a taking had been effected the Secretary of the Air Force was required to institute a condemnation proceeding wherein just compensation would be paid for the taking of an avigation easement. The prayer of the complaint was for an order directing the Secretary to ask the Attorney General to file an appropriate condemnation suit or, in the alternative, for an injunction prohibiting further flights.

A motion to dismiss was filed on the grounds that (a) the Court was without jurisdiction to issue a mandatory injunction directing the Secretary of the Air Force to exercise his discretionary authority to request the institution of condemnation proceedings, (b) that plaintiffs had an adequate remedy at law through the medium of suits either in the district court or in the Court of Claims to recover compensation for the alleged taking and (c) that the suit was one against the United States. Following a hearing, Judge Holtzoff directed that the motion be sustained. The Court held that defendant was not under any mandatory duty to institute condemnation proceedings and that plaintiffs had an adequate remedy at law. Hurley v. Kincaid, 285 U.S. 95.

The same plaintiffs have a suit pending in the United States District Court for the District of Maryland against the Commanding Officer of Andrews Air Force Base, wherein they seek an injunction restraining further low flights over their properties. A motion to dismiss filed in that action has been taken under advisement by the Court.

Staff: Thos. L. McKevitt (Lands Division)

Condemnation; Enhancement Due to Government's Activities; Valuation of Mineral Lands; Capitalization Evidence; Error of Charge Concerning Inflation. United States v. 158.76 Acres of Land in the Town of Townshend (C.A. 2, January 19, 1962). In this condemnation action, the district court over Government objection permitted the jury to consider the landowner's gravel sales directly connected with the Government's flood control project, and refused to charge that market value of mineral land is the value of the land as a whole and that it is improper to determine separately the value of the mineral deposit and to add such value to the land as a unit. The district court also allowed a witness to recite the present value of annual incomes of $2,000 and $3,000 capitalized at 4%, 5%, and 6% for periods of 40 and 60 years. The jury was instructed to consider the present purchasing power of the dollar in arriving at its determination of market value.

Reversing and remanding, the Court of Appeals held that "the enhanced value created by the government's need for the property is not to be considered in determining the fair market value of the property condemned." The Court emphasized the necessity "in the trial carefully to separate the admissible from the inadmissible evidence of value based on gravel sales" and that the instructions should have recognized the impropriety of adding mineral values to the value of the land as a unit. The capitalization evidence was rejected because the witness, who did not testify to market value, used income figures reflecting gravel sales connected with the project; did not testify to comparable investments or their possible rates of return; and based his present values on a formula from a handbook of factors for present value of an annuity of $1.00 per year. Also, there was no evidence that a commercial market for gravel would persist for 40 or 60 years. Since market value is the value as of the date of taking plus interest for delay in payment, the district court's reference in this condemnation suit to inflation of the dollar was regarded as "a prejudicial invitation to the jury to be generous to the condemnee."

Staff: Raymond N. Zagone (Lands Division)

Condemnation; Comparable Sales; Necessity of Offer of Proof to Establish Prejudice. Leeaye, Inc., et al. v. District of Columbia Redevelopment Land Agency (C.A. D.C., November 16, 1961). The Land Agency condemned the fee simple title to three adjoining parcels of unimproved land in connection with its redevelopment program of Southwest Washington. The Government's experts valued the property at $4.00 per square foot, based on sales of comparable property in the area. The landowners' witnesses valued it at $5.00 per square foot based on sales of property in the area, and also several pieces of property in the Northwest section of Washington, which had the same zoning. On objection of the Government, the sales of property in the Northwest section were excluded as not comparable. The jury gave a verdict of $4.00 per square foot. The landowners appealed, contending that the trial court abused its discretion in excluding the sales.

The Court of Appeals affirmed the judgment, stating: "We are persuaded not only that the trial judge had not here abused his discretion, but the appellants were not prejudiced." The sales the landowners sought to introduce were in very desirable locations, near the Capitol, the Supreme Court Building and Senate Office Buildings, and the court pointed out that such locations were not comparable to the area of the subject property in Southwest Washington, the generally blighted environs of which had given rise to the entire redevelopment program in process under the direction of the Land Agency. The Court stated that "we might almost take judicial notice as of a geographical fact of general notoriety," that sales of the property which had been excluded were not comparable to the subject property. It further pointed out that the appellants made no proffer as to what prices were involved in the excluded sales, or as to how such testimony could have enhanced the award, where there was ample evidence of a valuation of $5.00 per square foot, if the jury had chosen to accept it. The Court stated that the jury viewed this property and also other property in the area belonging to appellants. It was within the province of the jury to weigh the conflicting evidence. It saw and heard the witnesses and reached a valuation which was not inconsistent with that evidence.

Staff: Elizabeth Dudley (Lands Division)

Condemnation - Jurisdiction to Determine Recipient of Award - Injunction. George A. Hero, Jr., et al. v. City of New Orleans (La. Ct. App., November 6, 1961). This was an action in the Louisiana district court to enjoin the city of New Orleans from conveying a 110-acre parcel of land within the perimeter of the Alvin Callender Airfield, to the United States, and for revendication of the parcel. The land had been donated to the City in 1925 by George A. Hero, Sr., for use as a terminal for aircraft for any persons, firms or corporations desiring to use it. The donation contained a reversionary provision. In 1941, the airfield was designated for use in the national defense, provided the City would acquire additional property necessary for enlarging it. About 400 acres were acquired, principally from the Hero family, and the airfield was operated by the United States under leases from the City until 1954. The public was permitted to use the property except during periods of the national emergency.

In 1953, the United States determined that a Joint Air Reserve Training Center should be established on this airfield. In April 1954, the City adopted a resolution authorizing the Mayor to convey the property to the United States for that purpose, for $1.00. The Hero heirs immediately instituted this suit, contending that the adoption of that resolution constituted a violation of the donation. A temporary restraining order was entered on the same day. In August 1954, the United States instituted a condemnation proceeding to acquire the fee simple title to the property, and in January 1955, filed a declaration of taking, depositing $1.00 as estimated compensation.

In November 1959, a judgment was entered in the state court suit granting a permanent injunction, rescinding and annulling the donation by Hero, and decreeing that his heirs were the sole owners of the property. The Government filed a brief and participated in the argument before the Court of Appeal, as amicus curiae.

The Court of Appeal recognized that the property is owned by the United States and that title could not be restored to the Hero heirs, but affirmed the judgment to the extent that the donation was rescinded and annulled, and the Hero heirs were recognized "as sole owners of the property at the time of its appropriation," and "entitled to the proceeds of the appropriated land as fixed by the Federal courts." The City has filed a petition for certiorari or review in the Louisiana Supreme Court. The United States has filed a brief as amicus curiae. Its position is: (1) The Court of Appeal was in error in holding that the Hero heirs were entitled to the condemnation award for the property, as only the federal court has jurisdiction to determine the recipient of the award. (2) The Court of Appeal erred in granting a windfall to the Hero heirs because the City, in an effort to cooperate with the United States in acquiring the property, adopted the resolution authorizing its conveyance. (3) The Court of Appeal erred in holding that the Hero heirs were entitled to a revocation of the donation, since the use of the property was not changed prior to condemnation.

If it is finally determined that the Hero heirs are entitled to the award for the property, they will receive its fair market value as of the date of taking, rather than the nominal amount to which the City agreed.

Staff: Elizabeth Dudley (Lands Division).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CRIMINAL TAX MATTERS
Appellate Court Decisions

Evidence; Sufficiency of Proof:

Necessity of Specific Proof to Show Grand Jury Prejudiced by Publicity Adverse to Defendant; Evidence of Adverse Publicity at time of Trial Insufficient to Show Defendant Deprived of Unbiased Petit Jury; Sufficiency of Evidence to Support Conviction for Assisting in Preparation and Filing of False Union Returns; Taxability of Allegedly Embezzled Funds as Element in Income Tax Evasion Conviction. Beck v. United States (C. A. 9, January 20, 1962). Defendant Beck was convicted on six counts, two of which charged him with violating Section 3793(b), Internal Revenue Code of 1939, by aiding and assisting in the preparation and filing of false Form 990 returns for 1950 and 1952 on behalf of a union entity, and four of which charged him with violating Section 145(b), Internal Revenue Code of 1939, by wilfully attempting to evade or defeat his personal income tax for each of the years 1950 through 1953. He was sentenced to five years and fined $10,000 on each count, the sentences to run concurrently and the fines to be cumulative.

On appeal, defendant argued that he had been deprived of both an impartial grand jury and an impartial petit jury because of adverse newspaper publicity; that the evidence was insufficient to support his conviction on the false return counts; and that his conviction on the evasion counts should be reversed with instructions to dismiss the indictment as to those counts because the funds in question represented the proceeds of embezzlement within the meaning of James v. United States, 366 U. S. 213. The Court of Appeals rejected all of these contentions.

As to the allegation of a prejudiced grand jury, the Court pointed out that despite extensive and contemporaneous newspaper publicity featuring defendant as a "corrupt labor boss," there was no evidence that the grand jury, or any member thereof, was in fact prejudiced against defendant, and that such "a specific showing of prejudice is necessary to make erroneous the action of the trial judge in refusing to dismiss the indictment." The Court also observed that the trial judge issued his ruling only after making an in camera examination of the grand jury minutes. With respect to the petit jury, the Court noted that the trial judge had granted three continuances of the trial, that the trial was not commenced until more than a year and one-half after the return of the indictments, and that most of the adverse publicity occurred prior to, rather than contemporaneous with, the trial. These facts were deemed sufficient to distinguish Delaney v. United States, 199 F. 2d 107 (C. A. 1), where the prejudicial activities "were much more contemporaneous with the trial than is the case here." Pursuant to the requirement of Irvin v. Dowd,

366 U. S. 717, the Court also reviewed the voir dire testimony of the empaneled jurors and found that the trial judge had conducted the voir dire examination "in an able and admirable fashion." In these circumstances, and in the light of the trial judge's "large" discretion in this area, there was no error.

In affirming defendant's conviction on the two false return counts, the Court reasoned that the fact that defendant had not himself made out or signed returns for 1950 and 1952 did not preclude the jury from finding him personally responsible for misrepresentation contained therein, particularly in view of other evidence showing that he had in fact signed false Form 990 returns on behalf of a union entity for other years (1942 and 1945); that the 1951 return showing unusually high payments to one Lindsey, which payments in fact accrued to the personal benefit of defendant, had been delivered to defendant's office for signature but was never filed; that defendant did sign annual Form 990 returns on behalf of another union entity; that the falseness of the 1950 and 1952 returns consisted of their misrepresenting the purpose of certain union expenditures which in fact were applied to defendant's personal use; and that defendant exercised "complete one-man control" over the union and had detailed knowledge of its operations.

As to defendant's conviction on the four evasion counts, the Court accepted the Government's view that whereas the Supreme Court's decision in the James case would require the dismissal of any pre-James evasion indictments based on failure to report embezzled funds, the question of whether or not the unreported funds involved in the instant case represented the proceeds of embezzlement had not been resolved at the trial, and that the case should therefore be remanded for a new trial in which that fact could be ascertained. In rejecting defendant's contention that the funds necessarily represented the proceeds of embezzlement because the jury had found that they were not loans, the Court cited evidence indicating that the funds, or some of them, might have represented compensation to defendant, or the proceeds of criminal activities other than embezzlement, in which circumstances James would not apply as a bar to defendant's liability for income tax evasion. In the latter connection, the Court mentioned specifically certain unreported travel allowances which defendant received but, according to the Government, failed to expend. Defendant argued generally that because of his numerous and varied travels on union business, he must have expended at least the amount of travel monies which he was charged with failing to report. However, as the Court observed, the burden of going forward with evidence of his actual expenditures is upon the taxpayer once the Government establishes a prima facie case by proving unreported receipts, establishing that all deductions claimed in taxpayer's returns and discovered in the Government's investigation have been allowed, and showing that all possible leads suggested or provided by taxpayer have been exhausted.

Staff: Assistant United States Attorney John S. Obenour (W.D. Wash.) John J. McGarvey, Joseph M. Howard and Burt J. Abrams (Tax Division).

CIVIL TAX MATTERS
District Court Decision

Injunctions --

Suits to Enjoin Collection of Taxes; Sufficiency of Notice of Deficiency; Justification for Commissioner's Dispensing With Some Procedures of Regulation §601.105. Lester L. Luhring and Betty W. Luhring v. Clifford W. Glotzbach (E.D. Va. Oct. 25, 1961) CCH 62-1 U.S.T.C. Par. 9132. Henry G. Luhring, Jr. and Alice Luhring v. Clifford W. Glotzbach. Lawrence R. Luhring and Reidun S. Luhring v. Clifford W. Glotzbach. Henry G. Luhring and Dolly E. Luhring v. Clifford W. Glotzbach. (E.D. Va., Oct. 27, 1961) CCH 62-1 U.S.T.C. Par. 9133. All of these cases involve suits for injunctions to restrain the collection or assessment of taxes. In Lester Luhring and Betty Luhring v. Glotzbach, it was alleged that proper notices of deficiency were never mailed to them at their last known address as required by Section 6212(b) of the Internal Revenue Code of 1954. Tax returns were filed by these plaintiffs in April 1958 indicating as their address, 121 Sir Oliver Road, Norfolk, Virginia. In 1959 plaintiffs moved to 924 Eucalyptus Street, Sebring, Florida and in 1960, moved to 245 Algiers Avenue, Lauderdale-by-the-Sea, Florida; however, they did not file any change of address with the District Director in Richmond, Virginia. The Court held that the last known address of the taxpayers was the address appearing on the returns filed in the investigating district, and in the absence of a definitive notice of a change of address, the Director is entitled to use that address. Moreover, he is not required to seek out taxpayers in order to give them the notice of deficiency.

In the other three cases, plaintiffs seek to enjoin the collection of additional taxes assessed against them for the years 1957, 1958 and 1959. Statutory notices of deficiency for the years 1957, 1958 and 1959 were sent to plaintiffs on March 22, 1961, and Forms 17-A demanding payment of the additional taxes were received by plaintiffs in the month of July, 1961. Two of the plaintiffs, Lawrence R. Luhring and wife, requested an administrative hearing which was declined by defendant on March 27, 1961, stating that jurisdiction rested with the Appellate Division Office in Richmond to which the case file had been referred. Under date of March 30, 1961, the latter was advised that the statutory notice had been sent after the taxpayers had declined to consent to the extension of the period of limitations for the year 1957, and that it was not the policy to consider such cases during the ninety-day period within which a petition might be filed with the Tax Court.

Decision Not to File Petition for Certiorari. Austin v. United States, et al. (C. A. 4, November 21, 1961). This case was reported in the United States Attorneys Bulletin, Vol. 10, 1, January 12, 1962. It was a pre-indictment suit to enjoin the U. S. Attorney from presenting to the federal grand jury evidence allegedly obtained by Internal Revenue Agents in violation of constitutional rights under the 4th & 5th Amendments. The Solicitor General has decided not to file a petition for

certiorari but has suggested that the Government "make it plain on every occasion that we do not acquiesce in this decision." [Emphasis supplied.]

The real basis of the complaints is that certain procedures required by Part 601 of Subchapter H, Internal Revenue Practice, entitled "Statement of Procedural Rules" were not followed prior to the sending of the deficiency notices. The Court pointed out that "while it is true that the procedures under Section 601.105 were not followed, nevertheless such a course of action was fully justified in view of the imminent expiration of the statutory period of limitations for the year 1957." The Court therefore held that the Commissioner's action was not such "a capricious or arbitrary disregard of the procedural rules by the Commissioner that would" bring their cases within the principles enunciated in the case of Miller v. Nut Margarine Company, 284 U.S. 498, suspending the operation of Section 7421 of the Internal Revenue Code of 1954, namely, that before an injunction can issue "special and extraordinary circumstances" must combine with the illegality of the tax.

Staff: United States Attorney Claude V. Spratley, Jr. (E.D.); and Clarence J. Nickman, Anti-Trust Division (formerly with Tax Division)

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