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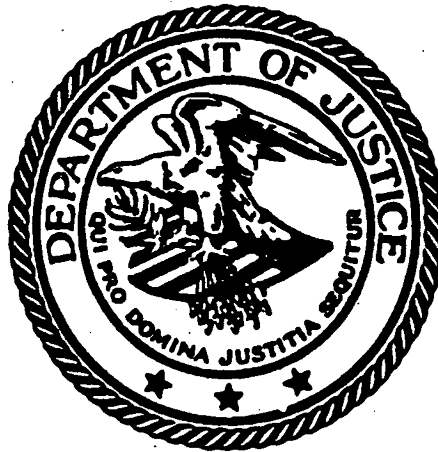

UNITED STATES ATTORNEYS
BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 10 July 13, 1962 No. 14

NEW APPOINTEES

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

Guam - James P. Alger

As of July 9, 1962, the score on new appointees is: Confirmed - 84; Pending - 4

CORRECTION

Through inadvertence, the District of Arizona was omitted from the list of districts current in civil cases as of May 31, 1962. As of that date, Arizona was current in all four categories of cases and matters.

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ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

SHERMAN ACT

Supreme Court, Reversing District Court, Holds Corporate Officer Responsible for Sherman Act Violation. United States v. Raymond J. Wise (NO. 488, October Term, 1961) On June 25, 1962, the Supreme Court handed down a unanimous decision holding that "a corporate officer is subject to prosecution under §1 of the Sherman Act . . . regardless of whether he is acting in a representative capacity."

The Court reversed the decision by Judge R. Jasper Smith in United States v. National Dairies, (W.D. Mo.), who had held that a corporate officer acting in a representative capacity could not be indicted under the Sherman Act, but only under Section 14 of the Clayton Act. In reversing Judge Smith, the Supreme Court rejected appellee's contention that a corporate officer acting in a representative capacity was not included in the statutory language "every person", on the ground that such "an artificial interpretation of a seemingly clear statute" was not supported by the legislative history of the Act or the cases decided under it prior to 1914.

The Court then found that the passage of Section 14 of the Clayton Act did not repeal or amend the criminal liability of officers under the Sherman Act. On the contrary, the Court stated that "Section 14 was intended to be a reaffirmation of the Sherman Act's basic penal provisions and a mandate to prosecutors to bring all responsible persons to justice" and that "insofar as §14 relates to the corporate officer who participates in the Sherman Act violations, whether or not in a representative capacity, no change was intended or effected."

Staff: Robert L. Wright, Richard A. Solomon and Patrick M. Ryan (Antitrust Division)

Cosmetic Manufacturer Charged With Sherman Act Violation. United States v. Revlon, Inc. (S.D. N.Y.) On June 22, 1962, a complaint was filed charging Revlon, Inc., the second largest cosmetics manufacturer in the United States, with violating Section 1 of the Sherman Act.

Revlon, whose headquarters are in New York City, markets its products at three different levels. It deals directly with certain drug and department stores as franchised retailers, with beauty shop and beauty school suppliers as franchised distributors, and with wholesale druggists and jobbers, whose customers are non-franchised retailers, such as grocery stores and supermarkets.

The complaint alleges a combination and conspiracy among the defendant and its various classes of customers in violation of Section 1 of the Sherman Act. By the terms of the alleged conspiracy, Revlon's customers are required to sell Revlon cosmetics at fixed prices; franchised retailers and distributors must purchase such products only from Revlon; franchised retailers must resell same only to consumers, and franchised distributors only to beauty shops and beauty schools situated within the territories allocated to them by Revlon; franchised distributors, wholesale druggists and jobbers must refuse to sell to anyone disapproved by Revlon; and Revlon cuts off the sources of supply from anyone failing to abide by these terms and conditions.

The complaint further alleges that as consequences of the combination and conspiracy, consumers pay high and artifically fixed prices for Revlon cosmetics; wholesalers are prevented from selling to certain retailers; and competition among the defendant distributors, wholesalers, and jobbers has been suppressed.

Through the extensive use of advertising in newspapers and magazines and on radio and television, Revlon has created a great consumer demand for its products. Consumers spend in excess of $150,000,000 annually for Revlon cosmetics. They account for approximately one quarter of all sales of cosmetics by drug and department stores.

The complaint seeks to enjoin defendant from continuing these marketing methods, including the application of state fair trade laws against persons buying or selling Revlon cosmetics.

Staff: John J. Galgay, John D. Swartz and Morton Steinberg (Antitrust Division)

* * *

Court Refuses to Impound Grand Jury Documents in Custody of Court. Grand Jury Investigation (S.D. W.Va.) On June 18, Judge Field denied a motion brought by five subpoenaed corporations requesting the Court to impound documents in the custody of the clerk of the court which they had produced before the grand jury pursuant to subpoenas duces tecum. The movants submitted a proposed order which would have made the grand jury documents available to Government counsel only in the courthouse in Charleston, and after a request for specific documents was made upon the clerk. The Government opposed the motion and asked that an order be entered impounding the documents in the custody of specifically named Division attorneys who had filed with the clerk of the court grand jury letters of authority.

The Government urged the acceptance of its proposed order upon the following grounds:

1. Impounding grand jury documents in the custody of the clerk of the court would impose an undue burden on him, since he would have to catalogue and separately file each grand jury document;

2. The Government attorneys were entitled to free access to grand jury documents. Such accessability could only be given if they were permitted to remove the documents from the district to their offices, in Washington, D. C., for examination and copy. This view had judicial support in United States v. United States District Court, 238 F. 2d 713 (C.A. 4, 1956) and In Re Petroleum Industry Investigation, 152 Fed. Supp. 646 (E.D. Va. 1957);

3. Entry of the movants proposed order would turn the grand jury proceeding into an adversary litigation, since subpoenaed persons would be able to learn the thrust of the Government's presentation by ascertaining the particular documents being examined by Government counsel.

The Court, in denying the motion, and granting the Government's application, cited United States v. United States District Court, supra, and In Re Petroleum Industry Investigation, supra, as authority for its determination. The Court also pointed out the undue burden which would be cast upon the clerk's office were the documents to be impounded in his custody.

Staff: Elliott H. Feldman and Bernard J. O'Reilly (Antitrust Division).

* * *

CIVIL DIVISION

Acting Assistant Attorney General Joseph D. Guilfoyle

COURT OF APPEALS

BANK HOLDING COMPANY ACT

Federal Reserve Board Order Denying Approval of Plan of Bank Holding Company for Acquisition of Stock of Bank Upheld. Northwest Bancorporation v. Board of Governors of Federal Reserve System (C.A. 8, June 13, 1962). Pursuant to Section 3(a) of the Bank Holding Company Act of 1956, petitioner filed an application with the Board of Governors of the Federal Reserve System for prior approval of a plan to acquire 80% or more of the outstanding shares of stock of the First National Bank of Pipestone in Pipestone, Minnesota. Petitioner's application contained facts and figures demonstrating its financial soundness and ability to manage the bank, announced its intention of improving service to the bank, and stated reasons why the proposed acquisition was in the public interest.

Upon receipt of the application, the Board notified the Comptroller of the Currency, as required by Section 3(b) of the Act. Because the Comptroller recommended approval, no hearing was required under the Act. None was held, though one was requested.

After consideration of the application in the light of the factors designated in the Act for consideration, the Board unanimously denied the application.

A petition was filed in the Court of Appeals, under Section 9 of the Act, to review the Order of the Board. In this first case to arise under the Bank Holding Company Act, the Court affirmed the Order of the Board. The Court held that the Board had the responsibility for approving or disapproving bank acquisitions by holding companies; that it had the duty to make a judgment as to the effect a proposed acquisition would have upon the convenience, needs, and welfare of the communities and area concerned, sound and adequate banking, the public interest and the preservation of competition in the field of banking; that in this case the Board's inference from the undisputed facts, that the public interest would be adversely affected and competition would be lessened may not be disturbed because the Board's findings are supported by substantial evidence and are not arbitrary or capricious. Petitioner's claim that the facts indicate that competition would be enhanced and public welfare unimpaired, is merely a disagreement with the Board's conclusion in an area where the Board is required to use its expertise and experience and furnishes no ground for overturning the Board's decision. The Court also ruled that the statute requires no hearing in instances where the Comptroller approves the application, that petitioner had had full opportunity to present all its facts, data and arguments, and that there had been no error in denying the request for a formal hearing.

Staff: Pauline B. Heller (Civil Division)

BANKRUPTCY

Bankrupt's Estate May Be Reopened to Prevent Legal Fraud. Thomas M. Reid v. Ben M. Richardson (C.A. 4, May 28, 1962). The United States brought this action to reopen the bankrupt estate of Thomas Reid and to consolidate it with the bankrupt estate of his wife, in order to enable the Government to satisfy its claims against the Reids out of property held by them as tenants by the entirety. Mr. Reid's estate had been closed and his debts discharged several months before his wife filed a petition in bankruptcy. The district court granted the Government's motion and the bankrupts appealed. The Court of Appeals affirmed. It held that, under the applicable Virginia law, the property held by the bankrupts as tenants by the entirety was not an asset of the bankrupt estate of the individual spouse. The discharge of the spouse in bankruptcy, however, would bar satisfaction of the joint debts of the spouses. Therefore, the Court allowed the estate to be reopened and the two estates consolidated to render the entirety as asset and, hence, available for satisfaction of the creditors' claims. Any other result, the Court noted, would allow the interrelation of property and bankruptcy rules to perpetrate a legal fraud on the creditors of the spouses.

Staff: Terence N. Doyle (Civil Division)

CIVIL SERVICE RETIREMENT ACT

Retirement Credit Refused for Service Performed in Employ of State Board of Vocational Education Receiving Financial Assistance from United States. D. V. Stapleton v. John W. Macy, et al. (C.A. D.C., June 28, 1962). In order that it might share in the benefits afforded by the Smith-Hughes Vocational Education Act (20 U.S.C. 11, et seq.), the State of Mississippi passed a vocational educational bill. Appellant was employed by the Mississippi State Board of Vocational Education which had been created by that bill, as a supervisor and itinerant teacher-trainer of agriculture, serving in that capacity from September 1, 1924 until July 1, 1928, at which time he embarked upon a career of federal employment. In October 1958, appellant submitted an application to the Civil Service Commission requesting that his years of employment with the Mississippi Board be included as a part of his period of creditable service under Section 3 of the Retirement Act, 5 U.S.C. 2253. The Commission held that the service was not creditable because during that period appellant was not an "employee" within the meaning of Section 1 of the Retirement Act, 5 U.S.C. 2251. In reaching this determination the Commission applied the criteria it had established in 1944. Under these criteria to be considered a federal employee a person must be: (1) engaged in the performance of federal functions under the authority of an act of Congress or an Executive order; (2) appointed or employed by a federal officer in his official capacity as such; and (3) under the supervision and direction of a federal officer. The Commission concluded that the appellant's service in question failed in all respects to satisfy these criteria. From this adverse administrative determination appellant instituted suit in the district court asserting that the Commission's

decision denying service credit was arbitrary, capricious and contrary to law. Summary judgment was granted on behalf of the appellee. On appeal, the Court of Appeals concluded that the long-established criteria utilized by the Commission had "a reasonable basis in law and the findings have warrant in the record". Accordingly, the judgment of the district court was affirmed.

Staff: Edward Berlin (Civil Division)

CONTRACTS

Contract Dispute; Timely Recision Supports later Set-Off, Findings of Contracts Dispute Board of Commodity Credit Corporation Supported by Substantial Evidence, 41 U.S.C. 321. Land O' Lakes Creameries, Inc. v. Commodity Credit Corporation, (C.A. 8, May 31, 1962). Appellant brought this action for breach of contract to recover the difference between the amount billed and the amount paid. This difference was occasioned by a set-off by C.C.C. of amounts paid on a previous contract, which in this action were asserted by C.C.C. as a counterclaim. The prior contract concerned a sale by appellant to C.C.C. of dried milk which was, in part, found to be insect-infested. The dispute which arose therefrom went to the Contract Disputes Board of C.C.C. which found, inter alia, a breach of warranty and an effective recision by C.C.C. This case was in substance, a review of the Board's determination, which was sustained by the district court and affirmed by the Court of Appeals. The Court sustained the finding of an implied warranty, holding the sale to be one by description. It rejected appellant's contention that because there had been no tender of the milk to it by C.C.C., there could not be an effective recision. In sustaining the Board's finding of effective recision, the Court stated that since appellant had disclaimed liability, and arranged with C.C.C. for the sale of the milk as animal feed, tender would have been a futile act and was therefore unnecessary. Additionally, the Court rejected appellant's assertion that the district court had sustained the Board on an independent ground.

Staff: United States Attorney Miles W. Lord and Assistant United States Attorney John J. Connelly (D. Minn.)

FEDERAL EMPLOYEES COMPENSATION ACT

Suit by Federal Employee Against United States Precluded by Federal Employees Compensation Act. Daniels-Lumley v. United States, (C.A. D.C., June 7, 1962). Plaintiff, an employee of the Department of Agriculture, was injured when she slipped on an accumulation of ice and snow on the sidewalk in front of the South Building of the Department of Agriculture in the District of Columbia, while walking to a mailbox to post a personal letter. Without filing a claim under the Federal Employees Compensation Act, she brought suit under the Tort Claims Act. The suit was dismissed by the district court and the Court of Appeals affirmed on the ground that where, as here, the injury is not clearly outside the scope of the Federal Employees Compensation Act, that Act requires that the Secretary of Labor

be given the primary opportunity to determine the compensability of the injury. (The United States may not be sued in tort for an injury compensable under the Act.) The affirmance was without prejudice to further proceedings under the Compensation Act.

Staff: Leavenworth Colby (Civil Division)

FEDERAL RULES OF CIVIL PROCEDURE

Person Threatened With Substantial Injury Entitled to Intervene as Defendant in Action Challenging Administrative Regulations. Atlantic Refining Co. v. Standard Oil Co., et al., and Independent Refiners Assoc. v. Standard Oil Co., et al. (C.A. D.C., June 7, 1962). Standard Oil Company of New Jersey (Standard) brought an action against the Secretary of the Interior seeking a declaratory judgment invalidating certain regulations under the Oil Import Control Program. The Atlantic Refining Company (Atlantic) and the Independent Refiners Association (Independent) filed applications for leave to intervene in support of the regulation under Rule 24(a)(2), F.R.C.P. The district court denied both applications. Both Atlantic and Independent appealed. The Court of Appeals affirmed the denial of intervention as to Atlantic, but reversed the order denying Independent's motion.

The principal question presented in the Court of Appeals was the meaning of the "bound by" provision of Rule 24(a)(2). The Court of Appeals held that, although the test for determining whether an applicant will be "bound by" a judgment in a conventional action is whether he will be bound under the doctrine of res judicata, this test is inappropriate in actions by private persons to test the validity of administrative orders or regulations. In the latter cases, the Court reasoned, invalidating the administrative action may result in substantial injury to those intended to benefit from the action and these persons will be without redress for their injuries. Applying this standard to the present cases, the Court of Appeals found that the potential injury to Independent was both real and substantial and, hence, they are entitled to intervene of right. The injury to Atlantic, however, was found to be neither certain nor remediless. Therefore, it had no right to intervene.

Staff: Morton Hollander and Terence N. Doyle (Civil Division)

FEDERAL TORT CLAIMS ACT

Federal Highway Program Generally Imposes no Duty on United States, Approval of Highway Plans Discretionary Function. Mahler, et al. v. United States (C.A. 3, June 27, 1962). In this action damages were sought under the Tort Claims Act for an injury to a motorist occasioned by a collision with a large boulder that had fallen from a steep embankment onto a Pennsylvania highway which had been constructed with a 50% grant-in-aid from the Government under the federal aid highway program. (See, 23 U.S.C. (1952 Ed.) 1-175.) The district court's summary judgment in favor of the United States was affirmed.

The Court of Appeals rejected the argument that the United States failed to fulfill a duty said to be owed to the traveling public by reason of the Federal Highway Act, (1) by causing defective plans for the project to be approved, (2) by failing to discover faulty construction and (3) by failing to provide for and make inspections after construction was completed. It held that the provisions of the Act concerning inspection were enacted not for the benefit of travelers, but merely to safeguard federal funds (if the highway fails to meet federal standards, funds are withheld). Although it found that the provision concerning prior approval of plans was intended by the Congress, at least in part, to ensure safety, and that this might support the imposition on the United States of a duty running in favor of travelers, the Court held that this was the exercise of a discretionary function which is without the waiver of immunity in the Tort Claims Act. See 28 U.S.C. 2680(a).

Staff: Jerome I. Levinson (Civil Division)

When Claim Accrues for Limitation Purposes (28 U.S.C. 2401(b)) Controlled by Federal Law; Claim for Malpractice Accrues, Under Federal Law, When Claimant Discovers, or Should Have Discovered Acts Constituting Malpractice. Quinton v. United States, (C.A. 5, June 14, 1962). This action under the Tort Claims Act, 28 U.S.C. 1346(b), was based on the alleged malpractice of Government employees in treating plaintiff's wife at an Air Force base hospital in May 1956. At that time, she was given three transfusions of R.H. Positive blood, although she was an R.H. Negative. It was alleged in the complaint filed in August 1960, that as a result of those transfusions, plaintiff's wife gave birth, in December 1959, to a still-born child, and that she could not safely bear children without, in all probability, their being still-born, blind or mentally defective. The district court granted the Government's motion to dismiss the claim, which was based on the two year limitations period provided in 28 U.S.C. 2401(b). It held that state law (here, that of Washington, the place of the alleged negligent act) controlled on the issue of when the claim accrued. Applying that law, it held the claim accrued in May 1956, the time at which the alleged negligent act took place, and therefore found this action, commenced some four years thereafter, barred by the two year limitations period provided in 28 U.S.C. 2401(b). The Court of Appeals reversed. It held (1) that federal, not state law controls on the issue of when a claim accrues within the meaning of 28 U.S.C. 2401(b), reasoning that this best vindicates the unmistakably manifested Congressional intent to have a single statute of limitations govern all tort claims; and (2) that a claim in malpractice accrues, under federal law, when the claimant discovered, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged malpractice. The Court recognized that it was departing from the rule concerning accrual of claims for malpractice which obtains in a majority of states. Finding that rule without significant redeeming virtue, and subject to heavy criticism, it chose, in fashioning a federal rule, to apply the liberal accrual rule. Applying that rule to the facts of this case, the Court found that the earliest date at which plaintiff or his wife could have known of the alleged negligent transfusions was during her pregnancy in 1959. The Court there-

fore held this action timely. A case presenting the same issues as those here involved is now on appeal in the Ninth Circuit, Hungerford v. United States, No. 17,514, argued on April 9, 1962. The opinion of the district court is reported at 192 F. Supp. 581.

Staff: Jerome I. Levinson (Civil Division)

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

District Court Has Jurisdiction to Review Deputy Commissioner's Refusal to Modify Compensation Order Under 33 U.S.C. 922. C.K. Case v. C.D. Calbeck, (C.A. 5, June 20, 1962). Pursuant to 33 U.S.C. 922, appellant longshoreman filed an application requesting modification of a prior compensation award under the Longshoremens' Act. The Deputy Commissioner, after a hearing, concluded that there was neither a change in conditions nor a mistake in a determination of fact and accordingly denied the application. Appellant, alleging jurisdiction under Section 21(b) of the Act (33 U.S.C. 921(b)), instituted suit in the district court seeking to set aside the Deputy Commissioner's denial of his application for modification. The Government moved to dismiss the complaint on the ground that the denial was not a "compensation order" and thus not subject to review under Section 21(b) of the Act. The district court granted the motion and dismissed the complaint on the grounds: (1) lack of jurisdiction and (2) the failure of the record to reflect any "abuse of authority." On appeal, the Court of Appeals rejected the Government's jurisdictional argument. It concluded that, in denying the application for modification, the Deputy Commissioner had in fact issued a new compensation order which was reviewable under Section 21(b) of the Act. However, finding that the Deputy Commissioner's determination on the merits did not reflect an abuse of authority, it affirmed. In affirming, the Court approved the practice followed by the district court of making, in the alternative, a finding on the merits after it had initially concluded that it lacked jurisdiction.

Staff: Edward Berlin (Civil Division)

Finding by Deputy Commissioner That Death Did Not Result from Injury Arising out of and in Course of Employment Not Supported by Substantial Evidence. Vinson, et al. v. Deputy Commissioner, et al., (C.A. D.C., June 14, 1962). The deceased employee, employed at a construction site, driving a truck with crane mounted thereon of the total weight of 34 tons, died over the wheel thereof of coronary insufficiency and coronary sclerosis. The Deputy Commissioner's finding that the death was not compensable under 33 U.S.C. 901 (D.C. Code 36-501 (1961)) was affirmed by the district court but reversed by the Court of Appeals. The Court of Appeals found ample evidence in the record that driving the vehicle in the circumstances was strenuous work, and that such work caused his death.

Staff: Herbert P. Miller (Department of Labor)

Prior Poor Health Not Previous Disability Within Meaning of Section 8(f) of Longshoremans' and Harbor Workers' Act, 38 U.S.C. 908(f). Superior Cafe-

teria and Lunch Co., Inc., et al. v. Britton, (C.A. D.C., June 21, 1962). Appellants challenged a compensation award of permanent partial disability for a hernia suffered by the employee, on the ground that the employee's prior condition (myocardial weakness, coronary insufficiency, urinary infection), which precluded surgical reduction of the hernia, should be considered a prior disability within the meaning of Section 8(f) of the Longshoremans' Act. The Court of Appeals disagreed, and affirmed the summary judgment entered by the district court in favor of the Deputy Commissioner. The Court accepted the Government's position that the employee's underlying weakness and poor health did not constitute a previous disability, or increase the employee's disability from the hernia.

Staff: Herbert P. Miller (Department of Labor)

PITTMAN ROBERTSON ACT

Apportionment of Funds Under Pittman Robertson Act by Secretary of Interior Sustained. Udall v. State of Wisconsin, et al., Udall v. State of Michigan, (C.A. D.C., June 28, 1962). Appellees sought mandamus to compel the Secretary of Interior to disburse to them funds under the Pittman Robertson Act, 16 U.S.C. 669. Under that Act, receipts from the federal excise tax on firearms, shells and cartridges are distributed to the states for use in approved wildlife conservation programs. The Secretary, charged since 1939 with the administration of the Act, is required to apportion the funds first on a geographic basis and second "in the ratio which the number of paid hunting-license holders of each state in the preceding fiscal year, as certified to [him] by the state fish and game departments, bears to the total number of paid hunting license holders of all states." (16 U.S.C. 669c).

The Secretary determined that the apportionment should be made on the basis of the number of individuals holding licenses, rather than on the basis of the number of licenses sold. Appellees are states which contend the latter method should be used. The district court agreed with appellee states and directed that a writ of mandamus issue against Secretary Udall.

On appeal, the Court of Appeals reversed. While rejecting the Government's arguments (1) that this is an unconsented suit against the sovereign and (2) that mandamus does not lie because here the Secretary was in the performance of a discretionary act, the majority of the Court accepted the Government's contention on the merits. It found that the language of the statute is clear, that the legislative history tendered by appellees was inconclusive, and that there was an absence of evidence supporting a Congressional acceptance of prior administrative practice which tended to support appellees' position.

Staff: Kathryn H. Baldwin (Civil Division)

SOCIAL SECURITY ACT

Review of Social Security Determination Must be Commenced Within Time Prescribed. John O. Bomer, Jr. v. Ribicoff, et al., (C.A. 6, June 25, 1962).

Appellant brought this action under Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), on May 1, 1961, seeking review of the final determination by the Secretary of Health, Education and Welfare denying his claim for increased benefits. That determination was made on August 4, 1959. The Government moved to dismiss the action on the ground that it had not been brought within the 60 day period provided by the Act (Ibid). Appellant had previously brought an action seeking review of the same determination within the time prescribed, but, on his motion, that action had been dismissed without prejudice. In response to the Government's motion herein, appellant moved to reinstate that prior action and for an order directing the Social Security Administration to extend the time for filing this action. The district court's order denying the motion to so direct the Administration and dismissing this action was affirmed by the Court of Appeals. The Court stated (1) the right of action herein involved is created by statute and is limited by the provisions thereof as to the time within which it must be asserted, and (2) although the Act gives the Secretary the discretion to extend the filing time, it does not confer upon the courts the right to compel him to do so.

Staff: United States Attorney Thomas L. Robinson (W.D., Tenn.)

SUIT AGAINST FEDERAL OFFICER

Slander Action Against Federal Officer, Absolute Privilege Where Statements Made in Line of Duty. Brownfield v. Landon, (C.A. D.C., June 28, 1962). Appellant was under investigation by appellee who was then Inspector General of the Air Force. The investigation concerned, inter alia, alleged misconduct of certain personnel in the Air Force involving a certain company and its connection with appellant, then a temporary Brigadier General of the Air Force. The head of the company, and a Congressman from Oklahoma who apparently wished to intercede on behalf of the company as well as appellant, sought and had a meeting with appellee concerning this investigation. It was at this meeting in the presence of the company head, the Congressman, appellee and one of his aides, and in the course of a discussion concerning the investigation, that appellee uttered alleged defamatory words. In this suit by appellant for slander, appellee moved for summary judgment on the ground, inter alia, of absolute privilege. The district court granted the motion. The Court of Appeals, relying, inter alia, upon Barr v. Matteo, 360 U.S. 564, affirmed. It found appellee's utterance to have been made in the "course of matters committed to his control" and "in the line of duty." The Court therefore held that the statements were absolutely privileged.

Staff: United States Attorney David C. Acheson and Assistant United States Attorney Daniel A. Rezneck (C.A. D.C.)

SUITS IN ADMIRALTY ACT

Service of Process Under 46 U.S.C. 742, 782; Failure to Forthwith Serve Attorney General Requires Dismissal of Action. Battaglia v. United States, (C.A. 2, June 4, 1962). Appellant brought a libel against the

United States, alleging injury as a result of negligence and unseaworthiness. The libel was filed on June 8, 1961, within the time prescribed. A copy was forthwith served on the United States Attorney, but appellant at that time failed to mail a copy to the Attorney General. On October 25, 1961, the Government moved for summary judgment pursuant to Admiralty Rule 58(b), based upon appellant's failure to make such service. Appellant, on the next day, attempted to remedy this defect by mailing a copy of the libel to the Attorney General. The district court's dismissal of the libel was affirmed by the Court of Appeals. In response to appellant's argument that service on the Attorney General is a minor secondary requirement, the Court stated:

> The Attorney General is responsible for handling the nationwide litigation against the Government. For convenience of litigants, actual personal service may be made in the appropriate district, thus avoiding the necessity of traveling from North Dakota (for example) to Washington, or engaging local Washington counsel, to make service. It is, nevertheless, equally important, if not more important, for the Attorney General to receive almost simultaneous notice. In final analysis, the ultimate final responsibility for the handling of cases, both as to pleading and trial tactics as well as possible settlements, is vested in the Attorney General. The local United States Attorneys are his deputies who possess such authority as he chooses to bestow upon them.

The Court therefore held that failure to serve the Attorney General as required was such an infirmity as required dismissal of the libel.

Staff: Jerome I. Levinson (Civil Division)

DISTRICT COURT

DISPUTES CLAUSE

Case Disposed of Upon Record Made Before Board of Contract Appeals. General Ship Contracting Corp. v. United States, (D. N.J., June 1962). One more court has spoken in the conflict over the effect which courts should give to determinations of fact under the standard "disputes clause." The Court of Claims allowed a trial *de novo* in Volentine & Littleton v. United States, 145 F. Supp. 952, and subsequent cases. In Wells & Wells v. United States, 269 F. 2d 412, and many other cases, various courts of appeals and district courts have held that, in reviewing contract disputes, they should merely read the record made before the Board of Contract Appeals. The instant decision is in line with the other holdings of the district courts and courts of appeals.

Staff: United States Attorney David M. Satz, Jr. and Assistant United States Attorney Richard A. Levin (D. N.J.); Robert Mandel (Civil Division)

FEDERAL TORT CLAIMS ACT

28 U.S.C. 2680(a) Bars Claim Based on Allegedly Wrongful Grant of Grazing Permit. Charles E. Kunzler v. United States, (D. Utah, June 15, 1962). 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 land, State and privately owned grazing land were adjoining which made it virtually impossible for the use of any of this land for grazing purposes without occasional trespass by cattle on adjoining Federal, State or privately owned lands. Plaintiff sought to recover damages under the Federal Tort Claims Act on the ground that Federal agents in granting grazing permits for publicly owned grazing lands in Box Elder County allegedly aided, encouraged, abetted, directed or counselled the trespass upon plaintiff's land by the cattle of permittees upon the Federal grazing land. The custom in the area was for the Federal authorities to grant Exchange of Use permits whereby users of Federal, State and privately owned adjoining grazing lands permitted grazing by cattle of permittees and private land owners on an exchange basis within the area designated by the Bureau of Land Management, Department of Interior, as a bovine summer unit grazing area. This, in practical effect, was an exchange of use arrangement whereby the cattle of private owners and permittees could graze either public or private lands within the unit. In the present case, the plaintiff, who was not part of an exchange of use agreement, claimed trespass by Federal permittees upon his privately owned and State leased grazing lands during the summer season of 1960 and during the grazing season of 1961 and that such trespass was aided, encouraged and abetted by virtue of the grant of a grazing license on part of Federal Taylor grazing agents. The Court in ruling in favor of the United States, held that the grant or the refusal to grant a Federal grazing permit by Government agents administering the Taylor Grazing Act was a discretionary function under 28 U.S.C. 2680(a) of the Federal Tort Claims Act. The Court distinguished Oman, et al. v. United States, 179 F. 2d 738 (C.A. 10, 1949), in which it was held the Government may be guilty of trespass because in that case there was an outright interference by Government agents with plaintiffs' grazing rights while their permits remained valid, outstanding and unrevoked.

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

* * *

CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

NOTICE TO ALL UNITED STATES ATTORNEYS

Whenever hereafter an opinion is rendered by a federal district court or a state court within your district in an action challenging either the apportionment of seats in a state legislature or the composition of congressional districts, you should promptly obtain and forward a copy of the opinion to the Assistant Attorney General, Civil Rights Division. The Civil Rights Division should also be apprised generally of developments in reapportionment litigation.

Voting and Elections: Civil Rights Act of 1957. United States v. Board of Education of Greene County, Mississippi, et al. (S.D. Miss.). This action, brought under the Civil Rights Act of 1957 (42 U.S.C. 1971), seeks to restrain the Superintendent of Education and the Board of Education of Greene County, Mississippi, from interfering with the right of Negro citizens to register and to vote or penalizing such citizens for their having registered or voted. It also seeks reinstatement of a schoolteacher who was released from her job. This teacher, one of the 22 Negro schoolteachers in Greene County, Mrs. Ernestine Talbert, had attempted to register to vote in the adjacent County, George County, where she resided. In connection with her attempt to register, she had signed an affidavit which the Government used in its voting case and filed in support of a motion for a temporary restraining order against the George County registrar. The Government's case in George County received wide publicity; articles listing the names of the Negro affiants appeared in the press.

In March, before the suit in Greene County was filed, the Negro school principal had recommended that Mrs. Talbert be rehired for the academic year 1962-1963. The standard practice in that County is that the Negro school principal recommends to the Superintendent the teachers who, in his judgment, should be reemployed. The Superintendent, in turn, recommends to the Board of Education, the teachers to be rehired. The names of the affiants in the George County case appeared in the press on April 17--then again on April 21 and 22. On April 24, 1962, the Court issued a temporary restraining order enjoining the George County registrar from further discrimination in the registration process. The next day, April 25, 1962, at a special meeting of the Board of Education in Greene County, the Superintendent with the Board's concurrence overruled the recommendation for reemployment of Mrs. Talbert. She was not rehired.

The Government filed a motion for a temporary restraining order, set for hearing on June 23, 1962, seeking to restrain the defendants, until the preliminary injunction can be heard, and from taking any steps to fill the position formerly held by Mrs. Talbert.

Staff: United States Attorney Robert E. Hauberg (S.D. Miss.);
John Doar and D. Robert Owen (Civil Rights Division)

Motion to Intervene and Request for Declaratory Judgment to Prevent Racial Discrimination in Hospital Receiving Funds Under Hill-Burton Act (42 U.S.C. 291 et seq.). Simpkins, et al. v. Moses Cone Memorial Hospital (M.D. N.C.) This case was previously reported in Volume 10, No. 10 at page 287. On June 26, 1962, the motion of the United States to intervene on the question of the constitutionality of the statutory provision was granted.

Staff: United States Attorney William H. Murdock (M.D.N.C.);
Assistant Attorney General Burke Marshall;
St. John Barrett, Theodore R. Newman, Jr.,
Howard A. Glickstein (Civil Rights Division)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

IMPORTANT NOTICE - DEPORTATION CASES

New Regulations Concerning Use of Non-record Information in Considering Requests for Stay of Deportation Under 8 U.S.C. 1253(h); Re-examination of Unexecuted Deportation Orders Based on Old Regulations. Suits are pending in the courts in various districts for judicial review of Immigration and Naturalization Service denials of applications for temporary stay of deportation under Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1253(h), on the ground that the alien would be subject to physical persecution in the country of deportation. Prior to January 22, 1962, such administrative determinations could be based upon non-record information. Under 8 C.F.R. 242.17(c), effective January 22, 1962, such determinations may be based on non-record information only if, in the opinion of the hearing officer or Board of Immigration Appeals, the disclosure of such information would be prejudicial to the interests of the United States.

Although the new regulations are not applicable to previously decided cases except for newly discovered evidence, the Commissioner of Immigration and Naturalization, as a matter of policy, has decided to reexamine all unexecuted orders of deportation (including those now in litigation) where an application under Section 243(h) was made and denied and where non-record information was considered pursuant to the provisions of the old regulations. Following this reexamination, the Commissioner will determine whether, applying the standards set forth in the present regulations, further administrative proceedings should be had.

The Service is in process of formulating instructions to its field offices. Pending further word from the Service with respect to individual cases now in the courts, it is suggested that the United States Attorneys having such cases take appropriate steps to hold further action therein in abeyance. In any case in which the Service concludes that further administrative proceedings should be had, an appropriate order should be obtained from the court, remanding the case to the Service for such purpose.

SEARCHES AND SEIZURES

Probable Cause Based Upon Information Supplied by Unidentified Informant and Corroborated by Surveillance Held Sufficient to Support Search Warrant in Wagering Tax Case. United States v. William T. Woodson and John Gant (C.A. 6, May 15, 1962). Acting on the basis of detailed information supplied by an unknown informant, four Special Agents of the Treasury Department undertook a two-week surveillance of premises

upon which a "numbers" operation allegedly was being conducted. The surveillance revealed that, of eleven automobiles observed at or near the premises during this period, ten belonged to persons who either held Federal Wagering Stamps, or by arrest or common knowledge were reputed to be in the "numbers" business. The remaining automobile had been followed on an apparent "numbers" route by the agents. Moreover, the general activity observed in and about the suspected premises corresponded with the mode of operation described by the confidential informant. Affidavits were then prepared setting forth the information furnished by the informant and the results of the agents' surveillance. The subsequent search yielded the evidence upon which convictions were obtained against the defendants.

The Court of Appeals affirming the district court's denial of a motion to suppress, held that the affidavits put before the Commissioner sufficient evidence to establish probable cause to justify the issuance of the search warrant. The Court held that observations of the agents during the course of the surveillance served to corroborate the unknown informant's allegations, thereby establishing "this information as trustworthy;" and that this information derived from the informant, when coupled with the independent knowledge of the operation gleaned from the agents' own observations, was deemed sufficient to support the search warrant. The most significant aspect of this decision is the holding that information supplied by an informant of unknown reliability can be the basis of a valid search warrant if those ~~phases~~ of his description of the gambling operation which can be corroborated by surveillance have been observed and verified.

SEARCHES AND SEIZURES

Probable Cause Based Upon Extensive Long Distance Telephone Activity With Known Professional Gamblers Held Sufficient to Support Search Warrant; Circumstantial Evidence Held Sufficient to Sustain Conviction in Wagering Tax Case. United States v. Billy Gilbert Nicholson (C.A. 6, May 24, 1962). Internal Revenue agents prepared an affidavit for a search warrant reciting two relevant grounds for believing the home of the subject's mother was being used to conduct a gambling operation and therefore would contain property being used in violation of the Wagering Tax laws. First, the subject had the general reputation of being a gambler and bookmaker in Nashville, Tennessee. Second, over a three and one-half month period approximately 293 long distance calls were made from the premises, most of them to known gamblers in Georgia, Pennsylvania and Florida. On the basis of this affidavit the Commissioner found probable cause and issued the search warrant. Upon appeal of the conviction and denial of the motion to suppress, the

Court of Appeals affirmed, stating that although the circumstances may have been ambiguous, "a determination that probable cause exists should be accepted by this Court unless it is shown that the Commissioner's judgment was arbitrarily exercised."

The search resulted in the discovery and seizure of various articles of gambling paraphernalia including flash paper, a wall blackboard, and numerous copies of several sports publications. This physical evidence together with certain conflicting statements by the subject was virtually the sole basis for conviction. There was no direct evidence of bets placed with the subject by undercover agents or others. The Court of Appeals held that though the evidence adduced against the defendant was entirely circumstantial, if was sufficient to support the verdict.

MAIL FRAUD

Denial of Motion for Judgment of Acquittal; Sufficiency of Circumstantial Evidence. Bolen et al. v. United States (C.A. 9, May 29, 1962). Defendants were convicted in the United States District Court for the Eastern District of Washington, Northern Division, on three counts of using the mails to defraud and were acquitted on a fourth count charging them with conspiracy. The indictment charged that defendants had represented to purchasers that certain merchandise would be shipped upon the payment of a specified down payment, the balance to be collected after shipment by sight drafts drawn upon the purchaser, but that defendants had caused sight drafts to be drawn and sent with spurious, false and fictitious bills of lading, invoices and other documents purporting to evidence shipments of the merchandise, and that the sight drafts were paid as a result, whereas the merchandise was not shipped as evidenced by the documents.

Defendants appealed from the denial of their motion for acquittal, urging that the evidence was insufficient to sustain conviction.

Affirming the judgment below, the Court of Appeals applied the following rule enunciated in Remmer v. United States, 205 F. 2d 277, 287 (C.A. 9, 1953), concerning the sufficiency of circumstantial evidence:

> The test to be applied on motion for judgment of acquittal * * * is not whether in the trial court's opinion the evidence fails to exclude every hypothesis but that of guilt, but rather whether as a matter of law reasonable minds, as triers of the fact, must be in agreement that reasonable hypotheses other that guilt could be drawn from the evidence. * * * If reasonable minds could find that the evidence excludes every reasonable hypothesis but that of guilt, the question is one of fact and must be submitted to the jury.

The Court also ruled that use of the mails may be established circumstantially or by proof of general custom. The assistant vice-president of the bank which had drawn drafts had testified in detail regarding the instruments (bills of lading, drafts, etc.) involved in one of the counts, and the Court said that that testimony could properly be construed "as illustrative of the manner in which all of the sight drafts and other instruments were transmitted by the bank."

Staff: United States Attorney Frank R. Freeman;
Assistant United States Attorney Patrick H. Shelledy
(E.D. Wash.).

POSTAL OFFENSES

Theft of Mail (18 U.S.C. 1709); Decoy Letters. Albert Baxter Thomas v. United States (C.A. 6). On June 15, 1962, the Court of Appeals affirmed the conviction of the appellant for stealing marked money from a letter mailed by a postal inspector, which carried on the envelope an assumed or fictitious return name and address.

Appellant contended that the postal inspectors by using a fictitious or assumed name for the return address violated 18 U.S.C. 1342, and made incompetent the evidence thus obtained. The Court rejected this argument on the ground that Section 1342 makes illegal the use of a fictitious or assumed name for the purpose of carrying out a scheme or device to defraud by use of the mail, as proscribed by 18 U.S.C. 1341. The use of an assumed name in this case was not for that purpose.

Appellant attempted to distinguish Hall v. United States, 168 U.S. 632 (1898), upholding the use of a decoy letter, by pointing out that that case was decided prior to the enactment of 18 U.S.C. 1342. The Court, however, observed that Section 1342 is derived from Chapter 393, Section 2, 25 Statutes at Large, 873, which was enacted in 1889, prior to the decision in the Hall case.

MOTION TO VACATE

Prisoner Accorded Same "Opportunity" to Present Argument on Appeal as Government Counsel. In Elchuk v. United States, Sup. Ct., No. 965 Misc., O.T. 1961, petitioner sought review of a judgment of the Fifth Circuit affirming an order of the district court denying a motion under 28 U.S.C. 2255 to vacate petitioner's conviction. After the Government had filed its answer to the contentions made in the petition for certiorari, the Supreme Court asked the Solicitor General for a further response addressed to the following question which lurked in the record: "Can a court of appeals allow oral argument by the government without allowing the petitioner or his representative to be present?" It appeared that the Clerk of the Court of Appeals had sent to the petitioner at the penitentiary a copy of the Court's printed calendar showing that his case was scheduled for argument on a day certain. Petitioner then filed a "Motion to Suppress Oral Argument by Either Side", which was denied. Later his motion for the appointment of counsel was also denied. It was not clear from the record just what occurred before the Court of Appeals when the case was called. The formal judgment recited that the cause "was argued by counsel". In a letter to petitioner, however, the Clerk stated that the Government attorney only "made a brief statement and answered some questions from the Court", that there was no extended argument, and that the procedure followed was "consistent with this Court's practice of not permitting such when it has refused to require the attendance of prisoners for the purpose of presenting their own argument in support of their appeal". In the further response requested by the Supreme Court, the Solicitor General argued that oral argument need not be had on an appeal in a Section 2255 proceeding and that a prisoner has no right to insist upon it. However, in view of the uncertainty of the record as to exactly what had transpired in the Court of Appeals, the policy of that Court as reflected in the Clerk's letter to petitioner, and "the problems involved in permitting ex parte 'argument' in any true sense of the term", it was suggested that the Supreme Court should not undertake to decide the question in this case, but should "vacate the judgment and remand the case to the court of appeals with directions to determine, if possible, (1) the role played by the government's attorney in his appearance before that court and (2) whether any of petitioner's rights were thereby violated. The mandate should also leave the court of appeals free, if the facts cannot now be accurately determined or if in its judgment petitioner's rights were violated, to take such further steps to reconsider the appeal as that court deems proper." The Supreme Court did not accept this suggestion. Instead, in a brief per curiam decision on June 25, 1962, it vacated the judgment of the Court of Appeals and remanded the case "to that court for further proceedings in which the petitioner is to be accorded the opportunity to present oral argument on the merits of his appeal, either personally or through counsel, to the same extent as such opportunity is accorded to the United States Attorney."

In view of this decision, it is clear that where a prisoner is not represented by counsel and no provision is made for his attendance to present oral argument personally, the Government should submit the cause on its brief and should not undertake to present oral argument. The clerk should be so advised when the Government's brief is filed, thus obviating the need for attendance of Government counsel. Of course, the decision does not require a court of appeals to appoint counsel in such a proceeding or to issue a writ of habeas corpus ad prosequendum for the prisoner's production before it to argue his own cause. Neither does it preclude oral argument by the Government where the prisoner has counsel. All it requires is that the prisoner be accorded the same "opportunity" to present argument as is accorded to Government counsel.

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Judicial Review of Deportation Order; Narcotics Conviction - Sentence Under Youth Corrections Act; Finality of Conviction. Hernandez-Valensuela v. Rosenberg (C.A. 9, June 13, 1962.) Petitioner, an alien, was convicted in 1960 for illegally importing narcotics into the United States in violation of 21 U.S.C. 174, and was sentenced under the Youth Corrections Act, 18 U.S.C. 5010(h). He was then ordered deported pursuant to 8 U.S.C. 1251(a)(11).

In seeking a judicial review of that order he contended that his conviction was not final and relied on Pino v. Landon, 349 U.S. 901. The Court of Appeals distinguished Pino however, since because of the availability of a de novo review in that case there was no adjudication, recognized as final in Massachusetts, that Pino had committed any crime.

As to a sentence under the Youth Corrections Act the Court said that once the time for appeal has passed the adjudication of guilt becomes final, and that while the sentence imposed carries with it the possibility of Congressional grace upon unconditional discharge, such a possibility in no respect affects the present fact of guilt nor does it in narcotics cases deprive the conviction of the finality necessary to warrant deportation.

That Congress did not intend such provisions for forgiveness to affect a narcotics offender's deportability is, said the Court, strongly suggested by 8 U.S.C. 1251(b) in which Congress explicitly states that neither executive pardon nor judicial judgment of leniency shall prevent his deportation.

Judicial Review of Deportation Order; Original Jurisdiction of Court of Appeals - Ancillary Matter. Blagaic v. Flagg (C.A. 7, June 15, 1962.) After an order of deportation entered against him had become final Blagaic applied for a temporary withholding of his deportation to Yugoslavia on the grounds that such deportation would result in his physical persecution (8 U.S.C. 1253(h)).

When that application was denied by the Regional Commissioner he sought a judicial review of the denial in the District Court, Northern District of Illinois. Because his action was pending unheard in that Court on the effective date of P.L. 87-301 (8 U.S.C. 1105a, Note) it was transferred to the Court of Appeals (7th) pursuant to section 5(b) of that Act.

In the Court of Appeals the Government contended that that court lacked jurisdiction to review the Regional Commissioner's denial initially because it was merely a denial of a temporary stay of deportation and no review of the deportation order itself was sought or involved.

The Court did not give such a narrow interpretation to 8 U.S.C. 1105a on the question of its jurisdiction and held that, although 8 U.S.C. 1253(h) is only applicable after a final order of deportation has been issued, it is pari materia with 8 U.S.C. 1252(b) which authorizes such an order and that the Court of Appeals has original jurisdiction to review the denial of petitioner's application for a stay of deportation. (The Court found the Government's argument to be impaired by the fact that a change in the regulations on January 22, 1962 (8 CFR 242.17(c)) put such stay of deportation proceedings within the framework of 8 U.S.C. 1252(b) and therefore now reviewable initially pursuant to 8 U.S.C. 1105a. While conceding that a change in the regulations does not give the Court jurisdiction if it had none before, the Court was persuaded that the Government now views the 1253(h) proceedings as being ancillary to 1252(b) deportation proceedings and the resultant deportation order.)

In deciding the case on the merits the Court found no abuse of discretion in the denial of the stay of deportation and affirmed the Regional Commissioner's order.

Judicial Review of Deportation Order; Original Jurisdiction of Court of Appeals - Ancillary Matter. Roumeliotis et al. v. INS C.A. 7, June 15, 1962.) Petitioners sought judicial review, pursuant to 8 U.S.C. 1105a, of the denial of a visa petition to accord them a preference status in the issuance of quota immigrant visas, and an order by the Court staying the execution of deportation orders against them until Congress has acted on a pending private bill which, if enacted, would give them permanent residence status.

The Government questioned the Court's jurisdiction on two grounds; (1) the administrative determination on a preference quota visa petition, while it may affect a deportation order, is not itself a final order of deportation reviewable under 8 U.S.C. 1105a, and (2) petitioners had not exhausted their administrative remedies since they had not appealed from the deportation orders and had permitted them to become final by default.

With respect to the first ground the Court said that the determination of a preference quota visa petition is no less ancillary to the deportation orders than was the stay of deportation proceeding under 8 U.S.C. 1253(h) in the Blagaic case decided the same day (see above), for had the visa petitions been granted they would have nullified the deportation orders. Therefore, the Court would not sustain that ground for lack of jurisdiction.

Nor would it sustain the second ground because the petition for review was not a direct attack upon the deportation orders per se but rather concerned a proceeding ancillary to those orders.

Going to the merits of the petition the Court held that the denial of the visa petitions was neither arbitrary nor capricious; and that the Service had no duty to stay the deportation orders merely because the private bill had been introduced in Congress.

Judicial Review of Deportation Order; Original Jurisdiction of Court of Appeals - Ancillary Matter. Giova v. Rosenberg (C.A. 9, June 15, 1962.) A deportation order against Giova became final when the Board of Immigration Appeals dismissed his appeal from it. Later he moved the Board to reopen his deportation proceedings and his motion was denied.

He then petitioned the Court of Appeals under 8 U.S.C. 1105a for a review of the denial of that motion; but not for a review of the deportation order.

The Court held that under that section it had no jurisdiction to hear the case and dismissed the petition in a per curiam opinion.

(Although tempted to discuss the merits of the case the Court said that it cannot give advisory opinions.)

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Contempt of Congress; Indictment. Russell v. United States; Shelton v. United States; Whitman v. United States; Liveright v. United States; Price v. United States; Gojack v. United States. On May 21, 1962, the Supreme Court reversed petitioner's convictions for contempt of Congress in the above six cases. The common holding, enunciated in a single opinion, was that the indictments under 2 U.S.C. 192 were defective for failure to particularize the subject matter under inquiry by the Congressional Committee at the time it was refused the testimony of these witnesses.

Petitioners Shelton, Whitman, Price, and Liveright had been called before the Senate Internal Security Subcommittee in 1956, the first three to give testimony in connection with that Subcommittee's investigation into Communist infiltration into news media, and Liveright in connection with an investigation of Communist activities in the South. Petitioners Russell and Gojack were called before subcommittees of the House Un-American Activities Committee in 1954 and 1955 respectively, Russell in connection with an investigation into Communist activities in the Dayton--Yellow Springs, Ohio, area--and Gojack in connection with an investigation into Communist activity in labor unions. All six were indicted, tried, and convicted in the District of Columbia for their refusals to answer certain questions alleged to be pertinent to the "question then under inquiry" by the particular subcommittee. They were there tried and convicted, and the judgments of conviction were affirmed by the Court of Appeals for the District of Columbia after having awaited the Supreme Court's landmark decision in Barenblatt v. United States, 360 U.S. 109.

In the Supreme Court all six petitioners pressed the contention that an indictment for contempt of Congress, under the requirements of the Fifth Amendment and Rule 7 (c) of the Federal Rules of Criminal Procedure, must identify the subject under inquiry which the Committee was pursuing when it questioned the witness about the information he refused to give. The Supreme Court agreed, holding that, since the questions' pertinency to the subject under inquiry is the "very core of criminality under 2 U.S.C. §192," an indictment which simply repeats the statutory language and fails to identify specifically the subject under inquiry is violative of the basic principle "that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him."

Mr. Justice Stewart delivered the Court's opinion, with Mr. Justice Douglas writing a concurring opinion on the First Amendment's freedom of the press guarantee. Mr. Justice Clark joined in Mr. Justice Harlan's strong dissent.

It henceforth will be the Department's policy to identify specifically the subject under Congressional inquiry when framing indictments under 2 U.S.C. 192.

Contempt of Congress; Indictment. United States v. Peter Seeger (C.A. 2, May 18, 1962). Seeger, a musician and folk singer, appeared as a witness before a subcommittee of the House Committee on Un-American Activities on August 18, 1955, at hearings concerning Communist infiltration in the field of entertainment in New York. He refused to answer questions as to whether he was connected with Communist activities or had participated in functions allegedly sponsored by the Communist Party, basing his refusals on a belief that the questions were either "improper" or "immoral." He was indicted under 2 U.S.C. 192 for refusal to answer ten of these questions, tried and convicted in the Southern District of New York, and sentenced to one year's imprisonment.

On appeal the Court of Appeals for the Second Circuit reversed the conviction and held that the indictment was defective under its rule in United States v. Lamont, 236 F. 2d 312, in that the source of the delegated authority of the hearing subcommittee was not alleged. An allegation, the Court held, that the subcommittee holding the hearings in issue was "duly created and authorized" is not sufficient to charge the claimed authority.

Judge Kaufman wrote for the majority of the Court, and Judge Moore, concurring in the result but disagreeing with the holding that the indictment was insufficient on the issue of authority, felt that the proof thereon was defective because of the prosecution's failure to introduce into evidence the resolution of the parent Committee vesting its authority in the hearing subcommittee.

Henceforth it will be the Department's policy that all indictments for contempt of Congress (2 U.S.C. 192) recite the resolution or other means by which the parent Committee or Subcommittee has delegated to the hearing subcommittee authority to conduct the hearings in issue.

Staff: The appeal was argued by Assistant United States Attorney Arthur I. Rosell. With him on the brief were United States Attorney Robert M. Morgenthau, and Assistant United States Attorney Irving Younger. (S.D. N.Y.)

COMMUNIST FRONT ORGANIZATIONS

Subversive Activities Control Board Reaffirms Order Directing Jefferson School of Social Science to Register as Communist Front Organization. Kennedy v. The Jefferson School of Social Science (S.A.C.B., June 20, 1962). On June 30, 1955, the Subversive Activities Control Board ordered the Jefferson School of Social Science to register as a Communist-front organization as required by the provisions of the Subversive Activities Control Act of 1950. The case was appealed to the Court of Appeals for the District of Columbia and held in abeyance until final disposition of the Communist Party case (367 U.S. 1 (June, 1961)). On November 27, 1961, the School filed a motion to dismiss the petition for review and to vacate the Board's order for mootness, asserting that the School was dissolved. On January 8, 1962, the Court of Appeals remanded the case to the Board for the purpose of making findings of fact on the alleged dissolution and conclusions as to the effect, if any, on the order previously issued by the Board. Hearing was held before the Board in New York City, New York, on February 19 and 26, and May 10 and 11, 1962. On June 20, 1962, the Board entered a finding that its registration order was not affected by the present circumstances of the case.

The Board determined, first, that the School had not established a permanent dissolution by the preponderance of the evidence. The Board stated that the question of dissolution should be viewed "in the light of the fact that this unincorporated activities is a Communist-front organization" and that as such " the technical organizational form otherwise assumed by the group from time to time is not of paramount importance and formal organizing and dissolving processes are not necessarily controlling." The Board then went on to state that it was unnecessary to determine whether steps taken to dissolve the School on November 26, 1956, were sufficient as a matter of law to bring about a termination of the existence of the organization because the evidence established that the activities of the allegedly dissolved school were continued by the Faculty of Social Science and/or the New York School for Marxist Studies. In addition the Board found that no disposition had ever been made of the School's library, comprising approximately 30,000 different titles and between 10,000 and 15,000 pamphlets. The Board also pointed out that the date of the alleged dissolution was January 2, 1957, and the motion to dismiss was not filed until November, 1961, after the Supreme Court had affirmed the Board's order directing the Communist Party to register, thus giving rise to the inference that the attempted dissolution of the School was merely an effort to prevent the registration order from becoming final.

Even assuming that there had been a permanent dissolution, the Board's report states that the dissolution would not prevent the order from becoming final since the issuance of a valid order created a right in the public to have the disclosures made as required by the Act. The Board did not consider any problems of enforcement which it held were for future determination in proceedings provided in the Act and in which the Board has no duties or powers.

Subversive Activities Control Board Reaffirms Orders Directing Washington Pension Union, Labor Youth League and California Labor School, Inc., to Register as Communist-front Organizations. Kennedy v. Washington Pension Union, Kennedy v. Labor Youth League, Kennedy v. California Labor School, Inc. (S.A.C.B., June 20, 1962). These three cases were companion cases to Kennedy v. The Jefferson School of Social Science. In all three cases the Board had ordered the organizations to register as Communist-front organizations and petitions for review in the Court of Appeals were held in abeyance pending final litigation of the Communist Party Case. Subsequent to the opinion of the Supreme Court affirming the Board's order in the Party case, each of the petitioners filed a motion to dismiss the petition of review and to vacate the Board's order on the grounds that the appeals had become moot because of the dissolution of the organization, which was alleged for the first time in the proceedings. The cases were then remanded by the Court to the Board for the purpose of making findings of fact on the alleged dissolution and conclusions as to the effect, if any, on the order previously issued by the Board.

At the hearings the Board determined in each case that permanent dissolution had not been established by a preponderance of the evidence and that there continued to exist a nucleus around which the activities of the organization might be resumed. But even if there had been a dissolution of each organization, the report states that dissolution would not prevent the order from becoming final since the issuance of a valid order created a right in the public to have the disclosures made as required by the Act. The Board did not consider any problems of enforcement which it held were for future determination in proceedings provided in the Act and in which the Board has no duties or powers.

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Condemnation; Rule 71A(h) Commissioners; Scope of District Court Review; Authority of District Court to Make Findings; Court of Appeals Review of District Court; Detailed Report by 71A(h) Commissioners Required; Valuation; Adding Separate Values; Original Cost; Deduction of Salvage Value Testified to by Owner. United States v. Carroll (C.A. 4, June 4, 1962). In this case the district court upset a 71A(h) Commissioners' award, made findings and entered judgment for an amount greater than that award on the ground that the Commissioners were clearly erroneous in failing to consider certain elements of value.

The Court of Appeals reversed and remanded to the district court to direct the Commissioners "to reconsider, clarify and correct its report." The Court reconsidered its position in United States v. Certain Interests in Property, and Bragg Investment Co., 296 F.2d 264 (reported in Vol. 10, No. 5 of this Bulletin) with respect to reviewing the district court rather than the Commissioners, and the authority of the district court to substitute its findings for those of the Commissioners. While purportedly reaffirming its prior position, the Court held that the district judge must first correctly determine that the Commissioners' findings were clearly erroneous. If so, the court may modify the report only "if there is evidence before him from which a correct ultimate decision can be made and which does not involve a determination upon conflicting testimony of questions of fact." This approaches the Government's view. However, the Court raised some doubts that expert opinion testimony presented a question of fact.

The Court was unable to ascertain from the report whether the Commissioners had considered a certain element of value (marketable sod) and concluded, contrary to the district court, that only the Commissioners could and should answer the question by clarification of the report. For guidance the Court laid out the measure of value applicable, e. g., highest and best use and without adding separate elements of value. In addition, the Court reinstated the Commissioners' findings which rejected original cost and subtracted salvage value testified to by the owner, holding that the district court erred as a matter of law in its contrary view.

Staff: Edmund B. Clark (Lands Division)

Eminent Domain; Federal Rules of Civil Procedure, 60(b) and 43(e); Expert Witness; Testimony in Other Condemnation Proceedings; Appraisal Methods. United States v. Certain Interests In Property In Monterey County, California; Likins-Foster Monterey Corporation, et al. (Fort Ord) (N.D. Calif.). Following the Benning Wherry Housing trial at which the witness Hastings testified to value on a different basis from that in the Fort Ord Wherry Housing case, defendants filed a motion to vacate judgment or in the alternative for an independent action. This motion was an attempt

to obtain relief from an alleged fraud under Rule 60(b), due to variance of the witness Hastings' approach to value from his approach in the Benning case. Defendants also moved for oral examination and introduction of other testimony under Rule 43(e). The Government moved to strike from the record and expunge defendants' motions from the files as scandalous.

The District Court held that in the circumstances fraudulent testimony could not be shown to exist by the introduction of new evidence, and that all relevant testimony was presently before the Court. He further held there were no inconsistencies in the witness Hastings' testimony that could be characterized as either fraudulent or perjured since it was commonly agreed the field of real estate appraisal is not an unyielding one and methods an appraiser uses may vary with what he finds in the market place, there being no legal principle that denies to an expert witness the right to refine his methods. The Court emphasized that defendants' characterization of Hastings' testimony was unfounded on the record and that instead of taking advantage of the full and liberal cross-examination permitted by the Court, they had lodged a serious, though unfounded charge against an expert witness whose qualifications are of the highest order.

The District Court denied all motions of the defendants but stated that because he completely rejected defendants' contentions, he would allow their motions to remain in the record along with his memorandum in order not to permit any doubts as to the nature of the charges and supporting evidence.

Staff: Assistant United States Attorney Charles R. Renda (N.D. Calif.); Ralph J. Luttrell and Naneita A. Smith (Lands Division).

Eminent Domain; Jurisdiction as Dependent on Location of Land; Accretion or Avulsion; Acquiescence or Prescription; Burden of Proceeding. United States v. 11.8 Acres of Land, More or Less, in the County of Imperial, State of California, et al. (S.D. Calif.). The United States brought condemnation proceedings in California to take title to all adverse interests, if any, in certain land on the north bank or California side of the Colorado River which the Government claimed had accreted to Federal land on that side of the river. Defendants filed a motion to dismiss for lack of jurisdiction on the ground (1) that the parcel had moved from the Arizona side of the river by avulsion rather than accretion and was therefore still Arizona land belonging to defendants, or (2) that if it had moved by accretion, it was still under the jurisdiction of Arizona by reason of acquiescence by the State of California in the exercise of dominion by Arizona. Defendants also filed an alternative motion for change of venue. The District Court first ruled in February 1962, in accordance with the Government's contention, that while in a matter of jurisdiction, the party asserting jurisdiction has the burden of proof, since the land in question was now and had been since at least 1938 on the California side of the river and prior to 1925 was in Arizona, he would indulge in a rebuttable presumption that the change between 1926 and 1938 occurred by accretion. He therefore ordered defendants to

proceed with any evidence they had with respect to avulsion and/or acquiescence. After considering extensive testimony, exhibits and briefs, the District Court on May 16, 1962, denied defendants' motion to dismiss an alternative motion for change of venue, holding first, that the evidence established that the parcel in question accreted to land on the California side and therefore became the property of the riparian owner of that land; and second, that no boundary change took place by prescription and acquiescence, the State of California having had no reason to tax the property in question since it had accreted to land owned by the Federal Government and the facts in the case falling more closely within the category of Louisiana v. Mississippi, 282 U.S. 458 (1931) and United States v. 450 Acres of Land, Etc., 220 F.2d 353 (C.A. 5, 1955), cert. den., 350 U.S. 826.

Staff: Assistant United States Attorney Melvin C. Blum (S.D. Calif.), and Anne S. Bell (Lands Division).

Eminent Domain; Authority to Condemn Land Held in Trust for Public Use; Necessity for Taking. United States v. 929.70 Acres of Land, More or Less, in Hughes County, South Dakota. (D.S.D.) In connection with the construction of the Big Bend Dam and Reservoir Project, a complaint was filed to acquire the fee simple title of certain land known as Farm Island situate on the Missouri River, which land would be inundated by the formation of backwater. The State of South Dakota moved for a dismissal of the complaint on various grounds. Among these were that earlier acts of Congress gave rise to a public trust in the Farm Island property for the use and benefit of the general public with the State of South Dakota as trustee; that the acts under which the condemnation proceeding was instituted did not necessitate the backwater inundation of Farm Island; that the proposed project will impede commerce between the states, and that the Act of August 4, 1947, 75 Stat. 462, which forbids the State of South Dakota from selling the Island, also, by implication, forbids condemnation thereof. The District Court denied the motion to dismiss. In doing so, the Court issued a memorandum decision rejecting the various contentions which had been advanced and spelling out the plenary nature of the federal eminent domain power. The opinion contains language which should prove helpful in similar cases, and if a copy is desired before the opinion is reported, such copy will be furnished on request made to Ralph J. Luttrell, Chief, Land Acquisition Section, Lands Division.

Staff: United States Attorney Harold C. Doyle (D.S.D.) and Joe W. Ingram (Lands Division).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
Appellate Decision

Convention Expenditures Not Deductible: District Court Findings Of Ultimate Fact, That Expense-Paid Convention Trip for Insurance Agent and Wife Was Primarily Pleasure Trip (Income and Not Deductible Expense), Are Subject to "Clearly Erroneous" Rule; Since Review Of Findings Of Courts Below Would Be of no Importance Save to Litigants Themselves, Writ Of Certiorari Dismissed as Improvidently Granted. C. J. D. Rudolph, et al. v. United States (Supreme Court, June 18, 1962). Having sold a predetermined amount of insurance, Rudolph qualified to attend his employer's company convention in New York City in 1956 and, in line with company policy, to bring his wife with him. Taxpayer, together with other employees and officers of the insurance company and their wives, traveled on special trains from Dallas, Texas, (where the Rudolphs' home and the home office of the company were located) to New York and return and were housed in a single hotel during their two and one-half day visit. One morning was devoted to a business meeting and group luncheon, the rest of the time in New York City to travel, sightseeing, entertainment, fellowship, or free time.

The company paid all the expenses of the one-week convention-trip. Taxpayers did not report their allocable share of these expenditures in their joint income tax return, and the Commissioner assessed this amount as taxable income. On a suit for refund the district court found that the trip was provided by the company for "the primary purpose of affording a pleasure trip * * * in the nature of a bonus, reward, and compensation for a job well done" and that from the point of view of the Rudolphs it "was primarily a pleasure trip in the nature of a vacation * * *". The Court of Appeals for the Fifth Circuit approved these findings and affirmed the district court's holding that the value of the convention trip was gross income to Rudolph and that the costs were personal and not deductible as business expenses.

The Supreme Court, in a *per curiam* opinion, noted the agreement of the parties that the tax consequences of the trip turn upon the Rudolphs' "dominant motive and purpose" in taking the trip and the company's in offering it. The Court held that the findings of ultimate fact in this regard by the courts below are subject to the "clearly erroneous" rule and that its review of the findings would be of no importance save to the litigants themselves. Accordingly, the Supreme Court dismissed the writ of certiorari as improvidently granted.

In a separate opinion Justice Harlan expressed the view that the findings of the two courts below satisfy the statutory criteria for inclusion in gross income and nondeduction and are not clearly erroneous and that the decision below should be affirmed. Justice Douglas dissented on the merits in an opinion in which Justice Black joined.

Staff: Wayne G. Barnett (Office of the Solicitor General), John B. Jones, Jr., I. Henry Kutz, Norman H. Wolfe (Tax Division)

District Court Decisions

Liens: Federal Tax Lien Not Extinguished Through Foreclosure of Prior State Lien and Purchase by Agent of Taxpayer. Le Jeune Decker v. Brereton, et al., ____ F. Supp. ____ (D. Utah, Feb. 27, 1962). This was an action to quiet title on a piece of property acquired in a county tax sale. The property was also subject to a federal tax lien on record against the taxpayer who was the former owner of the property. The county tax lien was superior to the federal tax lien since it was first in time.

The purchaser, plaintiff in this case, was the wife of the taxpayer's son who was an attorney acting for his ill father, the taxpayer. Plaintiff made the purchase here involved as an agent of taxpayer's son, her husband. The sole issue here involved is whether the foreclosure sale and the subsequent failure of the Government to exercise its right of redemption extinguished the federal tax lien.

The Court held that taxpayer and his son, as his agent and attorney, had a duty to pay the county taxes; and that the purchase of the property by plaintiff was either accomplished with the knowledge, express direction and collusion of taxpayer or it was a breach of trust by the son. In either case, however, the property is held in trust by plaintiff for the taxpayer. Thus, since the purchase was either brought about by collusion or breach of a fiduciary duty, it will not serve to extinguish the federal tax lien.

Judgment was entered declaring the federal tax lien to be prior and superior to the claims of plaintiff with the exception of the first lien in favor of plaintiff which was for the amount of the county tax sale.

Staff: Assistant United States Attorney C. Nelson Day (D. Utah)

Injunctions: Assessment and Collection; Injunction Suit Dismissed by Federal District Court While Matter Was Pending in Tax Court. Licavoli v. Nixon (E.D. Mich., 1962), 62-1 U.S.T.C. Par. 9468 - 201 F. Supp. 835. Plaintiffs sought an injunction to enjoin the making of a jeopardy assessment on the basis that it constituted an illegal claim against their property. Plaintiffs claimed that collateral estoppel should work to prevent such an assessment because of a prior Tax Court determination involving the same parties and years. The assessments complained of are presently before the Tax Court.

The Court denied the injunction and dismissed the complaint holding that the District Court has no jurisdiction to make any determination as to the legal status of a case pending in the Tax Court. The District Court does not review Tax Court cases and any supervisory power is vested in the Court of Appeals. Granting the relief prayed for here would have usurped the Tax Court's functions and prerogatives.

Staff: United States Attorney Lawrence Gubow and Assistant United States Attorney William H. Merill (E.D. Mich.).

Liens: Enforcement of Tax Liens on Cash Value of Life Insurance; Assignment of Policies After Assessment of Taxes. United States v. Waxman, et al., 62-1 U.S.T.C. par. 9444 (ND Ohio, April 10, 1962). This action was brought by the Government to enforce federal tax liens on a policy of insurance on the life of the taxpayer. Taxpayer had assigned the policy to his wife, beneficiary under the policy, after assessment of the taxes. The Court held that since, at the time of assessment, taxpayer had the right to demand the cash value, without consent of the beneficiary, federal tax liens attached thereto, and any rights received by the beneficiary by virtue of the subsequent assignment were received subject to the tax liens. Accordingly, the Court enforced the tax liens by requiring the defendant insurer to pay the cash value of the policy to the Government.

Staff: United States Attorney Merle M. McCurdy (N.D. Ohio), and Robert L. Handros (Tax Division).

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