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UNITED STATES ATTORNEYS
BULLETIN

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IMPORTANT NOTICE

The first case which appears in the Criminal Division portion of this Bulletin, McDonald v. United States, is an important one involving the issue of insanity as a defense, and should be read by all United States Attorneys and their staffs.

REMINDER NOTICE

PUBLIC STATEMENTS

Recent inquiries have suggested that not all United States Attorneys are aware of the Department's practice with regard to publicity. For your guidance, the relevant portions of the United States Attorneys' Manual are reprinted below. United States Attorneys are also reminded that public statements about pending cases may violate Canon 20 of the Canons of Legal Ethics. See American Bar Association Committee on Professional Ethics Opinion 199, January 26, 1940. Also Federal Rule of Criminal Procedure 6(e) forbids the disclosure, without court authorization, of matters occurring before a grand jury. In tax cases, 18 U.S.C. 905 and 26 U.S.C. 7213 prohibit unauthorized disclosures of certain information given on tax returns.

The United States Attorneys' Manual, Title 8, p. 59, reads as follows:

PRESS RELEASES, PUBLICITY, AND SPEECHES

All confidential information, whether relating to cases pending or to administrative business or policy, must be authorized and given to the press through the office of the Director of Public Information. Information relating to pending investigations and prospective appointments must also be handled in the same manner. Information which is a matter of public record (such as an indictment by the Grand Jury which has been made public) may be given to the press upon request. In no event, however, should information relative to or the identities of persons named in sealed indictments be given to anyone outside the Department of Justice.

Details of expected action to be taken by the United States Attorney that will have widespread news value should be forwarded to the Director of Public Information. This should be done in sufficient time for news releases to be prepared and disseminated at the time the action is taken.

Addresses and articles which relate to the policy, activities, or administration of the Department or any branch of the Government or any agency or department thereof should be cleared prior to release with the Director of Public Information, who will consult with the Deputy Attorney General or

other Department officials when necessary. (See also the section on safeguarding Government property and records.)

Employees should not use their official positions to influence pending or prospective legislation. Any correspondence expressing an opinion on legislation (except as a private citizen without identification as a Government employee) or any testimony in respect to any legislative matter must have the prior approval of the Department.

If it is desired that the press or radio withhold the dissemination of any item of information, the request therefor should be submitted to the Director of Public Information of the Department and not directly to any newspaper, news agency, or radio station.

MONTHLY TOTALS

For the third successive month totals in all categories of work increased, with the exception of criminal matters which decreased by 556 items. The aggregate of pending cases and matters rose for the third straight month and is now over 3,500 items higher than it was at the beginning of the fiscal year. This is the highest such total since February 1956. The following analysis shows the number of items pending in each category as compared to the total for the previous month.

	August 31, 1962	September 30, 1962	
Triable Criminal	8,330	9,177	+ 847
Civil Cases Inc. Civil Less Tax Lien & Cond.	16,102	16,190	+ 88
Total	24,432	25,367	+ 935
All Criminal	9,910	10,780	+ 870
Civil Cases Inc. Civil Tax & Cond. Less Tax Lien	19,120	19,172	+ 52
Criminal Matters	13,544	12,988	+ 556
Civil Matters	15,028	15,064	+ 36
Total Cases & Matters	57,602	58,004	+ 402

The breakdown below shows the pending caseload on the same date in fiscal 1962 and 1963. Both filings and terminations of criminal and civil cases are up over the totals for the first quarter of fiscal 1962. Terminations, however, continue to lag behind filings by almost 20 per cent. This gap between filings and terminations does not auger well for the success of the backlog drive which the Attorney General announced at the United States Attorneys' Conference. Unless case terminations pull ahead of case filings by a substantial amount it is difficult to see how the Attorney General's announced goal of a 25 per cent reduction in the pending caseload can be achieved.

	First Quarter F.Y. 1962	First Quarter F.Y. 1963	Increase or Decrease Number	%
Filed				
Criminal	6,892	7,921	+ 1,029	+ 14.93
Civil	6,001	6,386	+ 385	+ 6.42
Total	12,893	14,307	+ 1,414	+ 10.97
Terminated				
Criminal	5,624	6,461	+ 837	+ 14.88
Civil	4,745	5,573	+ 828	+ 17.45
Total	10,369	12,034	+ 1,665	+ 16.06
Pending				
Criminal	9,664	10,780	+ 1,116	+ 11.55
Civil	21,933	23,684	+ 1,751	+ 7.98
Total	31,597	34,464	+ 2,867	+ 9.07

The analysis below shows that total filings and terminations have increased in each month of the present fiscal year. Again the gap between filings and terminations is pointed up. Until pressure and emphasis are placed on terminations rather than filings, the present caseload will continue to increase rather than to be reduced in accordance with the Attorney General's wishes.

	Filed			Terminated		
	Crim.	Civ.	Total	Crim.	Civ.	Total
July	2,143	2,145	4,288	2,041	1,793	3,834
Aug.	2,454	2,354	4,808	1,964	2,040	4,004
Sept.	3,324	1,857	5,211	2,456	1,740	4,196

For the month of September, 1962 United States Attorneys reported collections of $3,567,608. This brings the total for the first three months of fiscal year 1963 to $11,764,452. Compared with the first three months of the previous fiscal year this is an increase of $3,399,675 or 40.64 per cent over the $8,364,777 collected during that period.

During September $1,503,300 was saved in 71 suits in which the government as defendant was sued for $1,936,009. 43 of them involving $1,116,347 were closed by compromises amounting to $224,794 and 15 of them involving $424,247 were closed by judgments against the United States amounting to $207,915. The remaining 13 suits involving $395,415 were won by the government. The total saved for the first three months of the current fiscal year was $10,471,332 and is a decrease of $265,948 or 2.48 per cent under the $10,737,290 saved in the first three months of fiscal year 1962.

DISTRICTS IN CURRENT STATUS

As of September 30, 1962, the districts meeting the standards of currency were:

CASES

Criminal

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

CASES

Civil

Ala., N.	Hawaii	Miss., N.	Okla., E.	Tex., W.
Ala., S.	Ind., S.	Mo., E.	Okla., W.	Utah
Alaska	Iowa, N.	Mo., W.	Ore.	Vt.
Ariz.	Iowa, S.	Mont.	Pa., M.	Va., E.
Ark., E.	Kan.	Neb.	Pa., W.	Wash., E.
Ark., W.	Ky., E.	N. J.	P. R.	Wash., W.
Cal., S.	Ky., W.	N. Mex.	S. C., W.	W. Va., N.
Colo.	La., W.	N. Y., E.	S. D.	W. Va., S.
Del.	Me.	N. C., M.	Tenn., E.	Wis., E.
Dist. of Col.	Mass.	N. C., W.	Tenn., W.	Wyo.
Fla., N.	Mich., E.	N. D.	Tex., N.	C. Z.
Ga., N.	Mich., W.	Ohio, N.	Tex., E.	Guam
		Okla., N.	Tex., S.	V. I.

MATTERS

Criminal

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

MATTERS

Civil

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

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ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

MEMOS AND ORDERS

The following Memoranda and Orders applicable to United States Attorneys' Offices have been issued since the list published in Bulletin No. 19, Vol. 10, dated September 21, 1962:

MEMO	DATED	DISTRIBUTION	SUBJECT
320	9-18-62	U.S. Attorneys & Marshals	Psychiatric Expenses Under 18 U.S.C. 4244-4248
321	9-27-62	U.S. Marshals	New Fee Bill
323	10-17-62	U.S. Attorneys & Marshals	Salary Reform Act of 1962
324	10-17-62	U.S. Attorneys & Marshals	Administration of Within-grade Salary Increases Under Title VII Sec. 701(a) of Classification Act of 1949, as amended by Fed. Salary Reform Act of 1962, P.L. 87-793 (10-11-62).
325	10-17-62	U.S. Attorneys & Marshals	Salary Reform Act of 1962
326	10-18-62	U.S. Attorneys	Long Distance Calls in Field
327	10-25-62	U.S. Attorneys	Use of Standard Printed Case Folders or File Jackets for Civil (Form No. USA-34) and Criminal (Form No. USA-33) Cases - Use of Standard Form of File Jacket for Use in Condemnation Matters (Form No. USA-40)
328	11-2-62	U.S. Attorneys	Prevention of Departure of Alien from U.S.
329	11-2-62	U.S. Attorneys & Marshals	Adjustment of Retirement Annuities

ORDER	DATED	DISTRIBUTION	SUBJECT
281-62	9-28-62	U.S. Attorneys & Marshals	Title 28--Judicial Administration Chapter I--Department of Justice Part 0--Organization of the Department of Justice - Subpart I Internal Security Division Assignment to Assistant Attorney General in Charge of Internal Security Division of Responsibility for Enforcement of Provisions of Federal Aviation Act of 1958 Relating to Offenses Under Security Control of Air Traffic Provisions of Act.
285-62	10-25-62	U.S. Attorneys & Marshals	Establishment of Federal Prison Camp at Eglin Air Force Base, Florida
286-62	10-29-62	U.S. Attorneys & Marshals	Title 8--Aliens & Nationality Chapter I--Immigration & Nat. Subchapter A--Gen. Provisions Part 3--Board of Immigration Appeals - Amendment of Regulations Relating to Appeals from Decisions of Special Inquiry Officers in Rescission of Adjustment Case
287-62	11-2-62	U.S. Attorneys & Marshals	Authorizing Asst. Atty. Gen. L. F. Oberdorfer to perform Functions & Duties of Attorney General

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ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

SHERMAN ACT

Price Fixing-Aluminum Conductor Cable; Indictment Under Section 1. United States v. Aluminum Company of America, et al. (E.D. Pa.). On October 31, 1962 a federal grand jury returned an indictment charging six corporations with conspiring to fix, stabilize and maintain uniform prices, terms and conditions for the sale of aluminum conductor cable beginning in or about June 1958 and continuing thereafter until at least August 1960. The corporations indicted are:

Aluminum Company of America
Anaconda Wire and Cable Company
General Cable Corporation
Kaiser Aluminum & Chemical Sales, Inc.
Olin Mathieson Chemical Corporation
Reynolds Metals Company.

The indictment charges that various corporations and individuals not named as defendants participated as co-conspirators in the offense charged.

Aluminum conductor cable is bare and covered aluminum wire and cable which is manufactured for use primarily in the overhead transmission or distribution of electricity. Examples of aluminum conductor cable are aluminum cable steel reinforced (ACSR), all aluminum cable (AAC), and all aluminum alloy conductor (AAAC). During the year 1959, sales of aluminum conductor cable by the defendants exceeded $70,000,000 and comprised over 90 per cent of all aluminum conductor cable sold in the United States. Substantial quantities of aluminum conductor cable are sold to municipal, State and Federal agencies, to public utilities, and to the Tennessee Valley Authority.

As a result of the alleged conspiracy, the indictment charges, prices of aluminum conductor cable were fixed, stabilized, and maintained at noncompetitive and artificial levels; price competition in the sale of aluminum conductor cable was restrained, suppressed, and eliminated; and customers of the defendants were deprived of the opportunity to purchase aluminum conductor cable at competitive prices.

Staff: Donald G. Balthis, John E. Sarbaugh, Stewart J. Miller, and Eli H. Subin. (Antitrust Division)

Restraint of Trade; Monopoly - Talent Agency Business, United States v. MCA Inc., (S.D. Calif.). On October 18, 1962, pursuant to a stipulation filed September 18, 1962 a final judgment was entered in this case by Judge Curtis.

The complaint in this case was filed on July 13, 1962, naming MCA Inc. as defendant and certain of its subsidiaries as co-conspirators. The Screen Actors Guild and the Writers Guild of America, West, Inc., were also named as co-conspirators. The complaint charged that MCA Inc. entered into contracts in restraint of trade with talent and others in violation of Section 1 of the Sherman Act; combined and conspired to restrain and to monopolize trade and commerce in the talent agency business, the production of television network programs in network prime time in violation of Sections 1 and 2 of the Sherman Act; and attempted to monopolize said trade and commerce in violation of Section 2 of the Sherman Act. The complaint also alleged that MCA Inc. violated Section 7 of the Clayton Act by acquiring Decca Records, Inc., and its subsidiary, Universal Pictures Company, Inc.

On July 23, 1962 a stipulation and order was filed requiring MCA Inc. and its subsidiaries to terminate all of their talent representation, package agency, and Guild franchise contracts, thereby going out of the talent agency business.

Under the terms of the judgment filed on October 18, 1962, MCA Inc. is enjoined from: (1) Engaging in the talent agency business and acquiring any interest in such business; (2) Acquiring any major television, motion picture or record company for the period of seven years without approval of the Department of Justice, unless the Court rules that a proposed acquisition would not substantially lessen competition; and (3) Conditioning the sale of television programs, feature films, or phonograph records upon the requirement that the purchaser thereof buy other television programs, feature films or phonograph records.

The judgment also provides that if within the next five years Universal Pictures Company, Inc., decides to license its 229 post-1948 feature films for free television exhibition, it must first attempt to obtain fair market value for 215 of such films from a distributor other than Universal or MCA. Unless and until Universal offers such films to an outside distributor, it may not distribute them for free television exhibition through its own organization prior to October 1, 1967.

Staff: Leonard R. Posner, Malcom D. MacArthur (Antitrust Division)

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CIVIL DIVISION

Acting Assistant Attorney General Joseph D. Guilfoyle

COURTS OF APPEALS

ADMINISTRATIVE LAW

Air Force Bound by Own Regulation; District Court Acted Improvidently in Granting Summary Judgment. Murry H. Ingalls v. Zuckert (C.A.D.C., October 25, 1962). Appellant, an Air Force Major with 14 years of service, was given the choice under Air Force Regulation 35-66 of resigning for the good of the service or facing a general court martial. Acting without counsel in the 72 hours allowed him, he chose to resign. He then brought suit seeking reinstatement, alleging that the Air Force had failed to afford him an opportunity to consult legal counsel with respect to the advisability of submitting his resignation. The district court sustained the Secretary's motion for summary judgment and dismissed the action. The Court of Appeals reversed. It noted that "Air Force Regulation 35-66, at least by implication required that appellant be afforded an opportunity to consult with legal counsel before making his decision." Accordingly, it held that the district court had acted improvidently in granting summary judgment since the evidence of record presented a factual question as to whether the Air Force had complied with its regulation.

Staff: United States Attorney David C. Acheson; Assistant United States Attorneys Daniel A. Rezneck, Nathan J. Paulson, and Frank Q. Nebeker. (D.C.)

FEDERAL RULES OF CIVIL PROCEDURE

Counsel's Ignorance of Federal Procedure Not "Excusable Neglect" Contemplated by Rule 60(b) for Vacating Adverse Judgment. Patricia E. Newton and John F. Ohliger v. United States and Karl Ohliger v. United States (C.A. 2, October 3, 1962). Appellants filed two Tort Claims Act suits against the United States on January 9, 1959. On June 16, 1961, the complaints were dismissed for want of prosecution after appellants had failed to complete discovery and to answer interrogatories submitted by the Government. Appellants then waited 4 months in one instance and 10 months in the other before moving to vacate the dismissals. These motions were denied by the district court.

The Court of Appeals affirmed from the bench. It agreed with the district court that efficient judicial administration required that the relief sought be denied. The Court noted that appellants had consistently failed to prosecute their claims or to respond to the Government's interrogatories and that ignorance of federal procedure is "not the sort of 'excusable neglect' contemplated by Federal Rule 60(b) as grounds for vacating an adverse judgment."

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

PERISHABLE AGRICULTURAL COMMODITIES ACT

Fraudulent Intent Not Needed to Establish Mislabelling; Secretary's Findings Adequately Supported by Record. Harrisburg Daily Market, Inc. v. Orville L. Freeman (C.A.D.C., October 4, 1962). Appellant filed a petition to review an order of the Secretary of Agriculture acting pursuant to the Perishable Agricultural Commodities Act, suspending its license as a dealer and broker in perishable agricultural commodities for a period of ten days. The Secretary found on the basis of the evidence adduced at the hearing that petitioner violated in numerous transactions the statutory provisions which make it unlawful "for any commission merchant, dealer, or broker to misrepresent * * * the character, kind, grade, quality, quantity, size, pack, weight, condition, degree of maturity * * * or region of origin of any perishable agricultural commodity * * *." 7 U.S.C. 499b(5).

The Court of Appeals affirmed. It noted that the Act was amended in 1956 to eliminate the necessity of proving fraudulent intent in cases involving mislabelling and that the findings of the Secretary were, therefore, adequately supported by the record. The Court also held that petitioner's contention, that the suspension of its license was contrary to the provisions of 9(b) of the Administrative Procedure Act, 5 U.S.C. 1008(b), had no substance whatever.

Staff: Neil Brooks (Department of Agriculture).

DISTRICT COURT

FALSE CLAIMS ACT

False Certifications by Government Construction Contractor of Compliance with Employees' Minimum Wage Rate Under Davis-Bacon Act Constitute False "Claims" Within False Claims Act. United States v. Hochstein (S.D. Fla., October 9, 1962). Defendant was president of a corporation which had a construction contract with the Department of the Navy, the contract containing the standard Davis-Bacon Act (40 U.S.C. 276a) provision requiring compliance with the schedules of minimum wage rates payable to laborers and mechanics. In its several applications to the Navy for partial or progress payments, the contractor submitted copies of weekly payrolls, certifying to their correctness and to compliance with the Davis-Bacon Act. A criminal indictment under 18 U.S.C. 1001 charged defendant with false certifications on several of those weekly payrolls in relation to the wages paid to two of the employees, and defendant was convicted on a plea of guilty on counts based on five of such weekly payrolls. The United States then brought a civil suit against defendant under the provisions of the False Claims Act, 31 U.S.C. 231. The complaint sought recovery only of the statutory forfeitures since it was conceded that the Government sustained no monetary damage as a result of the fraud and that the only ones who were pecuniarily damaged were the

underpaid workmen of the contractor. Defendant's answer consisted of a general denial. The United States moved for summary judgment based on the collateral estoppel effect of defendant's plea of guilty and conviction in the prior criminal proceeding. The Court granted the motion and entered judgment for the United States for $10,000, representing five statutory forfeitures, concluding as a matter of law that each of the five weekly payrolls submitted to the Navy constituted a false "claim" within the purview of the False Claims Act.

Staff: United States Attorney Edward F. Boardman and Assistant United States Attorney Arnold D. Levine, (S.D. Fla.); Stewart L. Smith (Civil Division)

STATE COURT

TRADING WITH THE ENEMY ACT

Assignment Executed in Violation of "Freezing Controls" in Effect Void as Against Subsequently Issued Vesting Order Seizing Enemy Alien's Interest in Estate. Estate of M. S. Bodamere-Gaus (Surrogate's Court, Kings County, New York, September, 1962). Pursuant to the Trading with the Enemy Act, as amended (50 U.S.C. App. 5b) and Executive Orders promulgated thereunder, the Attorney General was authorized to seize, use, and dispose of property in this country belonging to enemy nationals. Accordingly, on March 29, 1948, the Attorney General vested all right, title, interest, and claim of Anna Brachold, a German national, residing in Germany, the residuary legatee of decedent's estate located in New York. This vesting order was rejected by the executor of the estate upon the ground that the enemy alien had, prior to the vesting order, assigned her interest in the estate to her son, a citizen of the United States.

In the compulsory accounting proceedings which followed, objections were filed by the Government to the claim of ownership by the assignee based on the assignment. The Government contended that the assignment was a nullity and ineffective to transfer any interest regardless of date of execution because such "transaction" was not duly licensed. Under Executive Order 8389, as amended, the so-called "Freezing Controls," transfers of any property in which a national of a blocked country had an interest were prohibited unless licensed by the Secretary of the Treasury.

The objections to the accounting were sustained on consent; a decree was made by the Surrogate accordingly and the net estate in excess of $50,000 was paid to the Attorney General.

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorney Joseph Rosenzweig (E.D.N.Y.)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Police Brutality. United States v. Clinton E. Savage, et al., (N. D. Ind.). On May 3, 1962, a federal grand jury, sitting at South Bend, Indiana, returned a one-count indictment charging two Gary, Indiana, detectives with a violation of 18 U.S.C. 242. The two detectives, both Negroes, were charged with having removed a Negro prisoner from the Gary City Jail on November 20, 1961, and with having taken him to an isolated area on the outskirts of the city where they sought to induce him to confess to a number of unsolved crimes by beating him with a nightstick and their fists. Corroborative evidence existed in the form of statements by several Gary police officers and the daughter-in-law of one of the detectives, all of whom observed the prisoner's bruised and bloodied condition just prior to or just after his return to jail.

Beginning on October 29, 1962, the defendants were tried in the United States District Court of Hammond and at 12:30 a.m. November 1, 1962, a verdict of guilty was returned as to both defendants after more than ten hours of deliberation by a jury composed of ten women and two men. Sentence was postponed pending a presentence investigation.

Staff: Assistant United States Attorney Kenneth P. Fedder (S.D. Ill.); John L. Murphy, Gerald W. Jones and David H. Marlin (Civil Rights Division).

* * *

CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

INSANITY AS A DEFENSE

Examination of "Some Evidence" Standard of Davis v. United States, 160 U.S. 469; Definition of Terms "Disease," "Defect" and "Product" as Used in Durham (214 F. 2d 862) Rule of Insanity. McDonald v. United States (C.A. D.C., October 8, 1962). In a per curiam opinion, the Court of Appeals for the District of Columbia Circuit, sitting en banc, reversed a conviction of manslaughter on the ground that the trial judge had failed to comply with the District of Columbia jury instruction rule as announced in Lyles v. United States, 254 F. 2d 725, 728 (C.A. D.C.), certiorari denied, 356 U.S. 961, which requires that, in the absence of an affirmative waiver by the defendant, the jury must be instructed as to the consequences (hospitalization in a mental hospital) of a verdict of not guilty because of insanity. The court held that the record did not show an affirmative waiver of the required instruction by the defendant.

While this ground of decision would have no general significance in other circuits because it involves a rule as to the proper instruction to be given to a jury pursuant to a local statute (see D.C. Code § 24-301(d)), the decision is highly significant because the court of appeals utilized the case to state its current views on critically important aspects of the problem of insanity as a defense. First, the court expressed itself on the troublesome and recurrent problem of what constitutes a sufficient evidentiary showing to raise the defense of insanity--i.e., it explored to some extent the "some evidence" test of Davis v. United States, 160 U.S. 469. Second, the court, for the first time since the adoption of its Durham rule, defined the terms "mental disease" and "mental defect." This latter aspect of the opinion is especially important in light of recent reappraisals in some circuits of the historic standards governing the defense of insanity (see, e.g., Dusky v. United States, 295 F. 2d 743, 749 (C.A. 8), certiorari denied, 368 U.S. 998; United States v. Currens, 290 F. 2d 751 (C.A. 3)), and the advocacy of the Durham rule on behalf of defendants tried in federal courts outside of the District of Columbia.

1. With respect to the "some evidence" problem, the court of appeals pointed out that no "sharp quantitative or qualitative definition" is possible. Significantly, the court observed that the accused has to introduce more than a "scintilla" of proof of incompetence at the time of the crime to entitle him to submission to the jury of a claim of insanity as a defense. On the other hand, the amount of evidence required for this purpose "need not be so substantial as to require, if uncontroverted, a directed verdict of acquittal" by reason of insanity. Moreover, even if the accused adduces sufficient evidence to raise the issue, this does not mean that the government must offer affirmative rebuttal evidence of competence or else suffer a directed verdict. Rather, it was stressed that

the question would generally rest with the jury; that the jury is the ultimate arbiter on all the evidence, including the presumption of sanity. As the court put it, "[w]hether uncontradicted expert testimony overcomes the presumption [of sanity] depends upon its weight and credibility, and weight and credibility ordinarily are for the jury." Thus, the court has specifically recognized that the presumption of sanity remains in the case even though the "some evidence" test has been met and that the presumption may even overcome expert testimony of mental incompetence. The significance of the opinion in this regard is that it makes it clear that the issue of mental competence at the time of the crime is basically a jury question and that the trial judge is rarely, if ever, to direct a judgment of acquittal even if the defendant introduces expert testimony on the issue and the government introduces no evidence at all.

2. The court's explanation of the legal criteria to be given a jury for judging the criminal responsibility of the accused is of perhaps greater significance, because it recognizes capacity or ability to control behavior as a factor for the jury's consideration. First, the court specifically rejected the notion that a medical diagnosis of "mental disease or defect" is to be equated with the legal concept of mental incapacity. The court said:

> * * * Our purpose now is to make it very clear that neither the court nor the jury is bound by ad hoc definitions or conclusions as to what experts state is a disease or defect. What psychiatrists may consider a "mental disease or defect" for clinical purposes, where their concern is treatment, may or may not be the same as mental disease or defect for the jury's purpose in determining criminal responsibility.* * *

The court then set forth the general jury standard as follows:

> a mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls. Thus the jury would consider testimony concerning the development, adaptation and functioning of these processes and controls.

While this definition may seem somewhat vague, nevertheless it represents a marked improvement over the undefined standards of the Durham rule (214 F. 2d at 874-875):

> * * * An accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.
>
> We use "disease" in the sense of a condition which is considered capable of either improving or deteriorating. We use "defect" in the sense of a condition which

> is not considered capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease.
>
> Whenever there is "some evidence" that the accused suffered from a diseased or defective mental condition at the time the unlawful act was committed, the trial court must provide the jury with guides for determining whether the accused can be held criminally responsible. We do not, and indeed could not, formulate an instruction which would be either appropriate or binding in all cases. But under the rule now announced, any instruction should in some way convey to the jury the sense and substance of the following: If you the jury believe beyond a reasonable doubt that the accused was not suffering from a diseased or defective mental condition at the time he committed the criminal act charged, you may find him guilty. If you believe he was suffering from a diseased or defective mental condition when he committed the act, but believe beyond a reasonable doubt that the act was not the product of such mental abnormality, you may find him guilty. Unless you believe beyond a reasonable doubt either that he was not suffering from a diseased or defective mental condition, or that the act was not the product of such abnormality, you must find the accused not guilty by reason of insanity. Thus your task would not be completed upon finding, if you did find, that the accused suffered from a mental disease or defect. He would still be responsible for his unlawful act if there was no causal connection between such mental abnormality and the act. * * *.

Thus, it will be seen that in now relating the legal concept of a "mental disease or defect" to its effect upon "mental or emotional processes" and "behavior controls," the court is giving definitional contents to the vague terms of the Durham rule which comport more closely to tne traditional standard of the common law that one who, of his own free will, violates the law shall be criminally responsible. The recognition of the element of "substantial impairment of behavior controls" as a prerequisite to acquittal by reason of insanity is especially important in giving meaning to the sterile "product" or "causal connection" aspect of the Durham rule.

Beyond this definition of "mental disease or defect," the court also gave express approval to the elements of cognition and volition embodied in the M'Naghten and "irresistible impulse" tests. In this connection, the court said:

> * * * We think the jury may be instructed, provided there is testimony on the point, that capacity, or lack thereof, to distinguish right from wrong and ability to refrain from doing a wrong or unlawful act may be con-

> sidered in determining whether there is a relationship between the mental disease and the act charged. It should be remembered, however, that these considerations are not to be regarded in themselves as independently controlling or alternative tests of mental responsibility in this Circuit. They are factors which a jury may take into account in deciding whether the act charged was a product of mental disease or mental defect. * * *.

In sum, while it is clear that the court has not returned to the M'Naghten-irresistible impulse tests as the exclusive criteria for judging criminal responsibility, it has approved the substance of those tests, where there is supporting testimony, as at least factors, among others, for the jury's consideration. It remains for future cases for the court to elucidate what it means by its caveat that "these considerations /capacity to distinguish right from wrong and ability to refrain from doing wrong/ are not to be regarded in themselves as independently controlling or alternative tests." Meanwhile, this opinion should be helpful to United States Attorneys outside the District of Columbia in meeting pleas for the adoption of the Durham rule.

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT, 1959
29 U.S.C. 401-531
LABOR-MANAGEMENT RELATIONS ACT
29 U.S.C. 141-197

Notification of Assistant Commissioner for Compliance and Enforcement, Department of Labor, of Intended Action in Above Captioned Matters. Attention is invited to United States Attorneys Bulletin dated February 23, 1962 (Vol. 10, No. 4, p. 115), which advises that the FBI has been instructed to furnish United States Attorneys with duplicate copies of investigative reports of violations of the captioned acts, which, upon completion of the investigation, are to be furnished to the Regional Attorney, Department of Labor, with notification of the United States Attorney's intended action.

In addition to the above procedure, you are requested to furnish a copy of the letter notifying the Regional Attorney of your intended action, to Mr. Daniel O'Connor, Assistant Commissioner for Compliance and Enforcement, American National Bank Building, 8701 Georgia Avenue, Silver Spring, Maryland.

CENSUS

Refusal to Answer Questions on Bureau of Census Schedule. United States v. Sharrow (C.A. 2, September 28, 1962). Appellant was convicted for refusing to answer census form questions in violation of 13 U.S.C. 221(a). As his defense he asserted that 13 U.S.C. 141, which requires census taking of population, unemployment, and housing, failed to provide for a full constitutionally required enumeration in violation of Section 2

of the Fourteenth Amendment. Appellant contended that the census enumerator should have asked each citizen, or at least each male citizen of majority whether the right to vote was being denied, and that since the question was not being asked, Congressional representation in states where disfranchisement exists was not being reduced. Failure to inquire into disfranchisement, appellant asserted, was depriving citizens of other states, including appellant's state of New York, of proper proportionate representation in the House of Representatives. Appellant based his refusal to execute the census form on the ground that the census taking deprived him of equal protection of the law and the right to be governed by a constitutionally elected Congress.

In affirming the judgment of conviction, the Court ruled against the appellant, holding that Congress is not required to prescribe that information relative to disfranchisement be secured by census takers. The Court said: "The denial of suffrage is a complex question, and it has been thought inappropriate to use census forms in order to obtain information relative thereto. 1 Ninth Census of the United States (1870) (report of the director of the 1870 census)." The Court deemed it unnecessary to decide whether Baker v. Carr, 369 U.S. 186 (1962), which made inroads on the "political question" doctrine, was applicable in the instant case.

Staff: Former United States Attorney Robert M. Morgenthau; Assistant United States Attorneys Irving Younger and Sheldon H. Elsen (S.D. N.Y.)

DEPREDATION AGAINST GOVERNMENT PROPERTY
18 U.S.C. 1361

Damage to Missile Sites; Swift and Vigorous Prosecution. A recent examination indicates the firing of high powered rifles at certain missile sites and allied equipment. The cables to some of our missile sites stretch over one hundred miles; an inspection of the expansion joints on some of these cables shows that they have been destroyed by rifle fire. It is possible that the damage is being inflicted by hunters.

Weapons systems must be in a constant state of operational readiness; hence, any damage to our missile sites seriously affects the security of the United States. The Air Police have been instructed to apprehend any person found tampering with or damaging missile sites and allied equipment. It is hoped that the United States Attorneys concerned will recognize the seriousness of such incidents.

Wilfully damaging Government property is a violation of Section 1361 of Title 18, United States Code.

BANK ROBBERY CONSPIRACY

Conviction of Prospective Bank Robbers. United States v. Fleming J. Johns and William R. Austin (N.D. Ga.). On September 27, 1962, defendants Johns and Austin were found guilty of bank robbery conspiracy. This case

involved the unusual feature of convicting prospective bank robbers where no robbery was committed or attempted, and where they were arrested a considerable distance from the bank three hours prior to the scheduled robbery.

An informant notified local police in Atlanta, Georgia, that the two named defendants had approached him seeking to enlist his aid in an armed robbery of the Atlanta office of the Bank of Georgia. A wire recorder was placed in the informant's apartment and two meetings of the conspirators were recorded. The details of the proposed robbery, and the date of September 13 for the robbery were discussed by the suspects.

On September 13, the date of the proposed robbery, the defendants were apprehended just as they were starting out to steal a car which was to be used as the "get away car". A true bill was returned against them later on the same day and they were brought to trial on September 26. The next day they were both found guilty of the conspiracy. Austin was sentenced to five years' imprisonment. Johns is awaiting imposition of sentence.

Staff: Assistant United States Attorney A. Starks (N.D. Ga.)

FRAUD

Falsely Pretending to Be Licensed Attorney and Acting in Such False Capacity; Impersonation; Forgery; Perjury. Daniel Jackson Oliver Wendel Holmes Morgan v. United States (C.A. D.C., October 1, 1962). For a period of 14 months appellant falsely held himself out to be Attorney Lawrence Archie Harris, who is a bona fide member of the District of Columbia bar, presently residing in California. During this time Morgan made numerous appearances in the courts of the District of Columbia representing defendants in criminal cases. He was tried and convicted on thirteen counts of an indictment: Three counts of violating 18 U.S.C. 1001 by concealing his name, identity, and non-admission to the bar before the United States District Court for the District of Columbia; Four counts of violating 22 D.C. Code 1303 by falsely impersonating Lawrence Archie Harris, a duly authorized attorney, before the United States District and Municipal Courts for the District of Columbia; Three counts of violating 18 U.S.C. 494 by forging the name L.A. Harris on praecipes by which he entered his appearance in cases; One count of violating 22 D.C. Code 2501 by perjuring himself in taking an oath of admission; One count of violating 22 D.C. Code 1401 by forging a registration card; and Two counts of violating 22 D.C. Code 1301 by taking money from clients by falsely pretending that he was a licensed attorney. Concurrent sentences of three to ten years were imposed.

The Court found no support for appellant's contention that his sentence was cruel and unusual punishment under the Eighth Amendment. The Court also held that the appearance praecipes and registration card which were filed with the Clerk of the Court were forged instruments within the meaning of 18 U.S.C. 494. The Court also rejected appellant's argument that a perjury conviction under 22 D.C. Code 2501 cannot be predicated on an oath taken pursuant to a court rule validly enacted under a statute giving the court power to enact rules and regulations necessary and proper to conducting its

business. Since the oath was authorized by law, the perjury conviction could stand. Finally, relying on Bramblett v. United States, 348 U.S. 503, 509 (1955), the Court noted that the word "department" as used in 18 U.S.C. 1001 includes the judicial branch of the government. The Court held that the statute applies to those actions before the judiciary which involve the "administrative" or "housekeeping" functions and not the "judicial" machinery of the court. Since Morgan's activities involved "administrative" functions, his conviction under 18 U.S.C. 1001 was affirmed.

Staff: United States Attorney David C. Acheson; Principal Assistant United States Attorney Charles T. Duncan; Assistant United States Attorney William C. Weitzel, Jr.; Former Assistant United States Attorneys Nathan J. Paulson, Luke C. Moore and John R. Schmertz, Jr. (District of Columbia)

GAMBLING

Sentencing of Wagering Tax Law Offenders; Conference With District Judge. The wagering tax laws were enacted and have been enforced to fulfill a dual objective, (1) tapping a new source of revenue and (2) suppression of organized or syndicated gambling. Achievement of these objectives has been frustrated in large part by the sentencing practice in some district courts in regard to wagering tax cases. Despite the close connection between gambling and organized crime, some courts levy only minimal fines in such cases and seldom imprison offenders against the wagering statutes. The leniency of the punishments ordinarily imposed against wagering tax offenders has serious implications for the organized crime program. Professional gamblers feel only slight compulsion to obey the Federal wagering tax laws. It would appear to be much cheaper not to comply with the law and risk paying the consequences inasmuch as the penalty exacted can be written off as a business expense. As a result, the Federal Government suffers a tremendous loss of revenue through widespread disobedience. Equal in importance with the loss of revenue is the frustration visited upon prosecution of major racketeers. With the great expense and effort necessarily concentrated in establishing a wagering tax case against a top figure in organized crime, the community can ill afford to see success rewarded by the imposition of a small fine or a few days in jail.

On the other hand it may be conceded that in some districts the courts have encountered situations in which it would appear that little, if any, selectivity has been exercised in bringing Federal cases. It is unrealistic to expect that substantial sentences can become the rule in a police court atmosphere.

In view of the foregoing, it is suggested that a conference be sought with the judges in your district for the purpose of discussing with them the desirability of imposing substantial jail sentences on wager tax law

offenders, at least on those with records for prior convictions.

The Criminal Division is anxious to know the results of such conferences and would appreciate being advised of them as soon as possible.

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Raymond F. Farrell, Commissioner

DEPORTATION

Review of Validity of Deportation Order. Chung Young Chew v. Boyd. (C.A. 9, October 30, 1962).

In passing on the validity of an order of deportation under Section 106 of the Immigration and Nationality Act, 8 U.S.C. 1105a, the Ninth Circuit ruled that the failure to raise on appeal to the Board of Immigration Appeals a particular question constitutes a failure to exhaust administrative remedies and deprived the Board of jurisdiction to consider that question.

The Court also ruled that a copy of a record of conviction was inadmissible in administrative deportation proceedings where the certificate of the attesting officer on it failed to show that he had actual custody of the original record.

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Pacifists Demonstrations - Violations of Coast Guard Order Restricting Harbor Area (50 U.S.C. 191, 192); Administrative Law: Failure to Publish Order as Required by Federal Register Act and Administrative Procedure Act Does Not Prevent Criminal Prosecution of Individuals With Actual Notice. United States v. Roger Aarons and Robert Swann (C.A. 2, October 30, 1962). During the launching of the polaris submarine Ethan Allen at New London, Connecticut, a pacifist group named the Committee for Non-Violent Action staged a demonstration which included an attempt to place two rowboats and a canoe in front of the launchways and thereby prevent the scheduled launching. Prior to the launching, the Commander of the local Coast Guard District, in response to a request from the Naval authorities and pursuant to 10 U.S.C. 191 (the Magnuson Act) and Presidential regulations issued thereunder (33 CFR 6.04-1, 6.04-5 and 6.04-8), had issued a "Special Notice" closing, for a period of two hours, an area of the harbor which surrounded the launching area and was approximately 1000 yards square, and directing all persons and vessels to remain outside of the closed area. This Notice was published in the Notice to Mariners and each vessel approaching the restricted area was intercepted by a Coast Guard patrol boat and its occupants were given a copy of the Notice. The Notice was not published in the Federal Register. Despite actual knowledge of the notice, appellant Aarons entered the restricted area in a rowboat and appellant Swann, also with actual knowledge of the Coast Guard Order, helped in getting the boats into the water and in planning and coordinating the entire demonstration. Appellants were convicted in the District Court of Connecticut for knowing violation of the Coast Guard area under 50 U.S.C. 192, and the conviction was affirmed by the Court of Appeals.

On appeal, appellants challenged the validity of the Coast Guard order on the grounds that since the primary purpose of 50 U.S.C. 191 was the protection of vessels and harbors from sabotage and the demonstrators did not intend sabotage, the statute did not apply, and the Coast Guard order was not authorized by the statute or the regulations issued thereunder; that, for the same reasons and because a smaller area would have been sufficient to protect the Ethan Allen, the order was an unreasonable exercise of any authority the Coast Guard Commander had; and that, since the appellants in participating in the demonstration were only attempting to travel to the appropriate place to petition their Government, the order violated their constitutional right of freedom of speech guaranteed by the First Amendment and the constitutional guarantee of freedom to travel contained in the Fifth Amendment. The Court of Appeals for the Second Circuit, in an opinion by Circuit Judge Friendly, overruled these contentions and held that the order was within the authority conferred upon the Coast Guard Commander, was a reasonable exercise of that authority, and that, even assuming that appellants were correct in the contention that their action constituted nothing more than the exercise of their constitutional rights, the order was reasonable and permissible restriction of those rights.

Appellants also argued that publication of the "Special Notice" in the Federal Register was required by Section 5 of the Federal Register Act (4 U.S.C. 305(a)) and by Section 3(a) of the Administrative Procedure Act (5 U.S.C. 1002(a)), and that since it was not so published it could not be enforced against them. The Government contended that the Coast Guard order was not within the scope of the Federal Register Act or the Administrative Procedure Act since the order constituted an exercise of the directory or executory power conferred by the Presidential regulations which had been published (33 CFR, Part I, chapter 1), and argued that this contention was consistent with the underlying concept of both Acts since actual notice of the orders of a military commander which are issued as required are of much greater protection to the individual than publication in the Federal Register, and that actual notice is the best of all possible notices. The Court held the publication was required by Section 5 of the Federal Register Act since the order had "general applicability and legal effect" as that phrase is defined by the regulations issued by the Administrative Committee of the Federal Register, 1 CFR 1.32. However, citing Section 7 of the Act, 44 U.S.C. 307, the Court also held that actual notice was sufficient to create criminal liability, finding that since Section 7 provided that no document required by Section 5 shall be valid as against any person who has not had actual knowledge, it was reasonable to conclude that Congress meant such a document to be valid against such person with actual knowledge. The Court also found that publication was required by Section 3(a)3 of the Administrative Procedure Act, 5 U.S.C. 1002(a)(3), stating that the special notice was a "rule" within the definition of Section 2(c) of the APA, 5 U.S.C. 1001(c). Again, the Court held that actual notice was sufficient to support criminal prosecution, concluding that Section 3 of the APA did not provide a sanction for failure to publish the substantive rules included in Section 3(a)3, since Sections 5 and 7 of the Federal Register Act already apply and the legislative history of the APA made it clear that the Act was supplemental to the Federal Register Act. This being the case, their prior conclusion applied and actual notice was sufficient. In holding that lack of publication under these Acts should not be fatal to criminal prosecution, the Court pointed out that it was unable to follow the decision of the Ninth Circuit in Hotch v. United States, 212 F. 2d 280(1954), which reached the opposite result.

Staff: Robert L. Keuch (Internal Security) argued the case. With him on the brief was United States Attorney Robert C. Zampano (D. Conn.) and Kevin T. Maroney (Internal Security)

* * *

LANDS DIVISION

Assistant Attorney General Ramsey Clark

Condemnation; Wherry Housing Projects; Rate of Return Maintained by F.H.A.; Use of Ratio of Sales Price to Earnings to Establish Capitalization Rate; Use of 3% Average Vacancy Rate; No Bonus Value in Low-Rent Lease, or in Favorable Financing; Judgment Factors in Appraisal; Valuation Must Reflect Restrictive Elements in Wherry Housing; Wunderlich Statute; Procedure Under Rule 60(b), F.R.Civ.P., No Fraud in Appraiser Using Different Method in Later Case. Likins-Foster Monterey Corp., et al. v. United States (C.A. 9, October 1, 1962). The Government condemned the interests of the sponsors subject to the mortgage in two Wherry Housing projects at Fort Ord, California. The testimony as to value ranged from $650,000 to $3,880,000. The jury awarded $1,106,000. The sponsors appealed. Before the appeal was heard, they filed a motion in the district court under Rule 60(b), F.R.Civ.P., or, alternatively, a new action to vacate the judgment on the ground that a Government witness had committed a fraud by testifying falsely as shown by later testimony in another Wherry case. The appellate court remanded the case for consideration of that motion. Following an adverse ruling, the sponsors filed a second appeal and both appeals were consolidated for argument and disposition. The Court of Appeals held as follows:

1. The sponsors contended that the Government's witnesses erred in assuming that the F.H.A. Commissioner (a) had power to establish and maintain a rigid rate of return for the life of the project, (b) had power to enter into and had entered into a contract establishing a rigid net dollar income, and (c) properly adopted regulations which rigidly pegged net income. These contentions lack merit. The purpose of Wherry projects is to provide and maintain low-rental housing. Many financial returns and inducements, other than rental income, were given the sponsors. The Government's witnesses did not assume that the F.H.A. Commissioner could not change the rate of return, but only, on the basis of these facts and the fact that he had never changed it in the history of all types of low-cost housing, that he would not likely change it here. This was not an erroneous assumption.

2. The sponsors' contention that a stipulation not to offer comparable sales was violated is without merit. As the district court held, the stipulation related to sales of other low-cost housing projects as direct proof of value. It did not forbid use of the ratio of sales price to earnings of such projects as an aid in establishing a realistic capitalization rate to be applied to the estimated future income of the instant projects for a capitalized value.

3. There was no error in permitting the Government's witnesses to assume an average vacancy rate of 3%. The sponsors contended that there was no factual basis to support it and that there was a stipulation that there was a continuing need for these and additional military housing units. But the stipulation relating to the present did not prohibit the witnesses from believing that vacancies would occur and increase in the future due to inevitable obsolescence and competition.

4. The fact that the sponsors had a lease from the Government for the 215 acres of land on which the project was built at a nominal rental of $200 per year did not entitle them to a bonus value. The Court said:

> The low rentals charged Likins-Foster for the land were a contribution to the project made by the government as one means of minimizing operating costs and thereby holding down housing unit rentals. The sponsor was required to pass on to the tenants, in the form of lower rents, the cost saving resulting from the low leasing rate it paid. Any person succeeding to the sponsor's rights under the lease would have been subject to the same control. Therefore no transferable value attached to the low land rental.

5. Similarly, the sponsors were not entitled to a special bonus value for the favorable financing of a 4% mortgage in a 5% market. "The general benefit to the sponsor of a four per cent mortgage rate was compensated for in the capitalization of income process employed by the government's witnesses. * * * If the sponsors had a five per cent mortgage, the capitalization rate would have to be raised (and valuation lowered) to assure the acquiring owner the same yield on his equity capital."

6. An appraiser's result cannot validly be tested by applying automatically his capitalization rate, etc., to hypothetical figures which are drastically different from those existing in fact, because "of the judgment factors which are always present in such an undertaking."

7. The sponsors are not entitled "to have their interest in the project valued free from the restrictive elements in Wherry housing."

8. The so-called "Wunderlich Statute," 41 U.S.C. 321, pertaining to arbitrary, capricious or fraudulent decisions by Government officials was fully satisfied by a jury instruction that "the conduct of any government official could not be arbitrary or capricious."

9. There is no merit to the contention that fraud had been practiced on the court by false testimony of a Government witness. The fact that the witness used one method of valuation in this case and, in a later case, used another method "has no tendency to show fraud" but only "that the witness has indulged in a continual process of refining and testing his appraisal techniques."

Staff: S. Billingsley Hill (Lands Division).

Public Lands; Mineral Leasing Act; Offers to Lease Filed Prior to Announced Acceptance of Lease Offers Were Proper; Plaintiffs' Offer Submitted Subsequent to Pending Offers Properly Rejected. James K. Tallman, etc. v. Stewart L. Udall, etc., (Dist. Col.) Executive Order 8979, 6 F.R. 6471, dated December 16, 1941, established the Kenai Moose Range in Alaska. On August 31, 1953, the Secretary of the Interior directed that action on

pending offers for oil and gas leases be suspended to await a determination of whether any lands within the range would be leased under the Mineral Leasing Act. In 1954 and 1955, offers to lease lands within a portion of the range were filed. In 1958, the Secretary determined that a portion of the range would be closed to leasing and announced that offers would be received for leasing of the portion not closed.

Plaintiffs filed offers to lease within the portion open to leasing and their offers conflicted with the offers filed in 1954 and 1955. Leases were issued to the offerors who filed in 1954 and 1955 and plaintiffs' offers were rejected.

This action was brought to require the Secretary to issue leases to the plaintiffs based on their contention that they were the first persons qualified to hold leases who filed after the lands were opened to leasing. The Court, in granting summary judgment and dismissing the action against the Secretary, affirmed the Secretary's decision that the mere establishment of the wildlife refuge did not close the lands to the filing of offers and did not have the effect of withdrawing the lands from the operation of the Mineral Leasing Act. The Secretary's directive of August 31, 1953, ordering the suspension of the issuance of leases, likewise did not close the lands to the filing of offers, and offers filed between that time and the time that the Secretary decided to issue leases were "pending" offers and the first persons qualified to hold leases who filed such offers were entitled to leases when the Secretary decided that they might be issued.

Staff: Herbert Pittle (Lands Division).

Eminent Domain; Federal Aid Highways Act; Right of United States to Condemn Land Devoted to Local Public Use. United States v. Certain Parcels of Land in Peoria County (S.D. Ill.) The United States filed this action for the condemnation of certain lands for highway purposes. The defendant owner, Pleasure Driveway and Park District of Peoria, Illinois, answered averring that the land was devoted to a public use as part of Bradley Park in Peoria and that the United States had no authority under the provisions of Section 107(a) of the Federal Aid Highways Act, 72 Stat. 885, 892, 23 U.S.C. 107(a), to condemn the property for highway purposes. Accordingly, defendant moved for dismissal of the complaint and obtained a temporary restraining order against possession by the United States. Defendant's argument was that the Department of Public Works and Buildings had not been given authority by the Illinois General Assembly to request the United States to condemn land which is municipally owned; that because the Department of Public Works and Buildings did not have authority to condemn municipally-owned land already devoted to a public use as a park, the United States did not have authority to do so; and that the federal act is merely a grant-in-aid statute designed to enable Illinois and other states to provide suitable highways.

The District Court denied defendant's motion to dismiss, vacated the temporary restraining order and reinstated a prior order for delivery of possession. In doing so, the District Court wrote a comprehensive opinion upholding the authority of the United States to condemn property devoted

to a public use. The Court took judicial notice of the fact that:

> Only chaos can result if local law or municipal corporations across the nation may block the progress of construction, and prevent the logical and planned extension and connection of those completed projects to achieve the interstate system envisioned by Congress.
>
> This case presents one of the unavoidable areas of conflict of purposes inherent in our federal form of government. As the Court suggests in Carmack, supra /329 U.S. 230/, at 237, either the federal purpose is supreme or the federal sovereignty may be reduced below the minimum allowable limits of sovereign existence. Since here the federal purpose requires the use of a part of Bradley Park, the power to acquire that property transcends the public purpose of retention of the property as a park. I hold that the federal power of eminent domain has been properly invoked in this case, and that that power can not be limited by the law of Illinois which denies to the State the authority to condemn the property in suit.
>
> Staff: Assistant United States Attorney Richard E. Eagleton, (S.D. Ill.) and Mrs. Dollie M. Smith (Lands Division).

United States Immunity From Suit; Counterclaims. United States v. Carey Terminal Corp. et al. (E.D. N.Y. October 11, 1962); United States v. Ship Supply Corp. (E.D. N.Y. October 11, 1962). In the Carey case, the Government instituted an action against the defendants to recover damages in the sum of $9,000 for breach of a contract calling for the sale of certain real property. The answer of Carey Terminal Corp. set forth 17 defenses, and in addition, asserted a counterclaim against the Government in the amount of $10,000. This counterclaim was allegedly based upon plaintiff's breach of the agreement to sell the property to the defendant in that the Government was unable to convey a good and marketable title.

The Government moved pursuant to Rule 12(b)(1), (2), and (6), F.R.Civ.Proc., for an order dismissing the defendant's counterclaim on the ground that the District Court lacked jurisdiction to entertain it. More specifically, the Government contended that the Court could not grant affirmative relief to a defendant in an action instituted by the United States. The defendant contended that since the Tucker Act, 28 U.S.C. 1346(a)(2), waived the Government's sovereign immunity with respect to original actions for breach of contract for an amount not in excess of $10,000, this waiver of immunity extended to counterclaims as well.

Chief Judge Joseph C. Zavatt granted the Government's motion dismissing the counterclaim on the ground that "district courts are without jurisdiction over counterclaims against the United States on matters concerning which the defendant might have brought an original action under the Tucker Act." This important decision reaffirmed the rule in the

Second Circuit despite recent conflicting decisions in other circuits. The Court in the instant case recognized that in the First, Fourth and Fifth Circuits such counterclaims are allowed if they could be the subject of an original action under the Tucker Act. United States v. Silverton, 200 F.2d 824 (C.A. 1, 1952); Thompson v. United States, 250 F.2d 43 (C.A. 4, 1957); United States v. Springfield, 276 F.2d 798 (C.A. 5, 1960). Nevertheless the Court considered itself bound by the Second Circuit rule as set down in United States v. Nippissing Mines Co., 206 Fed. 431 (C.A. 2, 1913) and dismissed the counterclaim. It did grant defendant's cross motion to amend its answer to set forth a purely defensive set-off or recoupment in an amount not to exceed the amount of the Government's claim.

In the Ship Supply case the Government instituted an action alleging that the defendant defaulted on a contract to purchase certain Government property as a result of which the Government was damaged in the sum of $3,929.61. The defendant counterclaimed in the sum of $13,987.49. The Court relying upon its decision in Carey, supra, dismissed the counterclaim. In passing, the Court noted that even the courts which hold that the Tucker Act gives district courts jurisdiction over counterclaims do not support defendant's position here since judgment is sought in excess of the $10,000 limitation of the Tucker Act. The Court granted defendant leave to amend its answer to assert its claim in a purely defensive manner as one for set-off or recoupment.

Staff: United States Attorney Joseph P. Hoey, Assistant United States Attorney Martin R. Pollner, (E.D. N.Y.).

* * *

TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
Appellate Decision

Penalty Under Section 6672 of 1954 Code; Individual Corporate Director May Be Liable for Penalty for Failure to Pay Over Taxes Owed by Corporation. United States v. Graham (C.A. 9, October 22, 1962). Graham sued for refund of penalties assessed pursuant to Sections 6671(b) and 6672 of the 1954 Code for failure to collect, account for and pay over withholding, social security and excise taxes owed by a corporation of whose board of directors he was a member. He was not employed by the corporation and did not serve as an executive officer. Reversing the district court, the Court of Appeals held that a "person", as defined in Section 6671(b), must be construed to include all those so connected with a corporation as to be responsible for the performance of the act in respect of which the violation occurred. The Court further construed a person under Section 6672 "required to collect, truthfully account for and pay over" to reach those responsible for the corporation's failure to pay the taxes which are owing, and not to be confined to those performing merely mechanical functions of collection and payment, such as disbursing officers with authority to draw or sign checks. The essential question is whether the board controlled the payment of the corporation's tax debt, or whether this power had been delegated by the board to some officer of the corporation.

The Court concluded that where the board of directors is the corporate authority, which approves or disapproves the payment of corporate obligations, and where the board acts to pay other obligations of the corporation in preference to the tax obligations, an individual director may be liable for the penalty. Since the district court did not find upon this question and since it also did not appear what the state of Graham's knowledge was with reference to the unpaid taxes or what he did or did not do in regard to their payment, the reviewing court remanded for determination of these issues upon a new trial.

Staff: I. Henry Kutz, Kenneth Levin, Donald P. Horwitz (Tax Division)

District Court Decisions

Lien for Taxes of Defaulting Highway Contractor Did Not Attach to Amount Withheld Under Contract Since Contractor Had No Property Right in Such Amount. The Fidelity and Casualty Co. of New York v. Dykstra, United States, et al. (D. Minn.), 62-2 USTC ¶9728. The Government sought in this case to enforce its tax liens against an amount withheld by the State of Minnesota under a highway construction contract for

unpaid taxes of the contractor who had defaulted on the contract. The Court held that the contractor had to pay for material and labor before becoming entitled to receive payments under the contract and, since he had not done so, he had no property right in the retained amount, and the contractor's surety which had paid the materialmen and laborers was subrogated to their rights and was entitled to the amount retained.

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

Bankruptcy Trustee Liable for Taxes on Bankrupt's Share of Income Earned by Farm in Which Bankrupt Had One-Third Interest. In re Freddie Ernest Steck (S.D. Ill., August 3, 1962), 10 AFTR 2d ¶5436. Bernard G. Stutler was appointed trustee of the estate of Freddie Ernest Steck, bankrupt. Steck was the owner of a one-third life estate interest in two farms, which were operated by his brother. The trustee had never been authorized to continue the business of the bankrupt, but he did receive the income from the farms. The question was whether or not a liquidating trustee must pay federal income taxes on income received from assets which he is attempting to sell. In its opinion, the Court after considering Sections 641(a), 6012(a)(3), 6012(a)(4), 6012(b)(4) and 6151, I.R.C. 1954, 3 Collier on Bankruptcy 1521-1522, and In Re Loehr, 98 F. Supp. 402, held that the trustee in bankruptcy who receives income of more than $600 must file a return and pay tax on such income. The rationale of the Court was that if the bankrupt had received such income before bankruptcy he would have been liable for the tax and that the trustee was no more entitled to a tax exemption than the bankrupt. In response to the trustee's contention that 28 U.S.C. 960 granted the trustee an exemption from the tax, the Court stated that applying that statute to the instant facts would result in the trustee being liable for the tax, for the trustee was "conducting the business" in the same manner and to the same degree as had the bankrupt before bankruptcy -- that is, merely watching the operation of the farms and receiving income therefrom. As the bankrupt had been liable for the tax before bankruptcy, so the trustee is now liable, the Court ruled.

Staff: United States Attorney Edward R. Phelps (S.D. Ill.).

United States Entitled to Deficiency Judgment in Lien Foreclosure Suit Where Its Recovery From Condemnation Award to Taxpayer Was Insufficient to Satisfy Tax Liens. United States v. Akwa Heaters, Inc., et al. (S.D. N.Y., August 22, 1962), CCH 62-2 USTC ¶9698. The United States brought an action to foreclose federal tax liens on a certain fund of money held by the City of New York representing a fixture award made to Akwa as a result of condemnation proceedings by the City. The Government reserved its right to obtain a deficiency judgment against Akwa in the event its recovery out of the fund was insufficient to satisfy Akwa's tax liabilities.

In granting the Government's motion for default judgment pursuant to Rules 54 and 55 of the Federal Rules of Civil Procedure and in accordance with the Court's order of January 24, 1961, the Court found

that the United States was not limited to this particular fund in seeking satisfaction of its tax liabilities and that it did not forfeit its right to a deficiency judgment by reason of its acquiescence in distribution of the fund to other claimants. The Court also found that, although Akwa did not receive official notice of the order of January 24, 1961, directing distribution of the award, it in fact had actual notice and ample opportunity to protect its rights. Accordingly, Akwa's liability for the taxes being uncontested, the Court granted a deficiency judgment.

Staff: Former United States Attorney Robert M. Morgenthau (S.D. N.Y.).

Transfer of Leasehold Asset Without Registration According to Law of Hawaii by Individual to Newly Formed Corporation of Which He Is Principal Shareholder Operates as Constructive Trust and Places Beneficial Title in Corporation, Preventing United States From Foreclosing on Leasehold Asset for Tax Liabilities Against Individual. United States v. Carter (D. Hawaii), CCH 62-2 USTC ¶9725. This case involves the question of priority of claims against a fund of about $125,000 held in escrow by the defendant as Trustee in Dissolution (for creditors and stockholders) of Norman Jemal, Ltd., a Hawaiian corporation. This fund represents the proceeds of the sale of a lease and improvements thereon.

The aforementioned leasehold was acquired in February 1947 by Norman Jemal, individually. The lease was for a period of sixty years and contained a provision to the effect that the leasee would construct a building on the premises at a cost of not less than $100,000. In April 1947, Norman Jemal created a corporation named Norman Jemal, Ltd., with himself as 90 percent shareholder and his wife plus two others owning the remaining 10 percent of the stock. The lease was transferred to the corporation as an "investment" asset as set out in the affidavit of incorporation. The assignment of the lease by Jemal was not formally registered as required by Torrens law or land laws of Hawaii. The building provided for in the lease was begun in 1951 and completed at a cost of $200,000 paid by the corporation. In January 1954, federal income taxes for 1943, 1944, and 1945 were assessed against Jemal individually, totaling about $68,000.

In February 1954 jeopardy assessments of federal income taxes for 1948, 1949, and 1951 were assessed against the corporation in the amount of $230,000 and at the same time against Norman Jemal as transferee, on the theory that he was transferee of the corporation to the extent of the value of the building erected on the lease which stood in his name. Petitions were filed in the Tax Court on both jeopardy assessments. The Tax Court case was settled by a stipulated decision entered November 1956, holding the corporation liability at $39,000 for the three years, and that there was no transferee liability against Norman Jemal individually. As a part of the settlement, Jemal was required to reaffirm his allegations in his sworn petition in the Tax Court that the lease and building belonged to the corporation. In November 1956 income taxes were assessed against Norman Jemal and his wife individually for 1947 and against them jointly for 1948, in a total of about $12,500.

The issue involved is whether the leasehold asset of Norman Jemal was conveyed to the newly created corporation in April 1947 by the bill of sale contained in the affidavit of incorporation, or whether the title remained in Jemal individually until formally assigned to the corporation by registration in September 1956.

The Court held that as between Jemal and the corporation the bill of sale itself would have been sufficient to either convey the leasehold or establish a trust relationship whereby Jemal was trustee holding the leasehold for the benefit of the corporation. Also under Hawaiian law failure to register the assignment of registered land does not void the transaction but the conveyance is a contract between the parties. Further, since the corporation took beneficial title at the time of incorporation in consideration for stock in the corporation, the corporation took title in the leasehold as purchaser and as such receives the benefits of Section 6323, I.R.C. 1954, and that a purchaser of the leasehold from Jemal prior to the effective dates of the federal liens would be protected against any federal liens claimed against Jemal individually.

Staff: United States Attorney Herman T. F. Lum (D. Hawaii).

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