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November 12, 1965

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UNITED STATES ATTORNEYS
BULLETIN

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APPOINTMENTS--UNITED STATES ATTORNEYS

As of the close of the first session of the Eighty-Ninth Congress, 43 United States Attorneys had been appointed to new four-year terms, and 7 new United States Attorneys had been appointed.

MONTHLY TOTALS

Volume in both cases filed and cases terminated was higher in the first quarter of fiscal 1966 than in the same period of fiscal 1965. The gap between filings and terminations in September was lower than in August--11.9 per cent as compared with 20 per cent. If the rate of terminations can be increased over the coming months, the caseload may show a reduction at year's end. Should it materialize, such a reduction would be the first cut in the caseload since fiscal 1960.

	First Quarter Fiscal 1965	First Quarter Fiscal 1966	Increase or Decrease Number	%
Filed				
Criminal	7,781	8,043	+ 262	+ 3.37
Civil	6,898	7,123	+ 225	+ 3.26
Total	14,679	15,166	+ 487	+ 3.32
Terminated				
Criminal	6,130	6,530	+ 400	+ 6.53
Civil	6,537	6,697	+ 160	+ 2.45
Total	12,667	13,227	+ 560	+ 4.42
Pending				
Criminal	11,760	12,695	+ 935	+ 7.95
Civil	23,676	24,451	+ 775	+ 3.27
Total	35,436	37,146	+ 1,710	+ 4.83

Case terminations showed an encouraging increase of over 14 per cent during September. The rate of terminations for the first quarter of fiscal 1966, however, was 14.3 per cent lower than for cases filed--unless this ratio is reversed, the caseload will continue to increase.

	Filed			Terminated		
	Crim.	Civil	Total	Crim.	Civil	Total
July	2,296	2,465	4,761	2,212	2,194	4,406
Aug.	2,585	2,555	5,140	1,870	2,245	4,115
Sept.	3,162	2,103	5,265	2,448	2,258	4,706

For the month of September 1965, United States Attorneys reported collections of $3,656,546. This brings the total for the first three months of this fiscal year to $14,014,526. This is $1,070,817 or 8.27 per cent more than $12,943,709 collected in the first three months of fiscal year 1965.

During September $13,368,430 was saved in 170 suits in which the government as defendant was sued for $16,713,780. 66 of them involving $2,958,879 were closed by compromise amounting to $461,025 and 16 of them involving $2,843,900 were closed by judgments amounting to $2,884,325. The remaining 88 suits involving $10,911,001 were won by the government. The total saved for the first quarter of the current fiscal year was $61,775,236 and is an increase of $24,922,788 or 67.63 per cent over the $36,852,448 saved the first quarter of fiscal year 1965.

The cost of operating United States Attorneys' Offices for the first quarter of fiscal year 1966 amounted to $4,803,512 as compared to $4,634,816 for the first quarter of fiscal year 1965.

DISTRICTS IN CURRENT STATUS

Set out below are the districts in a current status as of September 30, 1965.

CASES

Criminal

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

CASES

Civil

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

CASES (Cont.)

Civil (Cont.)

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

MATTERS

Criminal

Ala., N.
Ala., M.
Ala., S.
Alaska
Ariz.
Ark., E.
Calif., S.
Colo.
Conn.
Del.
Fla., N.
Ga., N.
Ga., M.
Ga., S.
Idaho
Ill., E.
Ind., N.
Ind., S.
Iowa, N.
Iowa, S.
Ky., E.
Ky., W.
La., E.
La., W.
Me.
Md.
Mich., W.
Miss., N.
Mont.
N.H.
N.J.
N.Mex.
N.C., E.
N.C., M.
N.C., W.
N.D.
Okla., N.
Okla., E.
Okla., W.
Pa., E.
Pa., M.
Pa., W.
R.I.
S.C., E.
S.D.
Tenn., W.
Tex., N.
Tex., E.
Tex., S.
Tex., W.
Utah
Wash., E.
W.Va., N.
Wis., E.
Wyo.
C.Z.
Guam
V.I.

MATTERS

Civil

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

* * *

ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

Supreme Court Reverses District Court Dismissal of Antitrust Case. United States v. New Orleans Chapter, Associated General Contractors of America, et al. (S. Ct. No. 119). D.J. File 60-12-112. The Supreme Court, citing Times-Picayune Publishing Co. v. United States, 345 U.S. 594 at 623-624, and United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150 at 226, summarily reversed the district court's dismissal of a 1964 indictment charging the New Orleans Chapter with violating Section 1 of the Sherman Act in connection with its bidding practices. Defendant had convinced the district judge that the Government had investigated the same practices of the Association some ten years earlier and had made no complaint then. The district court said that the Government's acquiescence in the past had induced appellant to continue the challenged practice, and held that the Government was estopped from attacking it as unlawful, on a theory somewhat akin to entrapment. The passage in the Times-Picayune case cited by the Court is: "[d]oubtless long tolerated trade agreements acquire no vested immunity under the Sherman Act; no prescriptive rights accrue from the prosecutor's delay." The Socony-Vacuum reference is "[t]hough employees of the government may have known of those programs and winked at them or tacitly approved them, no immunity would have thereby been obtained."

This case holds that failure of the prosecutor to bring a criminal case does not estop the Government from prosecuting at a later time--a proposition universally accepted, but never before clearly held in any case, so far as we can discover.

Staff: Robert B. Hummel and Gerald Kadish (Antitrust Division)

Complaint Alleging Violation of Section 1 of Sherman Act. United States v. Pyrotronics, Inc. (D. N.J.). D.J. File 60-149-53. On October 15, 1965, a complaint was filed in Newark, New Jersey, charging Pyrotronics, Inc. with allocating territories, customers and classes of customers between and among Pyrotronics, Inc. and its nationwide network of franchised distributors. Pyrotronics, Inc., headquartered in Union, New Jersey, is a wholly owned subsidiary of Baker Industries, Inc., also of Union, New Jersey. Pyrotronics manufactures and sells, through independent franchised distributors, a patented fire detection system under the tradename "Pyr-A-Larm." The Pyr-A-Larm device detects the presence of the invisible gases set off during the incipient stages of combustion; the presence of such gases breaks an electrical circuit which in turn creates an alarm condition. The device is unique, distinctive and far superior to other types of fire detection systems.

The complaint, filed under Section 1 of the Sherman Act, charges that Pyrotronics, Inc. and its co-conspirator distributors have engaged in an unlawful combination and conspiracy to (1) prevent distributors from selling Pyrotronics equipment to the United States Government, original equipment manufacturers and to certain "national accounts"; (2) allocate individual customers, classes of customers and geographic markets among Pyrotronics and its co-conspirator distributors; and (3) restrain co-conspirator distributors from selling Pyrotronics

equipment to certain individual customers and classes of customers not specifically designated by Pyrotronics, Inc., and in territories not specifically assigned by Pyrotronics, Inc. The effect of the conspiracy has been the complete elimination of intra-brand competition in the distribution of Pyrotronics fire detection equipment.

The complaint seeks to perpetually enjoin Pyrotronics, Inc. from imposing or attempting to impose any limitation or restriction with respect to the territories and customers to whom any distributor may sell Pyrotronics equipment.

Staff: Noel E. Story and Hugh P. Morrison, Jr. (Antitrust Division)

Complaints From Treble Damage Plaintiffs Ordered Produced, But Informer's Privilege Held to Protect Identity Of Non-Plaintiff Complainants. City of Burlington, Vt. v. Westinghouse Electric Corp. (D. D.C.) D. J. File 60-230-29. On October 21, 1961, Judge John J. Sirica filed an opinion in this case after the hearing on remand regarding the right of defendants in the private electrical cases to obtain from the Department files documents reflecting or relating to complaints to the Department of possible violations of the antitrust laws in the electric equipment industry during the period 1948 to 1960. Judge Sirica had originally entered a brief order on February 14, 1964, sustaining the Government's motion to quash defendants' subpoena duces tecum served on January 20, 1964, on the grounds that the subpoena was burdensome and the documents were protected by the informer's privilege. On March 6, 1964, he denied defendants' motion to modify the order and certify the question under Section 1292(b). Argument was held before the Court of Appeals in the District of Columbia, in December 1964, and on June 9, 1965, that Court in a lengthy opinion by Judge Washington, reversed Judge Sirica and remanded the issues to him to determine the amount of compliance required. The Court of Appeals concluded that Judge Sirica had erred in quashing the subpoena as burdensome without attempting to accommodate the interests of the parties. The bulk of the opinion, however, was devoted to the question of the informer's privilege. The Court of Appeals denied the Government's contention that the informer's privilege should be upheld where the Government is not a party to the litigation, rejected the Government's interpretation of the leading case of Roviaro v. United States, 353 U.S. 53, and applied the balancing of interests standard enunciated in that criminal case to this civil litigation where the Government was not a party. Moreover, it suggested that insofar as the subpoena sought communications to the Department of Justice from electrical equipment purchasers who have filed suit against the defendants here seeking compliance with the subpoena, those plaintiffs have waived the informer's privilege and anonymity. By their treble damage claims, they have subjected themselves to civil discovery and the disclosure of their identity as informers, and no policy would be furthered by permitting the Government to protect their identity. The Government did not appeal from this decision.

The Court of Appeals opinion is significant because of the probable use that defendants, seeking discovery of the Government's files, will make of Judge Washington's unduly broad language concerning the scope of the informer's privilege. Judge Sirica's recent opinion, therefore, is important because of its interpretation of the Court of Appeal's decision, and its application of that decision on remand so as to preserve the informer's privilege to the utmost.

At the hearing on remand, the parties reached agreement on the nature of the search that the Government would make through voluminous files relating to electrical equipment investigations. After making the search, the Government submitted a series of documents to Judge Sirica for his in camera inspection, and filed a memorandum urging that most of the documents submitted should be protected from disclosure on a variety of grounds.

Judge Sirica's lengthy opinion took issue with the suggestion of the Court of Appeals that his prior action was "improvidently taken" and elaborated on the basis for his earlier orders, including his familiarity with the private electrical litigation. While he went on to apply the rules announced by the Court of Appeals, his opinion took great pains to express his continued disagreement with Judge Washington's opinion. Therefore, Judge Sirica's opinion should be consulted for his interpretation of the Court of Appeals' mandate and for language to rebut the probable position that may be taken by other parties seeking to gain access to Department files. For example, Judge Sirica states:

> While the principles outlined in Roviaro must now, at least in this Circuit, be broadly applied, this Court will neither permit nor demand a wholesale revelation of informers' identities. Although the distinction between civil and criminal cases may not of itself be controlling in deciding whether the informer's privilege should apply, it is the opinion of this Court that some showing of necessity must be made similar to that appearing in Roviaro, before disclosure should be ordered.

The opinion then goes on to discuss the importance of the informer's privilege to the Government in general and in antitrust cases in particular. The Court suggests:

> "Without the additional shield of anonymity, the Court did not [at the time of its brief order quashing the subpoena] and does not now feel that these incentives [described by the Court of Appeals as the possible cessation of the complained-of activities as a result of government action, and the facilitation of private treble damage actions after the government obtains a conviction] are of sufficient weight to encourage that cooperation which is necessary for the enforcement of the antitrust laws. . . . It is then, the opinion of the Court that in the antitrust area there remains considerable reason to protect the Government sources of information from undesired disclosure."

After making these explanatory comments, he then proceeded to interpret the Court of Appeals decision as requiring the Department of Justice to turn over letters from complainants, and Department memoranda reporting on oral complaints from parties, who had filed treble damage suits against defendants. He did refuse to permit defendants to have access to FBI reports, but left unanswered the question as to whether the Government may exclude certain portions of its own memoranda describing the oral complaints. On the other hand, Judge Sirica applied the balancing test to protect all communications made by persons

who never became plaintiffs. Documents reflecting such communications were considered unessential to defendants' needs. In this connection, Judge Sirica elaborated on the possible impairment to antitrust enforcement if the Department were compelled to reveal the identity of non-plaintiff complainants, and suggested that a complainant should be able to determine by himself whether his name should be disclosed by his decision concerning whether or not to bring suit, or by some other form of waiver. Thus, non-plaintiffs were found not to have waived their anonymity, nor were there "any necessitous circumstances which would render nondisclosure unfair." Judge Sirica concluded that the "public interest in encouraging the free flow of information to the Government, and in the enforcement of our laws, far outweigh the defendants' needs for these particular documents [from non-plaintiff complainants] in establishing their defense."

Staff: H. Robert Halper (Antitrust Division)

Court Rulings on Several Motions in Grand Jury Proceeding. In Re Grand Jury Proceedings Bus Transportation (E.D. Mo.). D.J. File 60-222-24. Several motions were made during the course of a grand jury investigation now being conducted in St. Louis, Missouri. These motions and the rulings thereon are:

Motion to Permit Attorneys
to Appear Before Grand Jury

A witness subpoenaed to appear before the grand jury filed a motion to permit her attorneys to accompany her before the grand jury. Her attorneys argued that the ruling in Escobedo v. Illinois, 378 U.S. 478 (1964), permitted an attorney to accompany his client at all stages of an investigation. They further argued that Rule 6 of the Federal Rules of Criminal Procedure insofar as it prevents an attorney from accompanying his client into the grand jury room, is unconstitutional. Chief Judge Harper declined to hear argument from the Government opposing the motion and summarily overruled the motion saying:

> I am not going to permit them to walk into the grand jury room until the Supreme Court says they may. And God help us if it ever does. It is my opinion that when that happens, law and order have gone to hell!

Conflict of Interest

During the same argument Judge Harper asked the witness's attorney whether he represented her or the Greyhound Corporation. The attorney stated that he represented both. The witness was not an employee of Greyhound. Judge Harper then suggested that there was a conflict of interest by an attorney representing both a witness and a company which might be under investigation. Although no ruling was made on this point, Judge Harper said to the attorney:

> Young man, I know and you know that if the grand jury indicted your main client and Mrs. Rinaldi, you would represent Greyhound and not her because, otherwise, you would have a conflict of interest. I would suggest that you and your firm in Chicago do a little soul-searching!

The Date of Letters of Authority

A motion was made to quash a subpoena on the ground that the subpoena was issued and served before letters of authority had been issued by the Attorney General. In support of this motion, attorneys for this witness cited a speech by Larry Williams of the Antitrust Division in which Mr. Williams stated that the usual procedure was for letters of authority to be issued and then subpoenas. Judge Harper interrupted the attorney for the witness at this point to state that in his court he relied upon the opinion of the United States Supreme Court and of the Eighth Circuit and not on speeches. Counsel for the Government argued that subpoenas were issued under the seal and signature of the Clerk of the Court and that the letters of authority were merely to permit access to the grand jury by Government attorneys. The Court thereupon denied the motion to quash.

Jurisdiction and Venue

A motion to quash a subpoena was also made on a different day for other reasons. One ground for this motion was that the witness subpoenaed would testify only as to activities occurring in Indiana, and that a grand jury in Missouri had no jurisdiction to examine her concerning matters which took place entirely within Indiana.

Government counsel in opposing this motion first attacked the standing of the witness to challenge the jurisdiction and venue of the grand jury, relying upon Blair v. United States, 250 U.S. 273 (1919), United States v. Girgenti, 197 F. 2d, 218 (C.A. 3, 1952), Application of Linen Supply Cos., 15 F.R.D. 115 (S.D. N.Y. 1953). The Court however wanted information as to the scope of the investigation and was handed a copy of the letters of authority which had previously been filed and were public within that district. The language in the letters of authority referred to an investigation throughout the United States. Based on this, Judge Harper denied this portion of the motion to quash.

The second part of this motion to quash attacked the subpoena on the ground that documents sought from the witness indicated the possibility of a violation of a consent decree. Counsel for the witness requested Government counsel to state that the grand jury in Missouri was not investigating a contempt of a consent decree entered elsewhere. Government counsel refused so to state. Defense counsel requested the Court to direct Government counsel to make such a statement. But the Court refused, saying that the letters of authority recited that there was reason to believe an indictable offense may have been committed within the district and that he would in no way interfere with the grand jury's investigation of all the facts. He declined to speculate on what the grand jury might do upon the conclusion of the investigation or what the evidence before the grand jury would show, and thereupon denied the motion to quash. He also denied a motion to dismiss the grand jury investigation based upon the same grounds.

Staff: Francis C. Hoyt, John J. Lannon and John T. Cusack (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURT OF APPEALS

FEDERAL TORT CLAIMS ACT

United States Held Liable in Absence of Affirmative Defenses for Negligence of Soldier Who, in Violation of Regulations, Brought Home Explosive Device Which Later Injured Child. Williams v. United States (C.A. 5, No. 21825, October 5, 1965) D.J. File 157-19M-175. A thirteen-year-old boy was severely injured when he lit an Army "M-80 Firecracker" thinking it was an ordinary firecracker. The firecracker had been carried off the Fort Benning, Georgia military reservation by an Army sergeant who had forgotten to turn it in following a field exercise in which the firecrackers were used to simulate the report of field guns. The sergeant's wife gave the firecracker to the thirteen-year-old boy baby-sitter who took the firecracker home and lit it thereby injuring himself.

The boy's mother sued the United States on behalf of her son, contending that the Government was negligent in the control of the explosive device. The district court entered judgment for the United States finding no negligence in its use of the simulators or in the supervision of the sergeant; and that, in any event the wife's act in giving the simulator to the boy was the proximate cause of the injury.

The Fifth Circuit reversed, holding under the doctrine of respondeat superior, the Government would be liable, in the absence of affirmative defenses, for the negligence of the sergeant in bringing the dangerous device into his home where foreseeably a child might find it. The Court ruled that the soldier's inadvertent and negligent violation of the regulation in the course of his line of duty was sufficient to impose liability. The Court of Appeals also ruled that the conduct of the sergeant's wife was also foreseeable, since there was little about the firecracker to put anyone on notice of its highly explosive nature.

The Court remanded for a district court determination of the issue of the boy's contributory negligence.

Staff: United States Attorney Floyd M. Buford and
Assistant United States Attorney Sampson M. Culpepper
(M.D. Ga.).

SMALL BUSINESS INVESTMENT COMPANY ACT

United States May Obtain Injunction Against Licensee Under Small Business Investment Company Act and Appointment of Receiver for Licensee Merely by Showing That Licensees Violated Act or Regulations Issued Pursuant Thereto in Obtaining Loans From Small Business Administration. First Louisiana

Investment Corp. v. United States (C.A. 5, No. 21651, October 11, 1965) D.J. File 105-33-90. The United States brought this action under both the False Claims Act and the Small Business Investment Company Act, 15 U.S.C. 661, et seq., alleging that First Louisiana, a licensee under the latter Act, and its president, had filed false claims with the Government and had obtained loans from the Small Business Administration upon false representations and for purposes other than those contemplated by the Small Business Investment Company Act. In light of the alleged violations of that Act and defendant's default upon the loans, the district court granted our motion for a preliminary injunction against the Company's further operations and the appointment of a receiver.

The Fifth Circuit affirmed this order holding that in an action under the Small Business Investment Company Act, the conventional grounds for an injunction and receivership need not be present and that a preliminary injunction and receivership may be granted under the statute merely upon a showing that a licensee has violated the Act or the rules and regulations of the SBA pursuant thereto.

Staff: John C. Eldridge (Civil Division)

SOCIAL SECURITY ACT

Pain May Be Considered Disabling Factor in Social Security Disability Cases; Testimony of Vocational Experts Regarding Kinds of Work Claimants May Perform Does Not Provide Substantial Evidence of Ability to Engage in Substantial Gainful Employment. Miracle v. Gardner (C.A. 6, No. 15,992, September 16, 1965) D.J. File 137-52-106. This Social Security disability case was brought by a claimant who asserted disability because he suffered from a slipped disc, a spinal ailment which was caused by degenerative osteoarthritis, and bad vision. Physicians estimated the disability to range from 20% to 60% of total disability. Claimant had completed the second grade and his entire work experience had been at heavy manual labor, including work in the Kentucky coal mines.

The hearing examiner found that with his residual abilities claimant could perform many jobs usually available in small towns and, therefore denied benefits. The Appeals Council affirmed the hearing examiner's decision. On judicial review, the district court granted summary judgment for the Secretary.

The Court of Appeals reversed, finding that the Secretary's decision was not supported by substantial evidence since he failed "to consider the mass of medical evidence and opinion bearing upon claimant's attitude and psychological condition" but relied instead "on isolated remarks of one of two medical reports before him." The Court disapproved of that part of the hearing examiner's decision ruling out appellant's pain as a disabling factor; stated that there was a large psychosomatic element which affected appellant's condition, noting studies in psychosomatic medicine establishing that emotions can cause transitory disturbances of physiological functions; stated that the record does not "give overwhelming support to a finding that appellant could not do hard or moderate manual labor;" and finally held that

there was no substantial evidence to support the examiner's finding that claimant could perform any enumerated jobs since the only evidence consisted of a "Vocational Counselor who has become a stock figure in these cases" and "whose evidence carried no weight."

Staff: United States Attorney Joseph P. Kinneary and Assistant United States Attorney Charles G. Heyd (S.D. Ohio)

DISTRICT COURT

ADMIRALTY

Where Contract Sued Upon Was One Under Which Dispute Arose and Not One Against Which United States Set Off Claim, Suit Sufficiently Raised Issues in Dispute Between Parties and Government's Motion for Summary Judgment Would Be Denied. Pan Atlantic Steamship Corp. v. United States (D. Del., Admiralty No. 1816, September 27, 1965). D.J. File 61-15-32. This action arose out of a bareboat charter agreement between the steamship company (libelant) and the United States. Libelant paid the basic charter hire for the year 1949. A net voyage loss was sustained for that year so that under the terms of the charter hire no contingent charter hire over and above the basic charter hire was payable by libelant. For the first three months of 1950 (at the end of which period the charter expired), libelant realized a net voyage profit on which the United States contended libelant owed a contingent charter hire of more than $33,000 over and above the basic charter hire. Libelant paid only the basic charter hire on the theory that it was entitled to a cumulative accounting over the life of the charter, taking into account its previous losses.

When libelant refused to pay the contingent charter hire, the Maritime Commission issued a "setoff payment order". Thereafter during 1951 and 1952, the United States withheld approximately $33,000 due libelant on other unrelated contracts between the parties about which there was no dispute and libelant's alleged debt to the United States was "cleared by payment."

Libelant then brought suit to recover the amount set off by the United States. The United States moved for summary judgment on the theory that in suing on the disputed contract rather than on the undisputed ones under which the United States withheld payment, libelant chose the wrong contract. The District Court denied the motion for summary judgment ruling that by suing on the disputed contract, libelant presented the real issues in the case to the court and by so doing avoided circuity of action.

Staff: United States Attorney Alexander Greenfeld and Assistant United States Attorney William J. Wier, Jr.; (D. Del.); Lawrence F. Ledebur (Civil Division)

FALSE CLAIMS ACT

Collusive Bid-Rigging Conspiracy for Award of Government Procurement Contract Gives Rise to False Claims Act Liability; Applicability of Statute of Limitations. United States v. Beatrice Foods Co., et al. (D. Neb., Civil No. 0158, October 4, 1965) D.J. File 46-45-110. Three companies, engaged in the supply of milk and dairy products, entered into a bid-rigging conspiracy in connection with the prospective award of procurement contracts by Government agencies. The crux of the conspiracy was that the three companies determined in advance which one (if any) should refrain from bidding on the particular contract and which one of the remaining companies should submit the lowest bid, thereby receiving the contract award. The United States sued for recovery of double damages and forfeitures under the False Claims Act (31 U.S.C. 231). The Court denied defendants' motions to dismiss the complaint and held that, where the contract recipient presented a claim for payment under the contract, a cause of action against all conspirators was stated under the False Claims Act.

The Court also held that False Claims Act suit under the statutory time limitation provision (31 U.S.C. 235) is barred as to those claims for payment which were presented more than six years prior to the filing of the Government's complaint. In connection with such ruling, the Court declared that the time limitation provision (a) applies to actions brought directly by the United States as well as to those commenced by so-called informers or qui tam plaintiffs; (b) is more than a statute of limitations in that it goes also to the jurisdiction of the court to entertain the suit; and (c) is not tolled during the period elapsing prior to the Government's discovery of the fraud.

Staff: United States Attorney Theodore L. Richling and Assistant United States Attorney Russell J. Blumenthal (D. Neb.); Jess H. Rosenberg (Civil Division).

FEDERAL TORT CLAIMS ACT

Veterans Administration Held Not Negligent in Suicide of Mental Patient at Veterans Administration Hospital Because Patient Not Found to Have Been Suicidal "Type." Lorraine Frederic, et al. v. United States (E.D. La., Civil No. 13873, October 12, 1965) D.J. File 157-32-141. In this case, the veteran, Louis R. Genevese, on the occasion of his third admission to the New Orleans Veterans Administration Hospital cut the sixth floor window screen and plunged to his death. He had been a medical patient rather than a mental patient, although his illness, ulcerative colitis, was accompanied by some emotional symptoms which caused the setting of a psychiatric consultation at the VA Hospital. His suicide occurred before the psychiatric examination could be scheduled. In the interim period, however, he was given a psychiatric review by a professor of psychiatry at Louisiana State University, with a resulting diagnosis of anxiety with some degree of depression. The fact that he was not given an immediate psychiatric examination by the VA Hospital was not considered negligent since no urgency was indicated in his case.

Especially important herein was the court's acceptance of the testimony of Dr. Edwin S. Schneidman, Co-director and Founder of the Suicide Prevention Center at Los Angeles, California, and Clinical Professor of Psychiatry and Psychology at the University of Southern California School of Medicine, that the veteran did not meet the pattern for a suicidal type of patient, thus eliminating the basic element of foreseeability herein. The Court found that the treatment accorded the patient met the standards applicable in the community and was therefore not negligent.

Staff: Assistant United States Attorney Gene Palmisano, (E.D. La.); Hubert M. Crean (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

COINAGE ACT OF 1965

Statutory Provisions; Prosecution and Forfeiture Proceedings. On July 23, 1965 the "Coinage Act of 1965", Public Law 89 - 81, 89th Congress, 79 Stat. 254 was signed by the President. Title 1 of the Act authorizes certain changes in the coinage of half dollars, quarter dollars, and dimes. Section 105 of the Title permits the Secretary of the Treasury, in order to protect the coinage of the United States, to issue rules and regulations "to prohibit, curtail or regulate the exportation, melting, or treating of any coin of the United States" and provides further that "Whoever knowingly violates any order, rule, regulation or license" so issued shall be fined not more than $10,000 or imprisoned not more than five years, or both. Section 106 of the Title provides for the forfeiture of any coins "exported, melted, or treated" in violation of such order, rule, regulation or license and any metal resulting from such melting or treating.

Title II of the Act provides for amendments to existing laws and Title III provides for the establishment of a Joint Commission on the Coinage. Among the significant amendments provided in Title II is the addition of a new Section 337 to Title 18, U.S. Code, which prohibits the lending or borrowing of money or credit "upon the security of such coins of the United States as the Secretary of the Treasury may from time to time designate by proclamation published in the Federal Register, during any period designated in such a proclamation", and provides for a fine of not more than $10,000 or imprisonment for not more than one year, or both, for any violation.

Also amended by Title II of the Act is present Section 485 of Title 18, U.S. Code relating to the false making, forging or counterfeiting of "Gold or silver coins or bars". The amendment enlarges the present section by including an additional prohibition against the false making, forging or counterfeiting "of any coin of a denomination higher than 5 cents".

Prosecution of cases involving violations of Section 105 of the Act and forfeiture proceedings instituted under Section 106 of the Act will be supervised by the Administrative Regulations Section of the Criminal Division. Prosecutions of cases involving violations of Sections 337 and 485 of Title 18, U.S. Code will be supervised by the General Crimes Section of the Criminal Division.

FRAUD

Pre-trial Publicity. United States v. Olin Mathieson Chemical Corp., et al. (S.D.N.Y., September 23, 1965) D.J. File 51-51-764. On March 31, 1965, Olin Mathieson Chemical Corporation entered a plea of guilty to three counts of an indictment charging violations of 18 U.S.C. 1001 and 371, in that the corporation and others had falsely denied payments of promotional allowances

and kickbacks to importers in connection with AID-financed drug shipments to Viet Nam and Cambodia. Immediately thereafter, the office of the United States Attorney issued a brief statement concerning the plea and information concerning the trial of other defendants scheduled for April 4th. Later in the day, Olin Mathieson issued a press release in which it was stated that the plea of guilty was entered since a jury might find the company guilty because of the unauthorized acts of a former employee in Hong Kong. The release was approved by Olin's counsel. In the newspaper stories, the former employee was easily identifiable as Wolf, one of the defendants to be tried in the next few days. Wolf applied for an adjournment of the trial or a transfer to another district.

At the time of imposing the maximum fine of $30,000, the Court reprimanded counsel for Olin, stating that the approval of the release overstepped reasonable bounds of proper conduct. The Court stated that the language could be construed to cast the mantle of guilt upon a defendant awaiting trial, and the release caused extra proceedings in connection with Wolf's application. The Court was of the view that there was nothing improper in the prosecutor's statement but, even if there had been, this would be no justification for Olin's release.

The Court noted, however, that counsel may have lost sight of their responsibilities to the court in their haste to protect their client's interest, and that counsel had a deserved reputation for professional excellence and character. Moreover, no clear guide lines have been developed to reconcile "the twin desiderata of free press and a fair trial." The Court concluded with the observation that: "The episode can serve as a specific reminder to our profession of its ever pressing and always present duty of enhancing its standards, high as it may be argued they are at present, particularly in the conduct of these criminal cases."

Staff: United States Attorney Robert M. Morgenthau and
Assistant United States Attorney Richard A. Givens (S.D.N.Y.)

MAIL FRAUD

Causing Submission of False Information by Licensee Operating Under Small Business Investment Act Program in Furtherance of Fraudulent Scheme. United States v. Louis M. Ray, Crim. No. 17,026 (W. D. La.). D.J. File 105-33-90. Defendant was found guilty by a jury on a seven count mail fraud indictment in connection with a scheme whereby he defrauded the Small Business Administration of $450,000.

Defendant obtained a license from the Small Business Administration for First Louisiana Investment Corporation to operate as a Small Business Investment Company (SBIC) pursuant to the Small Business Investment Act of 1958. He then proceeded to obtain both matching funds and operating loans from the SBA by submitting false financial reports and by making false statements on requests for funds. The Government proved that the defendant had not had the required $150,000 minimum private source capital, had made sham loans to dummy corporations which he controlled, and had channelled the funds back into the SBIC, causing the SBA to match its own money.

This was the first prosecution under the mail fraud statute (18 U.S.C. 1341) for fraud against the SBA under the Small Business Investment Company program. Prosecution under this statute rather than the false statement statute (18 U.S.C. 1001) enabled the Government to show the entire scheme to defraud rather than just the falsity of specific statements and representations.

Staff: United States Attorney Edward L. Shaheen and Assistant United States Attorney D. H. Perkins, Jr. (W.D. La.); Stephen Wizner (Criminal Division)

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Deportation Case Remanded for Reconsideration of Application for Stay of Deportation Under New Legislation. Domenico Andrijic v. INS (C.A. 9, No. 19632, October 21, 1965) D.J. File 39-11-552. Petitioner, a Yugoslav national, applied for a stay of deportation under Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1253(h), on the ground that if he were deported to Yugoslavia he would be subject to physical persecution. His application was denied by a Special Inquiry Officer and the denial order was affirmed by the Board of Immigration Appeals. This petition for review was instituted pursuant to Section 106(a) of the Act, 8 U.S.C. 1105a.

While the petition for review was pending, Congress on October 3, 1965, enacted Section 11(f) of Public Law 89-236 which amended Section 243(h) by substituting "persecution on account of race, religion, or political opinion" for the words "physical persecution". The Ninth Circuit, pursuant to petitioner's request, remanded the case stating in part as follows:

> The orders of the special inquiry officer and of the Board, in keeping with the statute as it then read, discuss only the possibility of "physical persecution". It is true that, through developing decisional law the quoted term has been given a rather broad reading. However, there is nothing in the record to indicate how broadly the Service read that term in deciding thos case, or whether its construction accords with the meaning which must now be given to the statutory term "persecution".

The Court left open the question of whether reconsideration should be had on the present record or whether the case should be reopened for reception of additional evidence. It expressed no opinion as to the construction that should be placed on the term "persecution".

Staff: United States Attorney Cecil F. Poole and Assistant United States Attorney Charles E. Collett (N.D. Cal.); Of Counsel: L. Paul Winings, General Counsel, and Charles Gordon, Deputy General Counsel (Immigration and Naturalization Service).

ADJUSTMENT OF STATUS

No abuse of Discretion in Denial of Adjustment of Alien's Status. Luis Enrique Cubillos-Gonzalez v. INS (C.A. 9, No. 20057, October 26, 1965) D.J. File 39-12-757. This is a petition filed under Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a, for review of the final order for the deportation of petitioner, a native and citizen of Columbia. After admission as a visitor, he filed an application under Section 245 of the Act, 8 U.S.C.

1255, to have his status adjusted from a visitor to a permanent resident alien. His application was denied on the ground that he had practiced deceit upon the United States Consul in Columbia when he obtained his visitor's visa. He gave the Consul a sworn statement that he intended to visit the United States for thirty days and then return to Columbia. Petitioner admitted to an officer of the respondent that at the time he procured his visa he intended to remain permanently in the United States.

The Ninth Circuit disagreed with petitioner's contention that there was an abuse of discretion in the denial of his application. It pointed out that there was substantial evidence from which it could be inferred that at the time of his entry into this country he harbored the preconceived intent to remain permanently. Petitioner relied upon Brownell v. Carija, 254 F. 2d 78, but the Court found that the facts in the present case were dissimilar from those in Carija. The deportation order was affirmed.

Staff: United States Attorney Manuel L. Real and Assistant United States Attorneys Frederick M. Brosio, Jr. and Carolyn M. Frlan (S.D. Cal.)

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LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

Public Lands; Administrative and Mining Law; Where Claimants Are Possessors of Adjoining Placer Mining Claims Discovery on One Adjoining Claim Does Not Inure to Benefit Other Claim; Secretary of Interior Properly Reversed Findings of Subordinates When Based on Error of Law and He Can Make His Own Findings Consistent With Evidence in Declaring Placer Mining Claims Invalid. Charles H. Henrikson and Oliver Henrikson v. Stewart L. Udall (C.A. 9, No. 19,560, Sept. 15, 1965, D.J. File 90-1-18-621). Appellants were the possessors of two adjoining placer mining claims - one known as Squaw Creek, the other known as Squaw Valley - located in the Tahoe National Forest. The claims were located for the purpose of mining common varieties of sand and gravel as provided by 30 U.S.C. 21 et seq. However, as a result of the Act of July 23, 1955 (30 U.S.C. 601, 611), common varieties of sand and gravel, the type alleged to be existing on appellants' claims could no longer provide the mineral basis for a valid claim and resulting patent as of the date of the Act. Appellants applied for patent on both claims and the Government initiated contest proceedings, alleging that the claims were invalid because there had been no discovery of valuable minerals prior to the passage of the Act.

A Department of the Interior hearing examiner upheld the validity of both claims, basing his decision on a finding that, since the claims were contiguous, the discovery and marketability established by the Squaw Valley claim inured to the benefit of the Squaw Creek claim. The Director of the Bureau of Land Management upheld the decision of the hearing examiner and the Government appealed to the Secretary of the Interior.

The Secretary upheld the validity of the Squaw Valley claim, but declared invalid the Squaw Creek claim, basing his decision on a correction of law that a discovery on one claim does not inure to the benefit of an adjoining claim (30 U.S.C. 23, 35) and held that there was no evidence that the Squaw Creek claim was validated by discovery prior to July 23, 1955, the effective date of the Act.

Appellants filed a complaint for judicial review and the district court granted the Government's motion for summary judgment, holding that since the hearing examiner based his findings upon a mistake of law it was proper for the Secretary to correct this error in his review and make a finding consistent with the evidence that a discovery was not made on the Squaw Creek claim within the statutory time limit. The district court further pointed out that the finding of the examiner is tentative and interlocutory and it is the Secretary's decision which is controlling and which the court must consider in weighing the evidence submitted upon the patent hearing. See Henrikson v. Udall, 229 F. Supp. 510 (N.D. Cal. 1964).

The Court of Appeals affirmed per curiam holding that it is not the function of either the court of appeals or of the district court, in a

proceeding such as this, to weigh the evidence adduced in the administrative proceeding. Rather, if upon review of the entire record of that proceeding there is found substantial evidence to support the Secretary's decision, that decision must be affirmed.

Staff: Robert M. Perry (Land and Natural Resources Division).

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TAX DIVISION

Acting Assistant Attorney General Richard M. Roberts

CRIMINAL TAX MATTERS
Court of Appeals Decisions

Admissibility of Evidence Claimed to Have Been Obtained in Derogation of Right to Counsel Under Escobedo Case. Kohatsu v. United States (C.A. 9, October 22, 1965.) This is an appeal from a conviction for crimes against the revenue in which the main contention was that the trial judge erred in admitting in evidence oral admissions and books and records obtained from appellant by a Treasury special agent at a time when he had not been warned of his Sixth Amendment right to be represented by counsel. Appellant had been under examination by a revenue agent for about a year before a special agent came into the case in mid-1961, and most of the records in question had been turned over to the revenue agent during that year. Some of the admissions had been made first to the special agent in 1963, after he had warned appellant of his Fifth, but not his Sixth, Amendment rights. When the special agent first arrived on the scene he showed appellant his credentials and there was no claim that any false or misleading statements had been made to appellant. Relying heavily upon Escobedo v. Illinois, 378 U.S. 478, appellant urged reversal on the ground that the records and oral admissions obtained from him by the special agent should have been excluded because at that point the investigation had "begun to focus on a particular suspect" and therefore the agent had a duty to advise that suspect (appellant) of his right to the assistance of counsel. In rejecting this contention and affirming the conviction the Court of Appeals pointed out some distinguishing facts, viz., that in Escobedo the defendant was in police custody, suspected of committing a known crime, the police interrogated him in a manner designed to elicit incriminating statements, the suspect had requested and been denied an opportunity to consult with a lawyer he had already retained, and the police had failed to warn him effectively of his right to remain silent. The Court stated:

> In taking the phrase "focus on a particular suspect" out of context, appellant would extend the rule of Escobedo beyond any logical implication of the effect of that decision. The Supreme Court in Escobedo referred to an unsolved crime. The existence of the crime was apparent. The police were seeking to identify the offender. The accused had been taken into custody. In the instant case the essential question to be determined by the investigations of the revenue agent was whether in fact any crime had been committed. The accused had not been indicted or arrested. (Emphasis added.)

With further reference to appellant's contentions under the Sixth Amendment, as well as similar arguments based on the Fourth and Fifth Amendments, the Court quoted from Irwin v. United States, 338 F. 2d 770, 777 (C.A. 9) and United States v. Sclafani, 265 F. 2d 408, 414-415 (C.A. 2), certiorari denied, 360 U.S. 918. The Court pointed out that "all of the agents properly identified themselves to appellant and disclosed their purpose to audit his returns" and he was therefore "fully apprised of the Government's concern with the accuracy of his returns."

Staff: United States Attorney Manuel L. Real and Assistant United States Attorney Jo Ann Dunne (S.D. Cal.)

Willfully Making and Subscribing to False Tax Returns; Willfully Failing to File Tax Return; Exhibits to Special Agent's Report Do Not Come Within Jencks Act; Proper to Show Failure to File Returns in Prior Years. Abraham Robert Ayash, a/k/a Robert Crail v. United States (C.A. 10, No. 8058; October 29, 1965). In a prosecution for willfully making and subscribing to false income tax returns for certain years, and for willfully failing to file a return in another year, the Special Agent was called as a witness for the purpose of summarizing the evidence in the record. The defense asked for the production of his report pursuant to the Jencks Act, 18 U.S.C. 3500. The report was produced, but not the exhibits thereto, which consisted mainly of reports of interviews which he had not discussed in his direct testimony. The Tenth Circuit affirmed the trial court's ruling that these exhibits did not have to be produced, holding that they were not "statements" within the meaning of the statute, and also that they were not relevant to the Agent's direct testimony.

The Government adduced evidence showing that defendant had failed to file returns in two prior years. The court held that such evidence was properly admitted for the limited purpose of tending to show that his failure to file in the year charged in the indictment was willful.

The appellate court also held that, on the record presented the trial judge did not abuse his discretion in his questioning of witnesses and his active participation in the trial, and that he did not err in permitting the Government to prove, in order to establish defendant's financial position and income for the indictment years, that defendant was spending large sums of money on his mistress and an illegitimate child.

Staff: Burton Berkley and Joseph M. Howard (Tax Division)

CIVIL TAX MATTERS
District Court Decisions

Internal Revenue Summons; Defenses of Attorney Client Privilege and Privilege Against Self-incrimination Held Inapplicable to Summons Directing Attorney for Taxpayer to Produce Copies of Closing Statements Prepared by Him in Conjunction With Real Estate Deals Involving His Client. United States, et al. v. Sidney J. Berger. (S.D. Fla., April 23, 1965). (CCH 65-2 U.S.T.C. par. 9589). An Internal Revenue summons was issued to Sidney Berger, attorney for the taxpayer, requiring him to produce copies of closing statements prepared by him for his client in the purchase of two parcels of real estate. The attorney refused to comply on the grounds that the records sought were protected by the attorney-client privilege, and that the production thereof would violate his client's right against self-incrimination.

The District Court, in ordering compliance with the summons, pointed out that the documents sought were not the subject of a confidential relationship because copies of the closing statements were obviously given to the seller; and further, the privilege, if it exists, is the client's privilege and cannot be raised by the attorney. The second ground was held equally fallacious for the reason that the summons did not seek records which were entrusted to the

attorney by his client, and further, the records sought were copies belonging to the attorney not the client.

Staff: United States Attorney William A. Meadows, Jr.; Assistant United States Attorney James O. Murphy, Jr. (S.D. Fla.); and Carl H. Miller (Tax Division).

Priorities; Federal Tax Lien Filed After Attachment by Creditor and Judgment but Before Execution Held Junior to Creditor's Lien. United States v. Frank C. Brame, et al. (D. Idaho, June 25, 1965). (CCH 65-2 U.S.T.C. par. 9588). The Government sought to foreclose federal tax liens against a fund of money in taxpayer's bank account, naming various other creditors of taxpayer as defendants. One of the creditors had previously instituted suit against taxpayer and had attached taxpayer's bank account. This creditor then obtained judgment against taxpayer, and, subsequently a tax liability was assessed and notice of lien was filed. The creditor then had execution issue on his judgment, and, in this action, took the position that it was a judgment creditor prior to the recordation of the tax lien and was, therefore, entitled to priority. The Government contended that the creditor was not a judgment creditor within the meaning of Section 6323 of the Internal Revenue Code of 1954, against whom the Government is required to file tax liens to obtain priority, because after obtaining the judgment the creditor had not executed on the judgment and was not, therefore, a lienor under Idaho law prior to the recordation of the tax liens.

The Court accepted the position of the creditor that its lien was choate in the federal sense when it acquired the judgment without execution, because, when the judgment following the attachment was obtained, the identity of the lienor, the amount of the lien and the fund subject to the lien were known, and the creditor thus met the choatness tests of United States v. New Britain, 347 U.S. 81. The Court distinguished other cases where judgment creditors were found not to have choate liens until execution issued, on the basis that here there was a prior attachment. Thus, the Court concluded that, under Idaho law, the inchoate lien of the attaching creditor became choate when judgment was entered. The Government will not appeal from this decision.

Staff: United States Attorney Sylvan A. Jeppesen and Assistant United States Attorney Jay F. Bates (Idaho).

State and Local; State Statute Authorizing Political Subdivisions to Apply for Refund of Sales and Use Taxes on Building Materials Used by Their Contractors in Performing Public Contracts, but Which Does Not Permit United States to Apply for Refunds of Taxes Paid Under Like Circumstances by Its Contractors, Discriminates Unconstitutionally Against United States. United States v. I. L. Clayton, et al. (E.D. N.C., September 15, 1965). In this action, the United States sought a judicial declaration that the North Carolina Sales and Use Tax Act is invalid insofar as it imposes sales and use taxes with respect to certain tangible personal property used by contractors performing contracts with agencies of the Federal Government. The Act imposes such taxes generally with respect to tangible personal property used by contractors in the erection, alteration or repair of buildings and other structures. It provides that counties and incorporated cities and towns of North Carolina may apply for refund of such taxes

paid by their contractors where the property so used becomes a part of or annexed to a building or other structure. However, under the Act and regulation, as construed and applied by state taxing authorities, there is no means whereby the United States may apply for refund of taxes paid by its contractors in similar circumstances. The United States contended that by reason of the discriminatory refunds thus allowed to certain political subdivisions of the state but not to the United States, the taxes imposed with respect to tangible personal property used by federal contractors are discriminatory per se, and illegal and void under the Federal and state Constitutions. The Government asked for (1) judgment declaring the Act and regulations invalid, as so applied, and the taxes illegal and void, (2) a permanent injunction against further assessment or collection of the illegal taxes, and (3) a finding that the Government is entitled, as a matter of law, to refund of the taxes already paid.

The matter was heard by a three-judge court on the Government's motion for summary judgment. In its opinion, the Court held that the statutory refund provision is unconstitutional because it discriminates invidiously against the United States. However, it declined to hold that the Act and regulations are invalid insofar as they impose the taxes in controversy. Observing that the Government can legitimately ask for equal treatment with local governmental units, but not more favorable treatment, the Court held that the Government like everyone else must resort to the statutory refund procedure. Although denying the Government's request for injunctive relief, the Court held, relying on Comptroller v. Pittsburgh-Des Moines Steel Co., 231 Md. 132, 189 A. 2d 107, cert. denied, 375 U.S. 821 (1963), that the Federal Constitution requires that the North Carolina refund provision be read to include the United States within its provisions "when an appropriate and timely request" for refund is made. It held the Government is entitled to recover the taxes paid since July 1, 1961, for which it could have claimed refund under such a reading of the statute, and ruled that the statutory time limitation for filing refund applications will not bar recovery of such taxes collected prior to its opinion. A hearing before the District Judge was authorized for the purpose of determining the amount of such refund.

Staff: United States Attorney Robert H. Cowen, (E.D. N.C.);
William Massar and Clinton B. D. Brown, (Tax Division).

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