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NEWS NOTES

Fifteen Companies Indicted for Conspiracy To Monopolize Sales of Drugs

October 29, 1968: Fifteen companies and eight executives were charged with an international conspiracy that monopolized the sales of two widely-used drugs, quinine and quinidine. The indictment, which was returned by a federal grand jury in U.S. District Court in New York City, also asserted that the defendants conspired to defraud the Government by rigging the market to obtain quinine from federal stockpiles at lower prices. Among the firms indicted are Rexall Drug and Chemical Company of Los Angeles, and Mead Johnson and Company of Evansville, Indiana. Quinine is widely used in the treatment of malaria and other diseases, and quinidine is used to treat a variety of heart ailments. As part of the conspiracy, the indictment charged, prices were fixed and raised, markets were allocated, and sales quotas were established. In addition, selective price cuts were used to help eliminate other producers of the drugs and the production of synthetic quinine was confined by the defendants to three of the conspiring companies. These practices have raised, fixed and maintained at artificial levels the prices paid by both processors and consumers in this country, the indictment said.

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POINTS TO REMEMBER

REQUISITION FOR BOOKS OR OTHER LIBRARY MATERIALS

Requisitions for books or other library materials should not be combined with requisitions for supplies because the two are not processed by the same persons. Submit separate requisitions. Past requisitions for books combined with supplies have failed to reach the proper desk.

FEDERAL FOOD, DRUG, AND COSMETIC ACT - AMENDMENTS

PUBLIC LAW 90-639

The President, on October 25, 1968, signed into law a bill amending the Federal Food, Drug, and Cosmetic Act which increases the penalties for unlawful acts involving lysergic acid diethylamide (LSD) and other depressant and stimulant drugs. The increased penalties apply to all offenses committed after the date of enactment.

The principal effect on existing law is to increase the criminal penalties for the illegal manufacturing, compounding, processing, the illegal sale, delivery, or other disposal to another, and counterfeiting of any depressant or stimulant drug to a felony punishable by imprisonment for not more than five years or a fine of not more than $10,000, or both.

The penalty for selling, delivering, or otherwise disposing of a depressant or stimulant drug by a person who is 18 years of age or older to another person under the age of 21 is raised to imprisonment for up to 10 years or a fine of up to $15,000 or both, for the first offense; 15 years or $20,000, or both, for a second or any subsequent offense.

No person other than one expressly excepted (21 U.S.C. 360a(a)(b)) can lawfully possess any stimulant or depressant drug for personal use unless it was obtained directly or through a prescription from a practitioner licensed by law to prescribe and administer such drug while acting in the regular course of his professional practice. Violations of this provision will be punishable by imprisonment for not more than one year or a fine of not more than $1,000, or both, for the first and second offenses, 3 years or $10,000, or both, for a third or any subsequent offense.

A complete analysis of these amendments will be distributed at an early date. Inquiries concerning matters related to the above should be directed to the Narcotic and Dangerous Drug Section, Criminal Division.

FORFEITURES

All forfeiture and remission cases under the Internal Revenue Laws relating to liquor, wagering and firearms and those having to do with narcotics, counterfeiting and violations of the Customs Laws involving narcotic drugs, which were formerly handled by the Administrative Regulations Section, have been transferred to the Narcotic and Dangerous Drug Section. Accordingly, initial correspondence pertaining to these matters which originates in the offices of the United States Attorneys, as well as communications relating to such forfeiture and remission matters previously within the jurisdiction of the Administrative Regulations Section, now should be sent to the Criminal Division, attention of the Narcotic and Dangerous Drug Section. Thereafter, any inquiries or correspondence relating to a particular case should be marked for the attention of the attorney who is handling the matter in that Section. The Administrative Regulations Section no longer has jurisdiction over these forfeiture matters.

United States Attorneys and their staffs should take particular care to see to it that correspondence or other material pertaining to such matters should not be directed to the Bureau of Narcotics and Dangerous Drugs, which has been established in the Department.

FIREARMS -- NEWLY ENACTED LAWS

The Gun Control Act of 1968 (Public Law 90-168) became effective upon Presidential approval on October 22, 1968. The Act substantially revises the National and Federal Firearms Acts, and to a lesser extent revises the firearms provisions of Title VII of the Omnibus Crime Control and Safe Streets Act. In addition, the new law extends Federal controls to the interstate sale of weapons and imposes greatly increased restrictions upon the importation of firearms into the United States.

The provisions of the Gun Control Act of 1968 become effective on varying dates. Title II, involving amendments to the National Firearms Act, took effect on November 1, 1968. The effective date for the restrictions on interstate transportation, sale of weapons set forth in Title I of the Act is December 16, 1968. However, the section concerning importation of weapons and the amendments to Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, became law on the date of enactment. An analysis of these two later provisions follows(Articles concerning the remaining portions of the Act will be published in subsequent issues of the Bulletin prior to their effective date.)

PUBLIC LAW 90-618

ANALYSIS OF THE GUN CONTROL ACT OF 1968, TITLE I, SECTIONS 922(a)(1) AND 925(d) - RESTRICTIONS UPON IMPORTATION OF FIREARMS AND AMMUNITION INTO THE UNITED STATES.

Title I of the Gun Control Act of 1968 sets forth comprehensive restrictions on the importation of all firearms and ammunition. 1/ Section 925(d) provides certain procedures which must be complied with before any weapon may be imported. Discretion is lodged with the Secretary of the Treasury to authorize such importation if the person seeking such approval establishes that the firearm or ammunition involved --

(1) is being imported for scientific or research purposes, or is for use in connection with military competition or training pursuant to chapter 401 of Title 10; or

(2) is an unserviceable firearm (not readily restorable to firing condition) other than a machine gun as defined in section 5845(b) of the Internal Revenue Code of 1964, 2/ imported as a curio or museum piece; or

(3) is a firearm, not falling within the provisions of section 5845(a) of the Internal Revenue Code 3/ and "generally recognized as particularly suitable for or readily adaptable to sporting purposes, excluding surplus military firearms"; or

1/ Title I, Section 921(3) and (17) define these terms in their broadest sense: "(3) The term 'firearm' means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm."

"(17) The term 'ammunition' means ammunition or cartridge cases, primers, bullets or propellent powder designed for use in a firearm."

2/ Section 5845(b) of the Internal Revenue Code defines a machine gun as "any weapon which shoots or is designed to shoot automatically or semi-automatically more than one shot without manual reloading, by a single function of the trigger."

3/ Section 5845(a) of the Internal Revenue Code defines a firearm as a sawed-off shotgun with a barrel length of less than 18 inches, a sawed-off rifle with a barrel length of less than 16 inches or any muffler or silencer or machine gun.

(4) was previously taken out of the United States or a possession by the person who is bringing in the firearm or ammunition.

Accordingly, the Act imposes a complete embargo upon weapons which do not come within one of these categories. 4/ In this regard, it is particularly significant that importation of all surplus military firearms is specifically prohibited. 5/

Pursuant to Section 922(1), it is unlawful for any person knowingly to import or bring into the United States any firearm or ammunition except as provided in Section 925(d). Moreover, Section 922(1) also prohibits knowingly receiving any firearm or ammunition which has been unlawfully imported. Note should be taken as to both of these proscriptions that scienter is required.6/ Violations of this section are punishable under Section 924(a) by a maximum fine of $5,000 or imprisonment for a term of five years, or both.

Finally, in relation to the foregoing, it is vital to note Section 922(a)(3) which becomes effective December 16, 1968. That provision specifically prohibits any person, other than a licensed importer, from transporting into or receiving in the state where he resides (or if the person is a corporation or other business entity, the state where it maintains a place of business) any firearm purchased or otherwise obtained outside that state. In short, after December 16, 1968 no one other than a licensed importer who has complied with Section 925(d) may lawfully bring a weapon into the United States from another country.

This statute is supervised by the General Crimes Section of the Criminal Division.

4/ The section does, however, provide that: "The Secretary may however permit the conditional importation or bringing in of a firearm or ammunition for examination and testing in connection with the making of a determination as to whether the importation or bringing in of such firearm or ammunition will be allowed under this subsection."

5/ Conference Report, H. R. Rep. No. 1956, 90th Cong., 2d Sess. (1968). p. 33.

6/ In the absence of legislative history to the contrary, the scienter element herein should be construed as requiring knowledge of the act of importation but not of the restrictions contained in Section 925(d).

ANALYSIS OF TITLE III, GUN CONTROL ACT OF 1968 - AMENDMENTS TO TITLE VII OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968, P. L. 90-351. 1/

Title III of the Gun Control Act of 1968 amends the original provisions of Title VII in the Omnibus Crime Control and Safe Streets Act of 1968 in two significant respects. 2/ In its initial form Title VII, Section 1202(b)(2) prohibited the receipt, possession or transportation of any firearm in commerce or affecting commerce by a person who "has been discharged from the Armed Forces under other than honorable conditions." Title III, Section 301(a)(2) of the Gun Control Act of 1968 reforms that section by striking the words "other than honorably discharged" and substituting the phrase "discharged under dishonorable conditions." The impact of this revision is to restrict the scope of Section 1202(a)(2) to include only persons who have been discharged from the Armed Forces pursuant to a court martial. This is to be distinguished from the instance where an individual has received an "undesirable discharge" in an administrative proceeding.

The Gun Control Act of 1968 further amends Title VII with respect to the definition of a "felony" in Section 1202(2) through the interposition of the following underlined phrase:

> "'felony' means any offense punishable by imprisonment for a term exceeding one year, but does not include any offense (other than one involving a firearm or explosive) classified as a misdemeanor under the laws of a State and punishable by a term of imprisonment of two years or less. . . ."

The addition of this qualification bears certain ramifications concerning the character of prosecutions which may be initiated under Section 1202(1) of Title VII against convicted felons for receipt, possession or transportation of a firearm since the laws of several states maintain a dichotomy between high and low misdemeanors, as distinguished from the felony-misdemeanor distinction,

1/ Reference should be made to Vol. 16, United States Attorneys' Bulletin, No. 16, July 26, 1968, pp. 559-562, for an overall analysis of Title VII. In particular, it should be noted that United States Attorneys are not to initiate or authorize prosecution under this statute until such action has first been approved by the Criminal Division, General Crimes Section.

2/ Title III, Section 302, stipulates that these amendments are effective June 19, 1968 and therefore are to be retroactively applied.

with regard to the severity of criminal offenses. It would therefore seem that, in light of the foregoing amendments, persons convicted of high misdemeanors punishable by imprisonment for two years or less are no longer subject to the prohibitions in Title VII.

This statute is supervised by the General Crimes Section of the Criminal Division.

DEPARTMENT OF JUSTICE PROFILES

Clyde O. Martz
Assistant Attorney General
Land & Natural Resources Division

Clyde Martz was born on August 14, 1920, in Lincoln, Nebraska. He received his A.B. degree from the University of Nebraska in 1941. During World War II he served on a submarine in the Pacific, and was awarded the Silver Star, Bronze Star, and Letter of Commendation. He received an LL.B. degree from Harvard Law School in 1947, and immediately joined the faculty of the University of Colorado Law School as an assistant professor. He was named a full professor in 1955, and was acting dean from 1957 to 1958. On July 1, 1959, he began a year-long appointment as Colorado's first Judicial Administrator--a post created by the Legislature to help reduce backlogs in the State Courts. In 1962 Mr. Martz entered private practice with a Denver law firm, and was a partner when nominated by President Johnson in 1967 to be Assistant Attorney General. Mr. Martz has written extensively in the field of resources and land law. His 1951 textbook, "Cases and Materials on Natural Resources Law", is widely used in universities. He was co-author of the three-volume "Water and Water Rights" (1967); the eight-volume "American Law of Property" (1951); and "Water for Mushrooming Populations" (1959). He was both the general editor of and a contributor to the five-volume "American Law of Mining" (1960).

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Edwin L. Miller, Jr.
United States Attorney
California, Southern

Mr. Miller was born January 17, 1926 at Los Angeles, California. He received his A.B. degree from Dartmouth College in 1947 and his LL.B. degree from the University of California in 1957. After private practice in San Diego, he was employed by the San Diego City Attorney's office from 1959 to 1961, during part of which time he served as Assistant City Prosecutor. From 1961 to 1964 he was employed as a Public Utilities Legal Representative, and from 1964 until his appointment as United States Attorney in 1966 he served as Assistant City Attorney. Mr. Miller and the then Chief Judge Carter of the U.S. District Court in San Diego devised in 1967 the "Omnibus hearing", the first attempted pretrial open-court mutual discovery procedure in the federal courts.

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ANTITRUST DIVISION

Assistant Attorney General Edwin M. Zimmerman

DISTRICT COURT

SHERMAN ACT

COURT DENIES DEFENDANTS MOTION FOR SEVERANCE OR SEPARATE TRIAL.

United States v. The American Oil Co., et al (D.N.J., Cr. 153-65; October 15, 1968; D.J. 60-57-170)

By opinion filed October 15, 1968, Judge Wortendyke denied a motion by four defendants in this case for a severance or separate trial.

The indictment in this case is in three counts. Count I charges a conspiracy in restraint of trade against eight defendants, consisting of an agreement to fix prices. Counts II and III charge four of these eight defendants with a conspiracy and an attempt to monopolize, consisting of an agreement to fix prices and to restrict supply.

A bill of particulars filed in this case claims, with respect to Count I that the agreement to restrict supply, which was not alleged as a term of the conspiracy in Count I, was nevertheless a method by which prices were to be fixed and was an act in furtherance of the Count I conspiracy. The bill recites that the four Count I defendants who are not defendants in Counts II and III did not agree to the restriction of supply, but names them as co-conspirators in Counts II and III.

The four defendants not named as such in Counts II and III previously moved to strike from the bill of particulars all references to the agreement to restrict supply in connection with Count I, on the ground that such a reference enlarged upon Count I, since Count I did not allege such an agreement as a term of the conspiracy. The motion was denied on the ground that the bill expressly exonerates the four moving defendants from entering into the agreement to restrict supply and because that agreement was alleged to have been a method by which prices were to be fixed. Thus, the court reasoned that Count I merely charges a conspiracy composed of an agreement to fix prices and is not enlarged upon by the bill.

The four defendants exonerated by the bill from being parties to agreement to restrict supply thereupon moved for severance of their trial from

that of the others or in the alternative, separate trial of Count I. As grounds for the motion they alleged (1) that Count I of the indictment, as illuminated by the bill of particulars, is duplicitous in that it charges two conspiracies, one to fix prices and another to restrict supply, and (2) that a joint trial would prejudice them because a jury may not be able to heed instructions designed to segregate Counts II and III from Count I.

The court denied the motion on the ground that (1) the opinion denying the motion to strike items from the bill of particulars held that the Bill did not enlarge upon the indictment so as to make it duplicitous, and (2) movants have failed to sustain the burden of showing prejudice. As to the latter point the court stated:

> We agree with the contention of the Government that "should proof of the agreement to restrict supply be prejudicial as against any defendant, it would be prejudicial against all. The avoidance of such prejudice through instructions to the jury is preferable to the duplication of trial* * *, and to a concomitant expenditure of time, effort and funds. Were there to be two trials the same witnesses would have to be called each time, and the non-moving defendants would have to defend twice against factually identical and equally serious charges. The law does not look with favor upon such an imposition on the Court, the Government, the non-moving parties and the witnesses."

Staff: Norman H. Seidler, Bernard Wehrmann, Edward F. Corcoran, David Leinsdorf, Barry Ravech, and Bruce E. Repetto (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

COURT OF APPEALS

STANDING OF GOVERNMENT AGENCIES TO CHALLENGE FEE AWARD

SECRETARY OF AGRICULTURE HAS STANDING TO OBJECT TO FEE AWARD PAYABLE OUT OF FUNDS ACCUMULATED DURING COURSE OF LITIGATION IN WHICH SECRETARY WAS PARTICIPATING, EVEN THOUGH GOVERNMENT HAS NO CLAIM TO FUNDS.

Orville Freeman v. Charles Patrick Ryan and Wayne Smyth (C. A. D. C., No. 21,446; October 16, 1968; D. J. 106-16-59)

During the course of litigation in which the plaintiffs attacked the validity of a provision of a federal Milk Marketing Order promulgated by the Secretary of Agriculture, an escrow fund was established to protect the rights of competing groups of farmers to payments under the Order. When the litigation was terminated, counsel for the successful plaintiffs claimed and were awarded by the district court an attorney's fee of $300,000 out of that escrow fund. This award had the effect of reducing the amount of the escrow fund available to be paid out to the plaintiffs' class of farmers.

The Secretary of Agriculture appealed, contending that the fee award was excessive and, for various other reasons, improper. Counsel to whom the fee was awarded moved to dismiss the Secretary's appeal for lack of standing, basing the motion on the agrument that the Secretary had no legal interest in the fee award, because neither he nor the United States claimed the funds. The Court of Appeals denied the motion holding that "where litigation involving federal programs comes to involve questions of attorney's fees the cognizant federal official has an interest in the fee award as well as the merits of the litigation even though, or assuming, the fee does not decrease funds in the Treasury." The Court of Appeals proceeded to vacate the fee award of the district court and to set its own award of $185,000.

Staff: Walter H. Fleischer (Civil Division)

DISTRICT COURTS

ADMIRALTY

FREIGHT "AT RISK" PROVISION OF CHARTER PARTY NOT AFFECTED BY FORCE MAJEURE EXCEPTION TO FEDERAL REGULATION, INCORPORATED BY CHARTER PROVISION, CONCERNING NOTICE OF ARRIVAL OF VESSEL.

Aetna Insurance Company v. The Director General of the India Supply Mission v. United States (S. D. N. Y., 66 Ad. 530; September 11, 1968; D. J. 61-51-4597)

The India Supply Mission and the owner of the American flag vessel SS SMITH VOYAGER entered into a charter party for transportation from the United States to India of a shipment of surplus wheat which the Mission had purchased. The charter provided for freight charges to be "at the risk of the vessel's owners" and that freight be deemed earned upon arrival of the vessel at the first port of discharge, subject to policies of the Commodity Credit Corporation and the United States Department of Agriculture as embodied in the provisions of the regulations promulgated under Public Law 480 (Agricultural Trade Development and Assistance Act of 1954). Public Law 480 provided generally that the United States would reimburse a foreign country for the added costs incurred by the foreign country when it imported surplus American produce in American flag vessels. One of the regulations thereunder, 7 U. S. C. 11. 9(b)(2), provided that a notice of arrival of the vessel would not be required in the event the vessel was lost as result of a force majeure situation "provided the owner or operator supplies evidence satisfactory to Commodity Credit Corporation" of such disability of the vessel.

While enroute to India the ship sank, resulting in a total loss of both vessel and cargo. Aetna, the insurer of the shipowner's interest, brought this action to recover the value of freight ($321,000) from Mission on the theory that the sinking was caused by a force majeure situation and that the reference in the charter to the Public Law 480 regulations introduced a force majeure exception to the express charter party provisions with respect to freight. The United States was brought in as a third-party defendant by Mission, which sought reimbursement, under Public Law 480, the regulations incident thereto and the applicable purchase authorization, for any freight recovered against it.

Mission moved for summary judgment on the ground that freight was at the risk of the vessel under the provisions of the charter. The Government joined in that motion and also sought dismissal of the third-party complaint.

The court granted both motions. It held that the force majeure provision of 7 C. F. R. 11. 9(b)(2) concerned only the documentation required by the United States as a precondition to reimbursement of foreign countries and did not affect the charter party conditions concerning freight. The court went on to hold that, in any event, the shipowner's conceded failure to comply with the regulation by supplying evidence of the cause of the ship's disability would preclude recovery.

Staff: Gilbert S. Fleischer (Civil Division)

BILLS AND NOTES

DISTRICT COURT DECLINES TO ADOPT AS "FEDERAL LAW" SECTION 3-405(1)(c) OF THE UNIFORM COMMERCIAL CODE IN LIEU OF "FEDERAL LAW" ESTABLISHED BY THE SUPREME COURT IN 1945 IN NATIONAL METROPOLITAN BANK CASE.

United States v. Bank of America National Trust & Savings Association (N. D. Cal., Civ. No. 47,431; July 24, 1968; D. J. 46-11-1182)

Two Navy enlisted men responsible for the preparation of payrolls submitted fictitious pay records for one Spiller in order to obtain from a Disbursing Officer Treasury checks payable to Spiller. They cashed the checks at the defendant Bank of America by forging endorsement of Spiller's name thereon. The Bank presented checks "prior endorsements guaranteed" to the Government, which made payment on the checks. Thereafter, the Government brought this action against the Bank to recover the amount of the checks.

The district court phrased the question presented as "whether a federal court should adopt by analogy as 'federal law' Section 3-405(1)(c) of the Uniform Commercial Code, adopted by all but one of the states, in lieu of the 'federal law' established by the United States Supreme Court in National Metropolitan Bank v. United States, 323 U. S. 454 (1945)." Section 3-405(1)(c) of the Code provides, in substance, that an endorsement in the name of the payee is effective where, as here, an agent or employee of the maker supplied the maker with the name of the payee intending the payee to have no interest in the instrument. Thus, this Section would treat the forgeries as if they were valid endorsements so far as the Bank was concerned and would preclude recovery by the Government. In contrast, National Metropolitan Bank held that where a payee's endorsement had been forged upon Government checks, and the collecting bank had guaranteed prior endorsements, the Government was entitled to recover from the bank.

The district court rejected the Bank's argument that in fashioning "federal law" the courts must look to the general commercial law in effect at the time of the transaction. Rather, the court recognized that under Clearfield Trust Co. v. United States, 318 U. S. 363, federal courts, in determining the law applicable to federal commercial paper, must develop a body of law consonant with those interests which are uniquely federal. The court noted that Section 3-405(1)(c) placed the loss from forgeries such as those involved here on the maker because of the maker's ability to prevent such forgeries by reasonable care in the selection or supervision of employees. The court then found that the Government could not be expected to exercise the same control over its employees, especially military personnel,

as could a private enterprise. Consequently, the court held that the rule in Metropolitan Bank (which was based on the Clearfield Trust Co. doctrine), rather than Section 3-405(1)(c), must control. The Bank has noted appeal.

Staff: United States Attorney Cecil F. Poole and Assistant United States Attorney Peter V. Shackter (N. D. Cal.)

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TAX DIVISION

Assistant Attorney General Mitchell Rogovin

DISTRICT COURT - CRIMINAL CASE

RIGHT TO SPEEDY TRIAL

TAX INDICTMENT PENDING 9-1/2 YEARS BEFORE PROSECUTION MOVED FOR TRIAL DISMISSED FOR LACK OF SPEEDY TRIAL UNDER SIXTH AMENDMENT AND FOR UNNECESSARY DELAY UNDER RULE 40(b), F. R. CR. P.

United States v. Theodore Mann (S. D. N. Y., Cr. 158-189, October 9, 1968)

The indictment in this five-count tax evasion case was returned in 1959 at which time the defendant was 67 years old. It was moved for trial in May of 1968 and set for trial on October 14, 1968. The defendant moved for a dismissal of the indictment on the ground that he had been deprived of his right to a speedy trial or a trial in the words of Rule 40(b) without "unnecessary delay". The district court found that there was no satisfactory reason for the delay. The affidavits of seven Assistant United States Attorneys to whom it had been successively assigned reflected only that defense counsel had suggested that he would show them some evidence to dissuade the Government from proceeding. A principal witness in the case had died in 1963 with consequent possible prejudice to the defendant. The possibility that the defendant waived his right to a speedy trial was discounted as merely one factor to be considered in evaluating the defendant's motion. Finally, the court specifically premised its decision to dismiss in the alternative on either the Sixth Amendment guarantee or the admonition of Rule 40(b) giving the court discretion to dismiss if there is unnecessary delay in bringing the defendant to trial.

Questions of the appealability of the dismissal order and the advisability of appeal are under review.

Staff: United States Attorney Robert M. Morgenthau and Assistant U. S. Attorney Frank M. Tuerkheimer (S. D. N. Y.)

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