Published by Executive Office for United States Attorneys,
Department of Justice, Washington, D. C.
December 4, 1959

United States

DEPARTMENT OF JUSTICE

Vol. 7 No. 25

UNITED STATES ATTORNEYS

BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 7 December 4, 1959 No. 25

IMPORTANT NOTICE

AS OF SEPTEMBER 30, 1959, THE FIRST QUARTER OF THE FISCAL YEAR, CASE TERMINATIONS WERE DOWN 282 FROM THE SAME PERIOD FOR FISCAL 1959, AND AGGREGATE COLLECTIONS WERE $364,000 LESS THAN FOR THE FIRST QUARTER OF THE PRECEDING YEAR.

* * *

CLASSIFICATION - LEGAL STENOGRAPHERS

The question is frequently asked, "Why can't our secretaries be classified as Legal Secretaries rather than Clerk-Stenographers?" The basic answer is that position classification standards published by the Civil Service Commission do not provide for that title. The Commission considers positions which involve the performance of clerical and stenographic duties for attorneys to be so similar to other Clerk-Stenographer positions (e.g., those that provide similar services for doctors, engineers or administrative personnel) that the same title is appropriate.

As you know, certain types of clerical assistants have been referred to informally as Legal Secretaries and Legal Stenographers, to distinguish them from Clerk-Stenographers, Clerk-Typists or Secretaries who do not assist attorneys. These so-called "working" titles are appropriate for use within the field offices and divisions of the Department. However, all official documents such as personnel actions and payrolls, must use the approved Civil Service Commission titles.

The Department has requested the Civil Service Commission to consider revising certain standards having to do with legal clerical work. There is some possibility that revision of these standards would result in authorization of the title Legal Stenographer or a similar title. In any event, whether the official classification title is Clerk-Stenographer or something else, the Department is intensely aware of the important role which Legal Stenographers play in the conduct of the Department's business, and will continue its efforts to enhance the positions in every way consistent with the Classification Plan.

* * *

JOB WELL DONE

The Chief Inspector, Post Office Department, has commended United States Attorney James A. Borland, District of New Mexico, for his fine work in a recent mail fraud case, involving the sale of knitting machines for work-at-home purposes, in which six defendants were convicted. The

letter stated that this was the first case involving knitting machines in which the defendants were found guilty by a jury; that despite an impressive array of legal talent representing the defense, Mr. Borland's outstanding handling of the case resulted in success; that there were a number of promoters of this type of scheme from other states present at the trial and the successful outcome may influence some of them to plead guilty to the charges against them; and that the convictions unquestionably will have a nationwide effect in helping to eradicate this type of mail fraud which annually obtains many millions of dollars from persons who can ill afford to lose it.

Acting United States Attorney Donald O'Connor and Assistant United States Attorney William J. Schafer, District of Alaska, First Division, have been commended by a Special Agent of the National Board of Fire Underwriters on their masterful preparation and presentation of the voluminous array of evidence in a recent arson trial which resulted successfully.

The General Counsel, Securities and Exchange Commission, has expressed appreciation for the fine cooperation and effort rendered by United States Attorney Chester A. Weidenburner and Assistant United States Attorney Jerome D. Schwitzer, District of New Jersey, in a recent fraud case.

Assistant United States Attorney Norton L. Wisdom, Eastern District of Louisiana, has been highly commended by the Coordinator, Greater Baton Rouge Port Commission, on the splendid contribution he made to the successful outcome of a recent condemnation trial in which his superior ability and competent handling of evidence and the testimony of witnesses were outstanding. In another letter commenting on the case, the Coordinator stated that Mr. Wisdom's able and energetic handling of the case was the finest exhibition of legal capability he had ever seen.

The General Counsel, Public Housing Administration, in commending United States Attorney M. Hepburn Many, Eastern District of Louisiana, on his capable presentation and trial of a recent case, stated that the favorable decision will serve as a valuable precedent and will result in very considerable savings to the Government. Private counsel for one of the parties involved in the case has written that the brief written by Mr. Many was one of the most devastating rebuttals to the usual theory presented in this type of case he had ever read.

United States Attorney S. Hazard Gillespie, Jr., and Assistant United States Attorneys Kevin T. Duffy and Silvio J. Mollo, Southern District of New York, have been congratulated by the Chief Inspector, Post Office Department, on bringing to a successful conclusion a recent case, involving the Postal Obscenity Statute, in which the first conviction in this District under 18 U.S.C. 1461 was obtained. Particular commendation was given Mr. Duffy who labored under severe strain due to demands for an early trial but who, despite the pressure necessitating long hours of arduous work including weekends, prepared the case brilliantly.

* * *

ANTITRUST DIVISION

Acting Assistant Attorney General Robert A. Bicks

SHERMAN ACT

Elimination of Competition - Steel Rebars. United States v. Blue Diamond Corporation, et al.,(N.D. Calif.). A civil antitrust complaint was filed on November 23, 1959 charging twelve reinforcing steel bar fabricators, a trade association, and six steel companies with conspiring to eliminate competition in the sale, distribution and fabrication of rebars in the States of Arizona, California, Idaho, Nevada, Oregon, Utah, and Washington.

The complaint alleged that the defendant fabricators (a) allocated rebar fabricating jobs among themselves; (b) fixed and adopted uniform contract terms of payment; (c) induced steel mills to refuse to sell rebars to general contractors; (d) induced steel mills to limit sales of rebars made to steel warehouses, building supply dealers, and small fabricators; and (e) used the facilities of the defendant trade association to further these agreements. The complaint further alleged that the defendant steel mills adopted and maintained such restrictive policies, which resulted in the suppression of competition in the sale, distribution and fabrication of rebars on the West Coast.

The term "rebars" means all types and sizes of steel bars and rods used to reinforce concrete work in various types of construction, such as buildings, highways, abutments, bridges, viaducts, dams, and tunnels. According to the complaint, total sales of rebars by defendant and other steel mills in the Western States amounted to approximately 491,000 tons valued at $69,000,000 in 1958. It was alleged that, during the same year, defendant fabricators and other members of defendant Association fabricated 298,000 tons of rebars which they sold for approximately $77,500,000. These sales, according to the complaint, accounted for approximately 75% of the total sales of rebars by all fabricators in the Western States.

In addition to injunctive relief, the suit seeks to prevent defendant steel mills, subject to appropriate conditions, from refusing to sell and from discriminating in the sale of rebars to any fabricator, general contractors, warehousing and building supply dealer.

Staff: Lyle L. Jones, Marquis L. Smith, William B. Richardson and Udell Jolley (Antitrust Division)

HOBBS ACT

Jail Sentences Imposed Under Hobbs Act. United States v. Irving Bitz, et al., (S.D. N.Y.). On August 3, 1959 defendant Irving Bitz pleaded guilty to four counts of a six count indictment which charged violations of the Sherman Act and the Hobbs Act in connection with the wholesale distribution of newspapers and magazines in the metropolitan New York area. Defendant Bitz was involved in Counts 1 (Section 1 of Sherman Act), 2 (Section 2 of Sherman Act), 5 (extortion), and 6 (conspiracy to extort).

District Judge Bryan imposed the following sentences upon the defendant on November 16, 1959:

Count 2 - $25,000 fine with no jail sentence
Count 5 - $10,000 fine and 5 years in jail
Count 6 - $10,000 fine and 5 years in jail to run concurrently with other jail sentence.

In view of the fact that District Judge Dimock had dismissed Count One of the indictment as against the remaining defendants in the case on November 12th, defendant Bitz withdrew his guilty plea on Count One of the indictment and entered a plea of not guilty.

Staff: Harry G. Sklarsky, Herman Gelfand, Donald Ferguson and Gerald R. Dicker (Antitrust Division)

CLAYTON ACT

Acquisition of and Merger With Competitors - Prefabricated Houses. United States v. National Homes Corporation, (N.D. Ind.). On November 20, 1959 a civil complaint was filed against National Homes Corporation charging that the recent acquisition of seven prefabricated house manufacturers by National violated Section 7 of the Clayton Act.

The corporations acquired include Knox Corporation, Thomson, Georgia; American Houses, Inc. Allentown, Pennsylvania; Lester Brothers, Incorporated, Martinsville, Virginia; W. G. Best Factory-Built Homes, Inc., Effingham, Illinois; The Thyer Manufacturing Corp., Toledo, Ohio; Fairhill, Inc., Memphis, Tennessee; and Western Pacific Homes, Inc., Decoto, California.

National Homes is and for a period of years has been the nation's largest producer of prefabricated houses. In 1958 its sales were more than $45 million and its assets were more than $51 million. It manufactures and produces prefabricated packaged houses at its plants in Lafayette, Indiana, Horseheads, New York, and Tyler, Texas. It markets these packaged houses to approximately 600 builder-dealers situated east of the Rocky Mountains with its principal sales areas in the midwest

and northeast sectors of the United States.

With the exception of the California Company, the acquired corporations' principal markets were in the midwest and the southeastern parts of the United States. Like National Homes, these corporations for the most part sold packaged houses through builder-dealers to the consumer public. The production of prefabricated houses has more than doubled since the end of World War II and the value of 1957 shipments of prefabricated houses was over $150 million. National Homes manufactured and sold approximately 25% of the nation's output of prefabricated houses in 1958 and the acquired corporations totaled nearly 13% of the national production. Thus, the merger has placed in the hands of the corporation, already dominant in the field, about 38% of total output.

Staff: John T. Duffner and Clement A. Parker
(Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General George Cochran Doub

SUPREME COURT

LABOR-MANAGEMENT RELATIONS ACT

Labor-Management Relations Act of 1947 Injunction Against Continuation of Steel Strike Upheld. United Steelworkers of America v. United States (S. Ct., November 7, 1959). Pursuant to Section 208 of the Labor-Management Relations Act, 61 Stat. 155, 29 U.S.C. 178, the Attorney General sought in the District Court for the District of Pennsylvania a 90-day injunction against the continuation of the industry-wide strike of workers in the basic steel industry. The injunction was granted by the District Court after finding, upon the evidence adduced, that (1) the strike affected a substantial part of the steel industry which is engaged in interstate trade, commerce, and transportation and (2) that, if permitted to continue, the strike would imperil the national health and safety.

The Supreme Court granted certiorari to review the judgment of the Court of Appeals for the Third Circuit affirming the District Court. In a per curiam decision, Justice Douglas dissenting, the Supreme Court upheld the issuance of the injunction.

Noting that the statute imposes on the courts the duty of finding whether the strike will imperil the "national health or safety," the Supreme Court, relying upon the evidence of the strike's effect on specific defense projects, held that the judgment of the Court below was amply supported on the ground that the strike imperils the national safety. The Court did not pass upon the disputed meaning of the statutory term "national health" which the Government had urged embraced the country's economic health, as opposed to the petitioner's argument that only the physical health of the citizenry was comprehended.

The Court rejected the petitioner's argument that a selective reopening of some of the steel mills would suffice to fulfill specific defense needs. Observing that the statute was designed to provide a public remedy in times of emergency, the Court held that the Government, under the statute, was not required either to "formulate a reorganization of the affected industry to satisfy its defense needs without the complete reopening of closed facilities, or demonstrate in court the unfeasibility of such a reorganization."

Finally, the Court rejected the petitioner's argument that there was no "case or controversy" before the federal court which it could adjudicate in the sense required by the Constitution. In this connection, the petitioner had argued that Section 208 was unconstitutional because it created no "duties" and conferred no "rights" other than the right to seek an injunction. The Court held, however, that the statute

recognized "certain rights in the public to have unimpeded for a time production in industries vital to the national health or safety" and that the Government, under the statute, was designated the "guardian of these rights in litigation."

Staff: Solicitor General J. Lee Rankin; Assistant Attorney General George Cochran Doub (Civil Division), Wayne G. Barnett (Assistant to the Solicitor General); Samuel D. Slade, Seymour Farber, Herbert E. Morris (Civil Division)

COURTS OF APPEAL

BANKRUPTCY

United States May Not Assert Priority for Debt Which, If Collected, Would Have to Be Shared With Private Party. Small Business Adm'n v. McClellan (C.A. 10, November 6, 1959). The SBA entered into a "Participating Agreement" with a bank whereby SBA agreed to purchase a 75% interest in a loan to be made by the bank, the bank would hold the note to be executed by the loan owner but, upon demand, would transfer the note to SBA, that the holder of the note would service it and remit to the other party its pro rata share, and that the two parties were to bear any loss incurred ratably according to their respective interests in the loan. In November 1956, SBA paid the bank $15,000 for its 75% share of the loan. The bank added $5,000 of its own money and then made the $20,000 loan to the borrower who executed and delivered a note payable to the bank and an agreement to use the loan proceeds solely for the purposes set out in the SBA loan authorization.

Subsequently, but before the loan was fully repaid, the borrower was adjudicated a bankrupt. At that time the bank still held the note, though it later assigned the note to SBA. SBA asserted a priority in the bankruptcy proceedings with respect to its 75% share of the loan on the ground that the debt was due the United States within the meaning of R.S. 3466, 31 U.S.C. 191, and therefore it was entitled to a priority under Section 64(a)(5) of the Bankruptcy Act, 11 U.S.C. 104(a)(5). The referee rejected this argument on the ground that the SBA was not the type of governmental entity entitled to the priority accorded to the United States by 31 U.S.C. 191. The district court affirmed on the ground that the SBA's interest in the note was acquired by assignment after the filing of the petition in bankruptcy.

The Court of Appeals, without passing on the correctness of the grounds of the referee's or district court's decisions, affirmed on a third ground. It held that, assuming without deciding that the interest of SBA is a debt due the United States, the SBA agreement to share ratably with the bank any proceeds realized bars the application of the priority. For otherwise, the Court reasoned, the priority would be used -- at least in part -- to collect a debt due a private individual in conflict with the principle of Nathanson v. N.L.R.B., 344 U.S. 25, 28.

Staff: Morton Hollander; Peter H. Schiff (Civil Division)

FEDERAL TORT CLAIMS ACT

Government Held Covered by Ship's Service Officer's Insurance Policy Issued Before Enactment of Tort Claims Act. Grant v. United States (C.A. 2, October 22, 1959). Plaintiff suffered an injury in 1952 while descending an unlighted stairway in the course of delivering newspapers in a federal building used by the Ship's Service Store of the United States Merchant Marine Academy. Plaintiff brought this suit against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b). The Government brought in, by third-party complaint, McGuire, officer in charge of the Ship's Service Store, and the Royal Indemnity Company, an insurance carrier which had on June 30, 1945, written liability insurance on the premises, naming the "Ship's Service Officer" as the insured.

The district court, finding that the lights were off when plaintiff sustained his injury, held the United States liable but dismissed its third-party complaints against both McGuire and Royal Indemnity, relying on Gilman v. United States, 347 U.S. 507.

The United States appealed, contending primarily that, while the Gilman decision prevented any recovery over against McGuire, that decision in no way precluded recovery by the United States against Royal on the theory that the United States was an additional insured under the policy and so had a direct contract right against the insurer.

The Court of Appeals, accepting the Government's argument, reversed the district court's dismissal of the third-party complaint against the insurance company. In the first appellate court opinion which limits the effect of Gilman, the Court distinguished Gilman on the ground that here the Government was not seeking recovery from Royal as the indemnifier of its employee, but was seeking recovery on a direct right which it claimed as an insured under the policy of insurance. The Court interpreted the contract of insurance, holding that the United States was an insured thereunder even though it was not expressly so named in the policy. The Court further held that the United States was entitled to coverage under the policy even though it was written before enactment of the Tort Claims Act in August 1946. On this aspect of the case the Court noted that the policy should be interpreted so as to allow its protection to attach to the United States upon enactment of the Tort Claims Act even though theretofore the United States could not have been held liable to the plaintiff.

Staff: Morton Hollander (Civil Division)

Reinstatement of Action Dismissed Without Prejudice Is Barred after Statute of Limitations Has Run. Humphreys v. United States (C.A. 9, October 21, 1959). Plaintiff instituted suit against the Government in July 1957 under the Tort Claims Act, alleging that the negligence of an agent of the Government caused the death of her husband on May 24, 1956. The suit was brought in the District of Oregon, though the alleged

negligence and the death occurred in Arkansas. In March 1958 plaintiff moved to dismiss the action without prejudice pursuant to F.R. Civ. P. 41(a)(2), stating that she intended to refile the suit in Arkansas for the convenience of the parties and witnesses. The Court granted the motion and dismissed the suit.

Plaintiff's attorneys failed to bring suit in Arkansas until three days subsequent to the running of the two-year limitations period for instituting actions under the Tort Claims Act. 28 U.S.C. 2401. (Plaintiff's action in the Arkansas District is still pending.) Plaintiff then, on June 18, 1958, moved the Oregon District Court to set aside its dismissal and to reinstate the action previously pending there. The District Court denied the motion.

Upon appeal, plaintiff argued that the District Court abused its discretion in denying the motion as the ends of justice are defeated by the failure to allow reinstatement.

The Court of Appeals affirmed, holding that the dismissal without prejudice left the situation as if the suit had never been brought, that the waiver of sovereign immunity contained in the Tort Claims Act is limited to a two-year period, and that therefore the District Court had no jurisdiction to reinstate the action once the two years had run.

Staff: United States Attorney C. E. Luckey; Assistant United States Attorney Robert R. Carney (D. Ore.)

United States Attorney Representation of Government Employee Sued Individually Does Not Make United States Party Under Federal Tort Claims Act; Requirements of F.R. Civ. P. 4(d)(4) Must Be Met Before United States Is Party to Suit. Bland and United States v. Britt (C.A. 4, October 19, 1959). Britt brought suit in a North Carolina state court against Bland individually for damages sustained in a vehicular collision while Bland was engaged in his duties as an employee of the Post Office Department. The United States Attorney, representing Bland under 5 U.S.C. 309, 316, and D.J. Circular No. 4122, May 11, 1950, removed the case to a federal district court under 28 U.S.C. 1442. After the completion of the trial, some five years after the collision, the district court announced that, as it found Bland negligent in the course of his employment and Britt free from contributory negligence, it would give Britt the option of having the United States added as a party defendant and having judgment entered against the United States as well as against Bland. Britt exercised the option. The district court, thereupon, in the order of judgment, added the United States as a party and entered judgment against both it and Bland with interest running against each from the date of judgment.

The Government and Bland appealed, asserting (1) that the district court had no jurisdiction to add the United States as a party more than three years after the Tort Claims Act period of limitations had run, 28 U.S.C. 2401; (2) that the district court had no jurisdiction to enter judgment against the United States when it was not a party to the suit,

the service requirements of F.R. Civ. P. 4(d)(4) had not been met, and the Government had been given no opportunity to answer or defend; (3) the district court had no jurisdiction to award interest against the United States, 31 U.S.C. 724a; and (4) the district court's finding that Britt was not contributorily negligent was clearly erroneous.

The Court of appeals reversed the judgment against the United States, holding that (1) the attempt to add the United States as a party was ineffectual as the requirements of Rule 4(d)(4) had not been met; (2) the fact that Bland was represented by a United States Attorney did not make the United States a party; and (3) the court was therefore without jurisdiction to enter judgment against the United States. The appeals court affirmed the judgment against Bland, holding that the finding as to contributory negligence was not clearly erroneous.

Staff: Sherman L. Cohn (Civil Division)

INTERSTATE COMMERCE ACT

ICC Approval Required of Agreement Which in Substance, Though Not in Form, Amends Railroad Stock. United States v. New York, New Haven, and Hartford R., et al. (C.A. 2, November 2, 1959). In 1955, the New Haven Railroad induced the appellee banking group to buy up about 130,000 shares of outstanding New Haven preferred stock, which was then selling for $60 per share, by entering into an agreement with the syndicate in which the railroad obligated itself to redeem the stock at the end of 1959 at $75 per share.

The stock is now selling on the market at about $11 per share. Thus, the agreement, if enforceable, would have forced New Haven to buy back the 130,000 shares for a price of about 10 million dollars even though those shares are worth only one and one-half million dollars at present market prices.

On November 18, 1958, the United States at the request of the ICC and in order to avert financial ruin of the railroad and to enable it to continue to serve the public as a common carrier, filed this action for (1) a declaratory judgment that the redemption agreement was unlawful and void, since ICC authorization was required by 49 U.S.C. 20a(2) and had not been obtained, and (2) a decree enjoining the carrying out of the agreement. The district court granted summary judgment in favor of the banking group and denied the Government's motion for summary judgment.

The Court of Appeals reversed, holding that the 1955 agreement, by conferring valuable redemption rights, significantly enlarged the rights of the holders of the 130,000 preferred shares and therefore was an "issue" of stock within the meaning of Section 20a(2), which requires prior ICC approval "for any carrier to issue any share of capital stock." The Court relied on ICC practice as furnishing settled statutory construction that such amendments are "issues" under Section 20a(2) though they may not be

"issues" in general corporation law. The Court rejected as immaterial the contentions of the banking group that (1) no modification was made on the shares themselves or in the corporate charter, (2) the agreement pertained to only 130,000 out of a total of over 500,000 outstanding preferred shares, (3) the agreement was executory, and (4) the ICC had held that various sales and finance contracts, not evidenced by a note or bond, are not within the meaning of Section 20a(2). The Court further rejected the banking syndicate's argument that the inaction of the ICC from November 1955, when the agreement was first consummated (at which time the ICC was informally apprised of the agreement) until November 1958, when this suit was instituted, amounted to administrative construction of nonapplicability of Section 20a.

The Court of Appeals accordingly held the 1955 agreement to be unlawful and unenforceable and directed the district court to enjoin the banking group from exercising its rights against the New Haven under the agreement.

Staff: Assistant Attorney General George Cochran Doub; Morton Hollander (Civil Division)

VETERANS AFFAIRS

Claim for NSLI Benefits Barred by Statute of Limitations; Claim for Death Benefits Denied by Administrator Not Reviewable by District Court. De Sinlao v. United States and Whittier (C.A.D.C., November 6, 1959). Plaintiff, the widow of a Philippine Scout killed in 1941, applied for gratuitous insurance benefits available to her under the National Life Insurance Act of 1940, and for certain death compensation benefits. The Veteran's Administrator granted her claim in part, but denied it for periods subsequent to 1948 on the ground that, in that year, she had held herself out in her community to be married. In fact, she was not married under Philippine law and the relationship was meretricious. Nevertheless, the Veteran's Administrator ruled that she was estopped to deny remarriage. Under the statute, her rights to benefits terminated upon marriage.

Plaintiff brought suit in the District Court in June 1957, more than six years after the denial of her claim. The District Court ruled that the six-year statute of limitations barred her insurance claim. 38 U.S.C. 784(b). It further ruled that under 38 U.S.C. 211(a) it lacked jurisdiction to review the Administrator's decision denying her death compensation claim.

The Court of Appeals affirmed, holding that 38 U.S.C. 784(b) flatly barred the insurance claim, and that in 38 U.S.C. 211(a) Congress had removed from the district court jurisdiction to review, either as to law or fact, decisions by the Veteran's Administrator respecting claims for benefits under laws administered by him. The Court implicitly distinguished Wellman v. Whittier, 259 F. 2d 163 (C.A.D.C.), in which it had refused to apply 38 U.S.C. 211(a), on the ground that the Whittier case involved a forfeiture and not a claim. Judge Miller dissented, viewing plaintiff's

action as a suit to compel the Veteran's Administrator to perform his statutory duty and not as a suit to review a decision denying a claim.

Staff: Peter H. Schiff, Howard E. Shapiro (Civil Division)

* * *

C R I M I N A L D I V I S I O N

Assistant Attorney General Malcolm R. Wilkey

REFERRAL PROCEDURE

Direct Referrals from Department of Agriculture. Arrangements have been made with the Department of Agriculture for the direct referral to United States Attorneys by that agency of cases involving false claims for services performed by fee-basis veterinarians employed by the Animal Disease Eradication Division, Agricultural Research Service. The substantive violations in these cases are under 18 U.S.C. 287 and 1001, and United States Attorneys are authorized to decline or initiate criminal prosecution as their judgment may dictate.

RAILWAY SAFETY APPLIANCE ACT

Transfer Operations Within Railroad Yard Constitute Train Movements Within Meaning of Power Brake Provisions of Safety Appliance Act; Statute to Be Liberally Construed. United States v. Seaboard Air Line Railroad Company (S. Ct.). The Supreme Court on November 9, 1959, unanimously held that the power brake provisions of the Safety Appliance Act applied to all four of the movements in issue of locomotives and freight cars within a railroad freight yard. The movements were two miles long and one of them included a stop midway to pick up additional cars. Accordingly, the Court held, in each instance the cars should have been coupled with each other and to the locomotive with power brakes (45 U.S.C. 1, 6, 9; 49 C.F.R. 132.1). During the described runs there were no switching operations, i.e., no "sorting, or selecting, or classifying" of cars "involving coupling and uncoupling and the movement of one or a few at a time for short distances." Switching movements preceded and followed the runs in question; the cars involved in the movements had been received from consignors and were being delivered to consignees in the freight yard. The Court held that the two mile long transfer operations were intrinsically no different, for purposes of the Act, than a main-line haul. Further, it is not for the courts to determine in a particular case whether the safety measure of coupling the air brakes is or is not needed, for Congress has determined the policy that governs in applying the law. The legislative history shows that Congress intended to protect railroad employees and the Act should therefore be liberally construed as a safety measure. "Movements which, though miniature when compared with main-line hauls, have the characteristics of the customary 'train' movement, [the usual freight run] and its attendant risks, are to be included."

Staff: John F. Davis (Solicitor General's office);
Julius F. Bishop (Criminal Division).

BANK ROBBERY
(18 U.S.C. 2113)

Concurrent Sentences Imposed Under Subsections (a) and (d). United States v. James Joseph Leather (C.A. 7, October 20, 1959). Defendant pleaded guilty to an indictment in two counts. Count 1 (robbery) was predicated on Section 2113(a), upon which count Leather was sentenced to 15 years' imprisonment. Count 2 (robbery aggravated by placing lives in jeopardy by the use of a dangerous weapon) was predicated on Section 2113(d), on which count defendant was sentenced to 5 years, to be served concurrently with the sentence on Count 1.

Leather began serving the sentences on May 23, 1952. On December 2, 1958, he moved to vacate the 15 year sentence on Count 1, contending that the robbery charged in that count merged into the aggravated robbery charged in Count 2. The district court denied defendant's motion, but on its own motion vacated the 5 year sentence imposed on Count 2.

Leather appealed, reiterating his contention of merger, and also contending that the 5 year sentence under Count 2 had been satisfied by imprisonment already served, with the result that he should now be released.

The Seventh Circuit refused to accept his contentions and affirmed the district court. The Court concluded that the defendant was found guilty of a single offense for which a single punishment should have been imposed, but that the district court had subsequently expunged the second sentence. It was stated that both sentences were imposed simultaneously to be served concurrently; the total punishment imposed was not in excess of the permissible limit on either count; and the defendant had not been prejudiced by the technical error committed and then corrected by the District Court.

The opinion presents a comprehensive review of Prince v. United States, 352 U.S. 322 (1957), and subsequent cases decided under the Act. The Court decided that there was no real merger of offenses in the instant case, and adverted to the principle that if a valid concurrent sentence of equal or longer duration exists, it is immaterial whether lesser concurrent sentences are valid.

Staff: United States Attorney Edward G. Minor and Assistant United States Attorneys Howard C. Equitz and Howard W. Hilgendorf (E.D. Wisc.).

MOTORBOAT ACT

Negligent Homicide. Benjamin L. Hoopengarner v. United States, 270 F. 2d 465 (C.A. 6). The defendant was convicted on both counts of an indictment charging (1) misconduct, negligence, and inattention

in operating a motorboat, as a result of which a life was lost, in violation of 18 U.S.C. 1115, and (2) operating a motorboat in a reckless and negligent manner so as to endanger the life, limb, and property of other persons, in violation of Sections 13 and 14 of the Motorboat Act (46 U.S.C. 526 (l) and (m)). He was sentenced to imprisonment for one year under each count, the sentences to run concurrently.

In affirming the judgment of conviction, the Court of Appeals held (1) federal criminal prosecution after a state criminal prosecution for the same acts does not constitute double jeopardy (the Court's decision on this point was held in abeyance pending the Supreme Court's decision in Abbate v. United States, 359 U.S. 187), (2) the constitutional right to a speedy trial applies only after criminal charges are formally lodged, and the statute of limitations applies to any delay in the commencement of criminal proceedings, (3) the defendant's negligent acts causing collision which resulted in the deceased person's being in the water when the fatal blow was struck in the darkness of night by a rescue vessel, were the proximate cause of death, (4) the admiralty and maritime jurisdiction of the United States includes navigable waters within a state (Michigan), and (5) the sentences to imprisonment for one year under each count to run concurrently were far from excessive, harsh, or cruel, and there was no abuse of judicial discretion in that regard.

This is the first decision of a court of appeals and the only reported decision under 18 U.S.C. 1115 since the present Criminal Code became effective on September 1, 1948. Prior to that date this statute (then 18 U.S.C. 461) was limited in application to the special maritime and territorial jurisdiction of the United States defined in 18 U.S.C.7 (formerly 18 U.S.C. 451). However, the present Criminal Code removed that limitation, and the statute is now one of general application.

Staff: United States Attorney Frederick W. Kaess and Chief Assistant United States Attorney George E. Woods (E.D. Mich.).

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

NATURALIZATION

Midway Islands, Prior to Statehood of Hawaii. Included in Hawaii Within Meaning of Naturalization Provisons of Immigration and Nationality Act. Petitions for naturalization of Teofilo Nitcha Acosta, Pedro Lopez and Felix Manibog, (D. Hawaii, filed November 2, 1959). Petitioners are natives of the Philippines who were admitted to Hawaii for permanent residence. They applied for naturalization. Section 316 of the Immigration and Nationality Act, 8 U.S.C. 1427 required that they have five years continuous residence preceding the filing of their applications. Their applications were opposed before the Court on the ground that this period of residence had not been fulfilled by reason of petitioners' absence from Hawaii in the course of temporary employment during that period on what is known as Midway Islands. The provisions of subsection (b) of section 316 are designed to excuse absences "from the United States" under certain conditions, but petitioners did not avail themselves of that subsection.

Referring to section 101(a)(38) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(38), which defines the term "United States" as the continental United States, Alaska, Hawaii, Puerto Rico, Guam and the Virgin Islands, the Court stated that in its opinion the Midway Islands were included in the definition of United States under the use of the term "Hawaii" at least prior to the Hawaii Statehood Act of March 18, 1959, since the term Hawaii was not limited as "territory" or "islands", but merely by reference to "Hawaii". The Court thought this conclusion was further evidenced by the fact that Congress saw fit specifically to set forth in the Statehood Act for Hawaii that the "State shall not be deemed to include Midway Islands", thus apparently feeling that unless such islands were excluded they would be included as part of the new state.

Upon the basis of the foregoing reasons the Court held that the petitioners had made no departure from the United States in proceeding to Midway Islands for employment and that they had fulfilled the requirement of five years continuous residence in the United States.

The objections to the petitions for naturalization were overruled.

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Contempt of Congress. United States v. Martin Popper (D.C. D.C.) On November 24, 1959 a federal grand jury in Washington, D.C. returned an indictment charging Martin Popper with contempt of Congress arising out of hearings of the House Committee on Un-American Activities in Washington in June 1959. The Committee at that time, through a subcommittee, was inquiring into passport security and related subjects in an effort to determine the need for remedial legislation in light of the Supreme Court's decision in the Kent and Briehl cases. Popper, a New York attorney, served as Secretary of the National Lawyers Guild from 1940 to 1947. He was charged in a five-count indictment with refusing to answer questions as to whether he was a Communist Party member when he applied for passports in 1946 and 1958, when he attended a convention of the International Congress of Lawyers in Paris in 1946, when he made a speech at a conference of the International Association of Democratic Lawyers in Prague in 1948 and when he was identified in testimony in 1955 as a member of a Communist Party lawyers group. In declining to answer these questions, Popper did not invoke the Fifth Amendment, but relied instead primarily on the First Amendment and the Supreme Court decision in Watkins v. United States. Three days subsequent to Popper's appearance, the Supreme Court announced its decision on Barenblatt v. United States, which upheld the authority of the Committee with respect to investigations of Communist activities.

Staff: Assistant United States Attorney William Hitz (D.C.)

Suits Against the Government; Industrial Personnel Security. Rose Haber v. Neil McElroy and A. Tyler Port (D.C. D.C.) Rose Haber a mechanical engineer, employed by the Loral Electronics Corporation, a defense contractor, was advised on July 29, 1958 that her clearance for access to classified information was suspended pending further processing of her case. She was thereupon discharged from her employment by Loral Electronics Corporation. Following a hearing before the New York Industrial Personnel Security Board she was notified that her clearance for access to classified defense information was determined not to be clearly consistent with the interests of national security. On July 2, 1959 plaintiff requested the defendant McElroy to reverse the adverse determination of June 12, 1959, calling attention to the decision of the Supreme Court in the case of Greene v. McElroy, et al., and claiming that the hearing in the instant case was contrary to law. The defendant A. Tyler Port advised the plaintiff on August 6, 1959 that the procedures followed by the Department of Defense in making determinations of eligibility for access to classified defense information were under review and any decision as to whether or not to reopen Mrs. Haber's case for reconsideration would necessarily have to be held in abeyance pending the completion of such review. The defendants contend that Greene v. McElroy did not vitiate the entire Industrial Personnel Security Program but only a hearing without confrontation and cross-examination. Accordingly

plaintiff's hearing is null and void but she is still suspended pending a lawful hearing or other action to be taken within a reasonable time. Thereafter on November 10, 1959 plaintiff filed suit alleging that the Government had unlawfully deprived her of her livelihood without due process by denying her clearance to defense secrets without affording her a hearing at which there would be confrontation and cross-examination of witnesses, and that the hearing was not explicitly authorized by either the President or Congress. The plaintiff seeks a declaration that the determination denying her an industrial personnel security clearance be declared null and void and that the defendants be restrained from enforcing the determination denying her access to classified defense information.

Staff: Oran H. Waterman and Leo J. Michaloski
(Internal Security Division)

* * *

LANDS DIVISION

Assistant Attorney General Perry W. Morton

Jurisdiction; Necessary and Proper Parties; Indians. John J. Spriggs, Sr., v. Fred A. Seaton, Secretary of the Interior and Mary Bradford, known also as Mary O'Neal Chandler (C.A. 10, October 23, 1959). This is an appeal from an order of the district court sustaining motions to dismiss by Fred A. Seaton, Secretary, and Mary Bradford. Suit had been instituted by Spriggs pursuant to a Special Act, approved August 26, 1958, which gave jurisdiction to the District Court of Wyoming to adjudicate his claim as against the United States. The Secretary's motion was based on the principle that he could be sued only at the place of his official residence, Washington, D. C. The motion by Mary Bradford, allegedly a restricted Indian, was sustained in the District Court on the grounds of laches and that the applicable statute of limitations had run. The appellate court expressly declined to decide whether the Secretary had been properly dismissed, since under the Special Act, Spriggs could receive all the relief to which he was legally entitled in the suit against the United States. As to the dismissal of Mary Bradford, who was not represented by Government counsel, the Court of Appeals held that Mary Bradford was not a necessary party since the basic issue in the case, whether or not she was in fact a restricted Indian, could be adjudicated without her presence; and, although she may have been a property party, she had voluntarily removed herself from the proceedings by her motion to dismiss. Accordingly, since Spriggs has pending his suit against the United States, the Court stated, in conclusion, that it did not deem it necessary to decide whether Secretary Seaton or Mary Bradford were correctly dismissed by the court below.

Staff: Robert S. Griswold, Jr. (Lands Division)

Indians; Inapplicability of First Ten Amendments to Tribal Legislation; Status of Tribal Nations. Native American Church of North America, et al., v. Navajo Tribal Council, et al. (C.A. 10, November 17, 1959). This was a suit to test the validity of a Navajo Tribal ordinance which prohibits the use of possession of the mescal button known as peyote on the Navajo reservation. The suit was brought by the Native American Church and several of its members who alleged that the use of peyote was an indispensable part of religious ceremonies of that church, and, therefore, sought to enjoin enforcement of the ordinance on the ground that it violated their rights of religious freedom under the First Amendment to the Constitution.

In affirming dismissal the Court of Appeals held that the semi-independent, quasi-sovereign Indian tribes are distinct legal entities, and that federal laws are applicable within their territorial jurisdiction only where Congress has expressly so stated. The Court stated that the federal courts are without jurisdiction over matters involving purely

internal tribal affairs, noting that not a single law has been found which undertakes to subject the Navajo tribe to the laws of the United States with respect to their internal affairs. Relying on those cases which hold the Fifth Amendment inapplicable to tribal action, and the recognized text authority in this field, the Court held that the First Amendment was applicable only to Congress, and by the Fourteenth Amendment, to the States. Accordingly, Indian tribes, enjoying a higher political status than states, are subordinate and dependent nations possessed of all powers as such, limited only to the extent that such powers have expressly been denied to them by the superior sovereign, the United States. Therefore, there being no law or treaty by Congress, which expressly binds the tribes under the First Amendment, it follows that neither under the Constitution, nor the laws of Congress, do the federal courts have jurisdiction of tribal laws or regulations, even though they may have an impact to some extent on forms of religious worship. Taking this ground the Court ignored various jurisdictional objections.

Staff: Robert S. Griswold, Jr. (Lands Division)

* * *

TAX DIVISION

Assistant Attorney General Charles K. Rice

CIVIL TAX MATTERS
Appellate Decisions

Estimated Taxes; Liability for Additions for Failure to File Declaration of Estimated Tax and for Substantial Underestimate of Tax Where Taxpayer Fails to File Declaration; Section 294(d)(1)(A) and (d)(2) of 1939 Code. Commissioner v. Fred N. Acker (Sup. Ct., November 16, 1959). The taxpayer, without reasonable cause, failed to file a declaration of his estimated income tax for any of the years 1947 through 1950. The Commissioner imposed an addition to the tax for each of these years under Section 294(d)(1)(A) of the 1939 Code for failure to file the declaration and also imposed a further addition for each of these years under Section 294(d)(2) for a substantial underestimate of the estimated tax. The Tax Court sustained the Commissioner's imposition of both additions. The Sixth Circuit affirmed with respect to the addition imposed for failure to file the declaration but reversed with respect to the addition imposed for substantial underestimation of the tax, holding that Section 294(d)(2) does not authorize the treatment of a taxpayer's failure to file a declaration as the equivalent of a declaration estimating a zero tax, and that the provision of the Regulations which purports to do so (Treasury Regulations 111, Sec. 29.294-1(b)(3)(A)) is not supported by any statute and is invalid. The Supreme Court, by a 6 to 3 decision, affirmed the Court of Appeals. Justices Frankfurter, Harlan and Clark dissented.

The majority opinion, written by Mr. Justice Whittaker, held that the addition for underestimation is a penalty provision and must be strictly construed and there is nothing in the language of the statute which purports to make the failure to file a declaration equivalent to a declaration of no tax. The fact that the provision of the Treasury Regulations had been adopted contemporaneously with the original enactment of the statute and had adopted without change the language of the committee reports accompanying the statute, did not persuade the majority of the Court. They held that the committee reports pertained to the forerunner of the section here involved and not to the section itself, and the legislative history of the initial enactment is not so persuasive as to overcome the language of the statute. Further, the fact that the statute had been amended several times subsequent to the promulgation of the Regulations, but that Congress had not made any relevant changes in Section 294(d)(2), was held not to be significant here on the ground that the Regulations were invalid as an attempted addition to the statute of something which is not there, and that successive reenactment of the statutory provision did not result in Congressional approval.

The dissenting opinion, written by Mr. Justice Frankfurter, while stating that a finding that a failure to file a declaration constitutes a "substantial underestimate" would be to attribute to Congress a most unlikely meaning for that phrase, nevertheless holds that the majority

opinion errs in disregarding what it considers to be of controlling significance here, i.e., the committee reports. The minority opinion holds that these reports constitute the most persuasive kind of evidence of Congressional intent that the additions for substantial underestimate may be imposed where a declaration was not filed. The minority opinion also holds that the subsequent revision of Section 294 did not affect its substance, and that the committee reports continued to carry their original gloss.

The effect of this decision is that under the 1939 Code an addition for substantial underestimate may not be imposed where a taxpayer fails to file a declaration of estimated taxes.

The 1954 Code (Section 6654) has eliminated the question decided by the Supreme Court with respect to taxable years beginning after January 1, 1955, by providing for a single addition of 6% of the amount of underpayment, whether for failure to file a declaration, a failure to make timely payment of the quarterly installments or for substantial underestimate.

Staff: Karl Schmeidler (Tax Division)
Ralph S. Spritzer (Office of the Solicitor General)

Levy; Property of Arrested Taxpayer, Taken from Him Incidental to His Arrest and Held for Safekeeping by United States Marshal Held Subject to Lien and Levy. Richard L. Simpson, et al. v. John L. Thomas and Earl J. Butler (C.A. 4, November 2, 1959.) Thomas and Butler were arrested at different times for the same violations of the internal revenue laws by the illicit distilling of whiskey. A search, incidental to their arrest, disclosed a substantial amount of cash in the possession of each. It was taken and held for safekeeping by the United States Marshal. Immediate jeopardy assessments were made by the District Director, and notices of lien and levy served upon the Marshal, after the prisoners refused payment, before they were to be released on bail and the cash could be returned to them. In the case of Thomas, the Marshal paid over the cash to the collection officer and it was covered into the United States Treasury. Butler filed a motion for return of the money which was then denied but at the district court's suggestion, the Marshal retained the money.

Both Thomas and Butler thereupon filed civil suits for the return of the money, Thomas against the District Director and Butler against the Marshal. In the criminal proceedings at the conclusion of the trial, the district court issued an order against the District Director and the Marshal to show cause why the money should not be returned to the claimants. After a hearing, the district court ordered the money to be returned on the ground that property of arrested persons is in the custody of the court and immune from lien and levy.

This decision was reversed by the Court of Appeals. It held that since the property, at the time of the notices of lien and levy, was the

property of the taxpayers, it was subject to lien and levy and the Marshal could not lawfully return the money to the prisoners without subjecting himself to personal liability therefor under 26 U.S.C. 6321. The appellate court further held that the concern of the district court of an abuse of criminal process was not justified here since there was no suggestion in the case that the arrests were made to enforce a civil liability for taxes. It further appeared that in this case the property was not necessary to the powers or jurisdiction of the court below. The Court noted that where the property is necessary to such powers or jurisdiction, e.g., as evidence in a case, the Marshal would be required to retain possession pending an order of the court. Even in these circumstances, however, the property is subject to lien, is not to be returned to the taxpayer, and may be taken by the United States when the criminal proceedings are concluded. The taxpayer must contest his liability for the taxes in appropriate proceedings, other than the criminal case.

Staff: Joseph Kovner (Tax Division)

District Court Decisions

Mandamus: Suit to Compel Release of Federal Tax Liens by District Director. James R. Whelpley v. A. R. Knox, District Director 176 F. Supp. 936 (D. Minn.). This action was brought to compel the District Director of Internal Revenue to release certain tax liens outstanding against the plaintiff on the ground that they were void by reason of the running of the statute of limitations. The plaintiff claimed that he was entitled to this mandatory relief under the Administrative Procedures Act. The Court dismissed the complaint on the ground that the federal tax liens were the property of the United States and not the property of the District Director, thereby making the United States an indispensable party to this suit. The Court further stated that the Administrative Procedures Act was not an implied waiver of all Government immunity from suit and that it did not apply to suits restraining the collection of federal taxes by reason of the specific prohibition against such suits found in Section 7421, Internal Revenue Code of 1954.

Staff: United States Attorney Fallon Kelly (D. Minn.)
John J. Gobel (Tax Division)

Lien Foreclosure Suit. Hoffmann, Donahue, Graff, Schultz and Springer v. LaRose, et al. (D. Minn., Aug. 14, 1959). The taxpayer was arrested on August 5, 1957 and certain money and property were seized. Two days later he assigned these properties to the plaintiff for good and valuable consideration. The property was sold and the proceeds therefrom were placed in the registry of the Court pending the adjudication of the claims of the plaintiff and others including the United States. The Government claimed a lien upon these funds arising from two assessments against the taxpayer made on August 15, 1957 aggregating $21,410.99. The Court granted judgment for the plaintiff holding that

on the dates of the assessments the taxpayer had no interest in the disputed property. The bona fides of the assignment was not challenged and the Government's claim that the assignment was in fact only a security interest was not supported by the evidence.

Staff: United States Attorney Fallon Kelly and Assistant United States Attorney William S. Fallon (D. Minn.); John J. Gobel (Tax Division)

Suit for Return of Money Illegally Seized to Pay Tax Liabilities of Another. First National Bank of Minneapolis v. United States (D. Minn., Aug. 21, 1959). The plaintiff bank alleged that one Mid-States Company, Inc., assigned its rights to the future proceeds of a subcontract to secure two loans of $47,000 from the plaintiff. Thereafter, Mid-States became delinquent in the payment of its employment taxes and the Internal Revenue Service seized proceeds due Mid-States under the subcontract and credited them toward these tax liabilities. Plaintiff brought this suit against the United States claiming that the assignment had passed title to the proceeds of the contract prior to the creation of the tax liens and that, therefore, the seizure was illegal. The Court granted the Government's motion to dismiss stating that 28 U.S.C. 1346(a)(1) does not confer jurisdiction upon a nontaxpayer to sue the United States on prior claims against property seized in tax foreclosure proceedings. First National Bank of Emlenton v. United States, 265 F. 2d 297 (C.A.3).

Staff: United States Attorney Fallon Kelly and Assistant United States Attorney Hyam Segell (D. Minn.) John J. Gobel (Tax Division)

* * *

I N D E X