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UNITED STATES ATTORNEYS
BULLETIN

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IMPORTANT NOTICE

Until further notice, no action for cancellation of naturalization under Section 340(d) of the Immigration and Nationality Act (8 U.S.C. 1451 (d)) should be instituted. In instances in which a complaint has been filed in such a proceeding without the attachment of an affidavit of a consular officer or other official of the State Department showing good cause and service has not been completed, the action should be dismissed immediately. In instances in which service has been completed, the case should be held in abeyance. Further instructions will be issued following the decision of the Supreme Court in two pending cases raising the issue of the sufficiency of affidavits showing good cause.

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IMPORTANT ANNOUNCEMENT

The Tax Division wishes to stress three items of immediate importance, the details of which are set forth, infra, in the Tax Division section of the Bulletin.

1. The Treasury Department has published its approval of a new procedure whereby checks in tax refund suits will be transmitted to United States Attorneys for delivery to taxpayers' counsel of record;

2. The Supreme Court's decision in Massei requires certain changes in the Suggested Instructions in criminal net worth cases; and

3. In Schaefer Brewing Co., the Supreme Court considered the question of the time within which an appeal may be taken from a District Court decision.

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LAW BOOKS AND CONTINUATION SERVICES

The Supplies and Printing Section of the Administrative Division automatically orders continuation services and pocket parts for existing sets of books in United States Attorneys' offices.

Any books and/or continuation services no longer required should be reported to the Supplies and Printing Section, Department of Justice, Washington 25, D. C., not later than May 31, 1958, so that arrangements may be made to cancel the service, transfer the books and services to a place needed, or other disposition made.

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COOPERATION WITH MARSHALS

The importance of complete cooperation between United States Attorneys and Marshals has been brought to the attention of the United States Attorneys in previous issues of the Bulletin. Despite these reminders, however, we continue to hear of areas in which such cooperation is in need of improvement. The following situations, recently brought to our attention, illustrate the areas in which coordination of effort is most urgently needed:

1. If a Marshal has been requested to produce a prisoner for arraignment, trial, or other purpose, he should be advised as soon as possible of a continuance or change in plans so that he will not produce the prisoner needlessly.

2. Whenever a complaint, information, or indictment is dismissed and the warrant has not been executed, the Marshal should be notified promptly so that he may return the warrant unexecuted to the issuing officer.

3. Whenever a writ of execution, fieri facias, etc., has been issued to the Marshal and the judgment debtor settles with the United States Attorney, the Marshal should be notified promptly so that he may return the writ to the issuing officer.

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SUGGESTED PROCEDURE FOR CLOSED CASES

On Page 170, Volume 6, Number 7 of the Bulletin, reference was made to the award given to Mrs. Margaret O. Oshiro, Southern District of California, for her suggestion concerning the establishment of a separate series of closed file numbers for certain types of cases. United States Attorney Laughlin E. Waters has suggested that a more detailed description of the procedure devised by Mrs. Oshiro might prove helpful to other offices having the same problem. We agree with Mr. Waters that the problem of how to deal with closed cases that are retained in the office for collection purposes is one that is familiar to many offices. Accordingly, a description of the procedure as submitted by the Southern District of California is set out below:

"Mrs. Oshiro suggested the establishment of a separate series of closed file numbers for those closed cases that established a judgment in favor of the United States, which new series differed and was in addition to the regular series of closed file numbers for closed cases in covering a money judgment for collection purposes.

"Our problem here was caused by the fact that for years we have run a series of closed numbers for all closed civil cases. The open civil cases are retained by the Assistant to whom the case is assigned until completion. If a case ended with a money judgment in favor of

the United States, a closed number was assigned and immediately the closed case was assigned to our Judgment Unit for collection and a charge card was inserted in its place in the file drawers of closed civil cases. When transmitting the closed cases to the Federal Records Center, the employees of the Records Center would not leave space for cases charged out to our Judgment Unit. When the cases were later closed and transmitted to the Records Center for filing in the regular sequence of closed numbers, they would often have to return files as there was not room in the boxes for them. It was then necessary to assign a new closed number to the case and change a number of records. To alleviate the situation, the Records Center suggested a new manner of transmitting files to them for storage purposes, which would have entailed a great deal more work. Mrs. Oshiro's suggestion to assign a different or "J" series of numbers to closed cases for money judgments is enabling us to transmit records to the Records Center of the other type closed cases without any difficulty, inasmuch as more than 95% of closed cases charged out are to the Judgment Unit."

* * *

JOB WELL DONE

Both the Chief Postal Inspector and the Postal Inspector in Charge have commended United States Attorney C. E. Luckey and Assistant United States Attorney Robert R. Carney, District of Oregon, on their able handling of a recent case and have congratulated them on the successful outcome.

In the District of New Jersey, an 18-month investigation of the illicit drug traffic recently culminated in a raid which resulted in the seizure of narcotics valued at $2,250,000, the arrest and subsequent indictment of seven persons, and the successful breaking of the dope ring. Assistant United States Attorney Charles H. Nugent advised and assisted the Bureau of Narcotics agents throughout the long investigation and with the arrests. The Grand Jury which returned the indictments, publicly commended the office of United States Attorney Chester A. Weidenburner, as well as the Bureau of Narcotics agents and the State Police, for fearless and devoted action on behalf of the public, and the presiding Federal judge observed that the Grand Jury's remarks were timely and well deserved.

The FBI Special Agent in Charge has commended Assistant United States Attorney John R. Jones, Eastern District of Michigan, on his outstanding work in the recent successful prosecution of a Mann Act case. The letter stated that Mr. Jones' handling of the case reflected excellent preparation, his skilled cross-examination elicited testimony most damaging to the defense, his summation was unusually able, and his efforts throughout the case were exemplary.

The outstanding work of United States Attorney Heard L. Floore and Assistant United States Attorneys Cavett S. Binion and William B. West, III, Northern District of Texas, in a recent case involving a check kiting scheme which cost banks in the area a sum in excess of $850,000, has been commended by the FBI Special Agent in Charge, the Executive Vice President of one area bank, and the President and Chairman of the Board of another local bank.

The Chief Special Agent of a rail express agency has expressed to Assistant United States Attorney John T. Elfvin, Western District of New York, his appreciation of Mr. Elfvin's hard work and interest which resulted in the successful outcome of a recent prosecution involving the theft of typewriters from interstate shipment. Despite the lack of the stolen machines, the scarcity of evidence, and numerous difficulties of trial, a conviction was obtained.

The fine manner in which Assistant United States Attorney Jean L. Auxier, Eastern District of Kentucky, handled a recent criminal case involving violation of the Motorboat Act of 1940 has received the commendation of the District Officer in Charge, Marine Inspector, United States Coast Guard. The letter stated that a conviction under this Act is very rare, and that some of the points established at the trial will be of assistance to the Coast Guard in further investigations of negligent or reckless operation of motor boats. The case involved a motorboat accident which resulted in the death of a passenger, and the subsequent conviction of defendant.

The Director, Bureau of Inquiry and Compliance, Interstate Commerce Commission, has commended United States Attorney William C. Farmer, District of Kansas, for his splendid preparation of a recent case. The letter stated that in the opinion of the Bureau's field attorney, the clarity and thoroughness of Mr. Farmer's opening statement to the jury was responsible for the defendant's change of plea before the Government presented its first witness. In expressing thanks for the time, effort and study given to the case by Mr. Farmer, the Director observed that such cooperation aids the ICC field attorneys considerably in their work.

The Regional Forester, Forest Service, Department of Agriculture, has expressed appreciation and thanks for the successful handling, by Assistant United States Attorney John L. Burke, Jr., Eastern District of Texas, of a recent difficult case involving the sale of timber.

Assistant United States Attorney Kenneth Sternberg, Eastern District of New York, recently delivered a lecture on "Federal Court Procedures" before the New York City Police Academy. In expressing appreciation for Mr. Sternberg's interest and effort, the Captain-in-Command of the Academy stated that the lecture was a most effective and important contribution to the course on criminal investigation.

The work of United States Attorney Chester A. Weidenburner and Assistant United States Attorney Albert P. Trapasso, District of New Jersey, in a case involving conspiracy to violate the internal revenue laws relating to liquor, has been commended by the Assistant Regional Commissioner, Alcohol and Tobacco Tax Unit. The case, a difficult one at the outset, was further complicated by the absence of the key witness. However, Mr. Trapasso's outstanding presentation of the evidence resulted in a verdict of guilty.

The Forest Supervisor of Clearwater National Forest, Idaho, has expressed his appreciation for the assistance and cooperation extended by United States Attorney Ben Peterson, Idaho, and particularly commended the efforts of Assistant United States Attorney R. Max Whittier in bringing a case involving theft of Forest Service equipment and supplies to a successful conclusion.

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INTERNAL SECURITY DIVISION

Acting Assistant Attorney General J. Walter Yeagley

Smith Act: Conspiracy. United States V. Forest, et al. (E.D.Mo.) On May 28, 1954, five defendants were convicted of conspiracy to violate the Smith Act. On May 9, 1956, oral argument was heard by the Court of Appeals and on June 28, 1957, that Court ordered re-argument in light of the Yates case. After submission of supplemental briefs to the Court of Appeals, oral argument was held on September 10 and 11, 1957. An amicus curiae brief was filed by the St. Louis Civil Liberties Committee on September 26, 1957, and the government's reply memorandum to the amicus brief was filed with the court on October 7, 1957. In an opinion filed on April 4, 1958, the Circuit Court, applying the standards of review prescribed in Yates, ordered a new trial as to all appellants.

Staff: United States Attorney Harry Richards(E.D.Mo.)
Victor C. Woerheide and John C. Keeney
(Internal Security Division)

Suits Against the Government. Anna Louise Strong v. John Foster Dulles (Dist.Col.) The summons and complaint were served on the Attorney General on April 14, 1958. Plaintiff seeks a declaratory judgment and other equitable relief to declare that the Passport Regulations of the Secretary of State (22 C.F.R. 51.135 et seq.) as applied to plaintiff, are arbitrary, unconstitutional, unlawful and invalid. Defendant refused to grant a passport to plaintiff on the basis of the open record and confidential information. Plaintiff prays that defendant be enjoined from continuing to refuse to issue a passport to her and that defendant be directed to issue forthwith a passport in order that she may travel abroad as a foreign correspondent.

Staff: Oran H. Waterman and A. Warren Littman
(Internal Security Division)

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CRIMINAL DIVISION

Assistant Attorney General Malcolm Anderson

SECTION 405, VETERANS READJUSTMENT ASSISTANCE ACT OF 1952
38 U.S.C. 995

SUBCHAPTER XV, SOCIAL SECURITY ACT
42 U.S.C. 1361 et seq.

With the July 23, 1954, issue of the Bulletin (Vol. 2, No. 15, pp. 5-6), the Criminal Division disseminated to all United States Attorneys a memorandum dated June 28, 1954, from the Department of Labor to all state employment security agencies evidencing the agreement previously entered into between the Department of Justice and the Department of Labor concerning the processing of cases involving apparent fraud in the securing of unemployment compensation benefits by veterans under Title IV of the Veterans Readjustment Assistance Act of 1952. Specifically, the agreement required that all state agencies, after preliminarily determining the possibility of a fraudulent overpayment, forward every such case to the Federal Bureau of Investigation for investigation and submission to the appropriate United States Attorney for prosecutive determination.

As the result of an evaluation of the effectiveness of the unemployment compensation for veterans referral program in achieving its deterrent purpose, in which evaluation the information requested from the United States Attorneys in the Bulletin of June 8, 1956 (Vol. 4, No. 12, p. 390), was considered, the Criminal Division and the Department of Labor have agreed to modification of the 1954 agreement. Further, it has been agreed that the referral procedures incident to veterans unemployment compensation fraud cases should also apply to cases involving the fraudulent receipt of unemployment compensation benefits by federal employees under Subchapter XV of the Social Security Act, 42 U.S.C. 1361 et seq. Specifically, the agreement has been amended to provide that state agencies shall not be required to refer veteran unemployment compensation cases and federal employee unemployment compensation cases to the FBI where the alleged overpayment does not exceed $104, except in those cases (1) where offenses are repeatedly committed by the same applicant for these benefits; (2) where the offense consists of an ineligible applicant utilizing a veteran's or federal employee's entitlement to obtain benefits, or where a veteran or federal employee uses another veteran's or federal employee's entitlement; and (3) where there are factors which, in the judgment of the state agency, suggest that the matter be referred for federal action. All other cases, including those falling within the above exceptions, must be referred by the state agencies to the FBI for investigation. In these cases, the Criminal Division has recognized the right and privilege of the Department of Labor to bring to our attention, for appropriate review, any case in which the United States has declined prosecution, where the Department of Labor feels such action to be warranted by the particular circumstances of the individual case.

Accordingly, in the future the state agencies will, under both of the unemployment compensation programs, refer only those cases which are subject to the modifications and exceptions set forth above.

USE OF AUTHENTICATED RECORDS

In prosecutions arising out of the theft, forgery, or wrongful negotiation of government checks, or in other matters where it is necessary to prove the actual issuance and mailing of such checks, each United States Attorney should give consideration to the use of authenticated copies of checks and related records pursuant to Section 1733, Title 28, U.S.C., which the Treasury Department is prepared to furnish promptly. It has come to our attention that in some instances the presence of Treasury Department personnel in court involves extensive travel with attendant transportation and per diem costs in addition to the loss to the Treasury of the services of the personnel involved. The use of authenticated copies, where practicable, in lieu of testimony of Division of Disbursement personnel would result in substantial economies to the government.

FOOD, DRUG, AND COSMETIC ACT

Dispensing Dangerous Drugs without Prescriptions; Second Offender. United States v. Albert Blank (D. Mass.). On June 21, 1957, defendant was indicted in six counts for felony (second offender) violations of the Federal Food, Drug, and Cosmetic Act. The indictment charged defendant, a pharmacist in Boston, with having dispensed certain drugs on different occasions without prescriptions. Since the drugs thus dispensed "over the counter" were dangerous drugs (21 U.S.C. 353 (b)(1)(B)), and since they had been shipped into Massachusetts from without the state in bottles containing labels warning against dispensing them without prescription, violations of 21 U.S.C. 331 (b) were committed. Following his plea of guilty, defendant was sentenced on March 10, 1958, under Count 1, to six months' imprisonment and to pay a $500 fine. Under the remaining five counts, he was sentenced to serve six months, suspended, and placed on probation for two years to begin upon completion of the prison term under Count 1.

Staff: United States Attorney Anthony Julian;
Assistant United States Attorney George H. Lewald (D. Mass.).

EXPATRIATION

Constitutionality of Section 401(e) of Nationality Act of 1940; Voting in Foreign Political Election. Perez v. Brownell (United States Supreme Court, March 31, 1958). Petitioner, a native-born citizen of the United States who had been taken to Mexico as a child by his parents, last reentered this country in 1952. In 1953 he was ordered deported on the ground that he had been expatriated prior to his 1952 entry and

lacked the immigration visa required of aliens when he reentered. He sued for a declaratory judgment of nationality. The district court concluded that he had been expatriated (a) under Section 401(j) of the Nationality Act of 1940 by remaining outside the United States from November 1944 to July 1947 for the purpose of avoiding service in our armed forces; or (b) under Section 401(e) of that Act by voting in a political election in Mexico in 1946. The court of appeals affirmed.

The Supreme Court, affirming by a divided vote, sustained the judgment below on the voting ground and did not find it necessary to rule on the Section 401(j) ground. The majority opinion sustained the constitutionality of Section 401(e) as rationally related to the broad power of Congress to regulate foreign affairs. It concluded that it is within the power of Congress to achieve the avoidance of embarrassment in the conduct of our foreign relations attributable to voting by American citizens in foreign political elections, and that the means selected by Congress (expatriation) was reasonably calculated to effect that end.

Dissenting, the Chief Justice and Justices Black and Douglas concluded that the Constitution confers no power on Congress to divest native-born citizens of their nationality. Conceding that a citizen may elect to renounce his citizenship voluntarily and that under some circumstances the act of voting may rationally be said to constitute an abandonment of citizenship, the dissenters felt that Section 401(e) was so broad that it encompassed conduct that failed to show a voluntary abandonment of American citizenship. Justice Whittaker, also dissenting, agreed with the major premise of the majority opinion that Congress may expatriate a citizen for an act which it may reasonably find to be fraught with danger of embroiling our government in an international dispute or of embarrassing it in the conduct of foreign affairs; but he felt that Section 401(e) is too broadly written to be sustained on that ground.

Staff: The case was argued by Solicitor General J. Lee Rankin.

Conviction of Desertion in Wartime; Constitutionality of Section 401(g) of Nationality Act of 1940. Trop v. Dulles (United States Supreme Court, March 31, 1958). Petitioner, a native-born citizen of the United States, was convicted of desertion by a court-martial while serving in our army in French Morocco in 1944 and was sentenced to three years at hard labor and a dishonorable discharge. After returning to the United States in 1952, he applied for a passport, which was denied on the ground that his conviction and dishonorable discharge had resulted in his expatriation under Section 401(g) of the Nationality Act of 1940. His suit for a declaratory judgment of nationality resulted in a district court judgment for the government which was affirmed by the court of appeals.

The Supreme Court, reversing by a divided vote, struck down Section 401(g) as unconstitutional. The Chief Justice, in an opinion in which Justices Black, Douglas and Whittaker joined, reiterated the

view announced in his dissenting opinion in Perez, supra, that citizenship cannot be divested in the exercise of the government's general powers. Turning specifically to the argument that Section 401(g) represented a valid exercise of the war power, the Chief Justice concluded that the expatriation provision was clearly penal in nature, and as such constituted cruel and unusual punishment within the meaning of the Eighth Amendment. In a separate concurring opinion, Justice Brennan expressed the view that Section 401(g) was unconstitutional as evincing no rational relationship between the expatriation provision and the war power.

Justices Frankfurter, Burton, Clark and Harlan, dissenting, felt that Section 401(g) bore a reasonable relationship to the war power and did not constitute cruel and unusual punishment.

Staff: The case was argued by Solicitor General J. Lee Rankin.

Duress; Burden of Proof. Nishikawa v. Dulles (United States Supreme Court, March 31, 1958). Petitioner, who was a dual national of the United States and Japan at birth, was denied a passport on the ground that he had been expatriated under Section 401(c) of the Nationality Act of 1940 by serving in the Japanese army. At the trial of his suit for a declaratory judgment of nationality, he was the only witness. He testified that he was born and educated in the United States and received an engineering degree here. In August, 1939, he went to Japan, intending to visit and study for two to five years. His father, who was paying his way, died in November, 1939 and petitioner went to work in Japan. In June, 1940 he was required to take a physical examination pursuant to the Japanese Military Service Law and on March 1, 1941 he was inducted into the Japanese army. The Military Service Law provided for imprisonment for evasion. Between the time of his physical examination and his induction, he did not protest his induction or attempt to renounce his Japanese nationality, return to the United States or secure the aid of United States consular officials. He testified he was told by a friend who worked for the American Embassy that the American Consulate could not aid a dual national; and that the rumored brutality of the Japanese secret police made him afraid to make any protest. He testified that when he went to Japan he was not aware of any threat of war between the United States and Japan and that he did not then know he was likely to be drafted. The district court did not believe his testimony, found that his Japanese military service was voluntary and concluded that he had been expatriated. The court of appeals affirmed.

The Supreme Court reversed. The majority opinion, by the Chief Justice, pointed out that all agreed that no conduct can result in expatriation unless the conduct is engaged in voluntarily; also, that when American citizenship is once shown to exist, the burden is on the government to prove an expatriating act by clear, unequivocal and convincing evidence. With respect to the government's contention that the citizenship claimant bears the burden of proving that his act was involuntary, the Court held that because of the drastic consequences of expatriation

the government must bear the burden of proving that the expatriating act was voluntarily performed. On this record, the Court found that the government had not sustained its burden. The majority opinion did not limit its doctrine, stating "Regardless of what conduct is alleged to result in expatriation, whenever the issue of voluntariness is put in issue, the Government must in each case prove voluntary conduct by clear, convincing and unequivocal evidence."

Concurring in the result, Justices Frankfurter and Burton felt that while ordinarily it is the individual who should have the burden of proving state of mind, in this case it was proper for the government to bear that burden because the normal assumption that a person acts of his own free will is placed in doubt when an individual engages in conduct commanded by a penal statute of another country to whose laws he is subject. However, these Justices felt that the Court need not and should not reach the question whether, in other classes of cases in which the defense of duress is asserted, the government should also have the burden of proving lack of duress.

Justices Harlan and Clark, dissenting, concluded that to permit conscription, without more, to establish duress unjustifiably limits, if it does not largely nullify, the mandate of Section 401(c). They also saw no reason to depart in this case from the general rule that consciously performed acts are presumed voluntary.

Staff: The case was argued by Oscar H. Davis, Assistant to the Solicitor General.

CONTEMPT

Privilege Against Self-incrimination; Waiver by Direct Testimony in Civil Case. Brown v. United States (United States Supreme Court, March 31, 1958). Petitioner was the defendant in a denaturalization suit, charging that she had fraudulently procured citizenship in 1946 by falsely swearing that she had not within the preceding ten years been a member of the Communist Party. Called as an adverse witness by the government at the trial, she denied Communist Party membership prior to 1946 but refused to answer questions about activities and associates after 1946 on the ground that her answers might tend to incriminate her. The district court sustained the claim of privilege. Taking the stand in her own behalf, she testified on direct examination not only concerning her pre-naturalization activities, but also as to her present disposition towards the United States. On cross-examination, the government asked, "Are you now or have you ever been a member of the Communist Party of the United States?" Petitioner again invoked the privilege against self-incrimination. The district court ruled that by taking the stand in her own defense she had abandoned the privilege, and directed her to answer. On her persistence in refusing to answer, she was summarily held in contempt and sentenced to imprisonment for six months. The judgment of conviction was affirmed by the court of appeals.

The Supreme Court affirmed. Preliminarily, it distinguished this situation from those holding that for perjury alone a witness may not be summarily punished for contempt. "Perjury is one thing; testimonial recalcitrance another." Turning to the constitutional issue posed by petitioner, the Court could find no reason to depart from the rule applicable to a defendant in a criminal case. If he takes the stand and testifies in his own defense, his credibility may be impeached and his testimony assailed like that of any other witness. He has no right to set forth to the jury all the facts which tend in his favor without laying himself open to cross-examination upon those facts.

Justice Black dissented in an opinion in which the Chief Justice and Justice Douglas concurred. They felt that the rule applicable in criminal cases is inapposite, since in such cases the defendant cannot be called as an adverse witness and his failure to take the stand in his own behalf may not be the subject of adverse comment or support an inference of guilt. In civil cases, on the other hand, the failure of a party to testify may be freely commented on and evidentiary inferences may be drawn from his silence. Justice Brennan, dissenting in a separate opinion, felt there was an abuse of discretion in punishing petitioner's act as a criminal contempt. He pointed to the fact that the trial judge had at first ruled erroneously that petitioner had waived the privilege by simply taking the stand and it was only when he was later holding her in contempt that he advised her she had waived the privilege by her testimony. Under the circumstances, Justice Brennan felt that the trial judge should have resorted to sanctions other than criminal contempt.

Staff: The case was argued by Ralph S. Spritzer, Assistant to the Solicitor General.

JENCKS' LAW - PRODUCTION OF DOCUMENTS

Effect of Jencks' Law (18 U.S.C. 3500) on Production of Grand Jury Testimony. United States v. Consolidated Laundries Corporation, et al. (S.D. N.Y.), dated March 10, 1958. One copy of Judge Palmieri's decision in this case is being transmitted to each United States Attorney's office with this issue of the Bulletin.

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CIVIL DIVISION

Assistant Attorney General George Cochran Doub

COURTS OF APPEAL

FEDERAL TORT CLAIMS ACT

Employee of Non-appropriated Fund Activity Cannot Sue United States Under Tort Claims Act for On-the-job Injury Allegedly Caused by Federal Employees. Leland K. Aubrey and Charlotte R. Aubrey v. United States, (C.A.D.C., April 10, 1958). Leland K. Aubrey was Assistant Manager of the Officers' Mess of the Naval Gun Factory in the District of Columbia. In the course of his employment he was injured, allegedly through the negligence of naval personnel, and received benefits from the private workman's compensation insurance carried by the Mess pursuant to 66 Stat. 138, 5 U.S.C. 150K-1. He then filed suit against the United States for additional compensation; his wife also sued for loss of consortium. The district court, without opinion, granted the government's motion for summary judgment.

The Court of Appeals, through Justice Reed (sitting by designation), held that Mr. Aubrey was precluded from suing under the Tort Claims Act, even though it had been stipulated at trial that he was not a federal employee. The Act was not intended to provide additional compensation for an employee of a non-appropriated fund instrumentality where Congress has made available an administrative and exclusive remedy for him. In the present case, Public Law 397 of the 82d Cong., 1st Sess. was held to have provided such an exclusive remedy by requiring non-appropriated fund instrumentalities to secure compensation insurance for their employees for on-the-job injuries.

The Court reversed as to the wife's claim, however. She has an independent claim against the United States for loss of consortium and is entitled to a trial. Determination of whether recovery for loss of consortium is still available under D.C. law must await the results of the trial.

Staff: Stanley D. Rose (Civil Division)

Tort Claims Act Does Not Extend to United Nations Trust Territory Under United States Control. Callas v. United States, (C.A. 2, April 1, 1958). Edward Callas, an infant, was playing on the beach at Kwajalein, trust territory of the Pacific Islands, when he was injured by the explosion of a round of military ordnance. His suit under the Tort Claims Act was dismissed by the district court for want of jurisdiction.

On appeal, this judgment was affirmed. The Tort Claims Act excludes claims arising in a foreign country. 28 U.S.C. 2680(k). Kwajalein is foreign territory held by the United States as trustee for the United

Nations. The Court of Appeals held that the United States' control over Kwajalein is not in its capacity as a sovereign, but as a trustee, and that the island must therefore be regarded a foreign country within the meaning of the Tort Claims Act. Judge Lumbard, dissenting, argued that for all practical purposes the United States acts as sovereign in the area; Congress did not intend the "foreign country" exclusion to apply to territory held under such circumstances.

Staff: United States Attorney Cornelius W. Wickersham, Jr. Assistant United States Attorney Margaret E. Millus (E.D. N.Y.)

GOVERNMENT CONTRACTS

Defaulting Purchaser Cannot Defend Against Liability on Factual Issue Not Raised Pursuant to Disputes Article of Contract. Fay d/b/a Borderland Salvage Co. v. United States, (C.A. 5, April 2, 1958). The Borderland Salvage Company's bid to purchase 31,149 five-gallon drums at seventy-five cents per drum was accepted by the Fort Worth, Texas Quartermaster Depot. Payment in full prior to removal of the property by the purchaser was required by the contract. When Borderland driver came to pick up the drums, however, payment in full had not been made, and the driver did not tender payment. Instead he offered a performance bond, which the Contracting Officer refused to accept. Borderland's attorney conferred with the Colonel in charge of the Quartermaster warehouse and was advised that no replacement bid of less than seventy cents per drum would be accepted. Nevertheless, the drums were resold for only forty-two cents per drum, $9,254.16 less than the amount of the sale to Borderland. Borderland did not protest the resale to the Contracting Officer or appeal to the Secretary of War from the Contracting Officer's decision as provided in the Disputes Article of its contract. In a suit by the United States to recover the difference between the original sale price, and the resale price, the district court awarded summary judgment to the United States.

On appeal, this judgment was affirmed. The contract plainly required payment before removal of the drums, and the United States had the right to resell when Borderland failed to perform. The Colonel in charge of the warehouse had no real or apparent authority to amend the terms of the contract. If Borderland considered his representations material, they should have challenged acceptance of the resale bid under the disputes procedure set forth in the contract.

Staff: United States Attorney James L. Guilmartin (S.D. Fla.)

LIENS

Junior Lien of United States Is Divested by Foreclosure of Prior Mortgage in Accordance With State Procedure, Although Joinder of or Notice to Junior Lienors Is Not Required. United States v. Daniel K. Cless (C.A. 3, April 11, 1958). The United States brought this suit to

foreclose its non-statutory second mortgage on real estate in Pennsylvania. A first mortgage on the same property had previously been foreclosed by a common law writ of execution. Under Pennsylvania law, foreclosure in this manner divests all junior liens without the necessity of making junior lienors parties to the proceedings or giving them actual notice of the judicial sale. The district court held that the existence and enforcement of non-statutory liens held by the United States are controlled by state law. Under Pennsylvania law therefore, the junior lien held by the United States was extinguished.

On appeal, the government argued that a judicial proceeding purporting to extinguish any property interest of the United States was a suit against the United States; that the only consent to be sued in such cases is as provided in 28 U.S.C. 2410, which requires that the government be joined in the proceeding and receive actual notice of the sale; and that all government liens are controlled by federal, and not state, law. In addition, the government urged that the Pennsylvania procedure did not meet constitutional requirements of notice of judicial proceedings affecting the property interests. The Court of Appeals rejected these contentions and affirmed the judgment of dismissal. It held that federal law does not require that the United States be made a party to a judicial proceeding which affects its security interests; joinder is required only when the government is in possession or claims ownership of the property. Therefore, the Court ruled that the Pennsylvania proceeding was not a suit against the United States and that 28 U.S.C. 2410, which is only a waiver of sovereign immunity and does not itself require joinder, was not applicable. The Court further held that the government's attack on the constitutional inadequacy of constructive notice to known claimants "ignores the rights that first mortgagees in Pennsylvania have enjoyed for more than a century, and ignores the impact such a decision might have on the business of lending money."

Staff: Bernard Cedarbaum (Civil Division)

MEAT SUBSIDY CLAIMS

Pendency of Administrative Protest Renders Action to Recover Meat Subsidy Payments Premature; Trial Court Should Dismiss Suit Without Prejudice. United States v. Frank L. Smith (C. A. 9, April 1, 1958). Certain wartime meat subsidy payments were granted by the OPA on preliminary approval to Smith, a livestock slaughterer. Subsequently, OPA determined that Smith was not entitled to them. This determination was certified to the RFC, which invalidated the payments. On December 15, 1950, Smith filed with RFC a telegraphic protest against the invalidation. According to RFC records, this protest was rejected in a letter addressed to Smith, dated June 25, 1951.

On February 2, 1956, the United States brought suit to recapture the invalidated subsidy payments. Smith denied ever having received the letter rejecting his protest, and the government was unable to prove at trial whether the letter had in fact been deposited in the mails by RFC, or received by Smith. Accordingly, the Government conceded that, as a matter of law, the protest was still pending before the agency. In this posture, the trial court entered judgment for defendant upon a directed verdict.

On appeal, the government urged, inter alia, that the judgment which was entered, being in effect "with prejudice", prevented the institution of a new suit after steps were taken to make the RFC order final. Noting that the only defense which had been raised in the trial court was that the suit was premature, and that such a defense did not warrant a dismissal "with prejudice", the Court of Appeals reversed, and directed the District Court to dismiss the action "without prejudice".

Staff: B. Jenkins Middleton, Seymour Farber
(Civil Division)

MEAT SUBSIDY CLAIMS

Government Not Entitled to Summary Judgment in Action to Recover Meat Subsidy Payments Where Administrative Protest Is Still Pending. Clackamas Meat Company v. United States (C.A. 9, April 1, 1958). In this suit by the government to recapture invalidated meat subsidy payments, defendant meat packer argued that its protest against the invalidation was still pending before the RFC. After first denying that a protest had been filed, the government reversed its position and moved to continue the case pending the outcome of the administrative proceedings. The court denied the Government's motion for continuance and subsequently set the case for trial on April 29, 1957. However, the court's order stated that, if the case was referred by the parties to the RFC before the trial date, the trial would be postponed.

On May 27, 1957, the government filed a motion for summary judgment, accompanied by an affidavit stating that the RFC had not, as of May 2, 1957, received any protest or appeal from Clackamas. At the hearing on this motion, counsel for Clackamas urged that, as matters then stood, the government could not make out a case because the protest was still pending. He admitted that Clackamas had taken no further administrative action. The court thereupon granted the government's motion for summary judgment since it was apparently of the view that Clackamas had failed to pursue its remedy before the agency.

On appeal, this judgment was reversed. The packer argued that the government was not entitled to summary judgment because there was a genuine issue as to a material fact, i.e., whether a protest had been duly filed. The Court of Appeals noted that the government had reversed its position below and had not disputed the fact that a protest had been filed. But it held that the burden of taking further administrative action on the protest was not the sole responsibility of the packer because the court below, in setting the date for trial, had stated that the case may be referred to the agency by "the parties". Since the matter was still pending before the agency, the government's suit was premature and the action should be dismissed without prejudice. Recognizing that the packer had limited its brief on appeal to the question of whether there was a genuine issue as to a material fact, the

Court nevertheless noted that the issue of "prematurity" had been discussed at oral argument and should not be foreclosed because of the limited scope of appellant's brief.

Staff: B. Jenkins Middleton, Seymour Farber (Civil Division)

MERCHANT MARINE ACT OF 1936

Tax Consequences of Ship Purchase Under Merchant Marine Act Cannot Be Determined in Suit Against Maritime Administration. New York and Cuba Mail Steamship Company v. Sinclair Weeks, et al., (C.A.D.C., April 3, 1958). Plaintiff had an operating-differential subsidy contract with the Maritime Commission under the Merchant Marine Act of 1936. It sued the Maritime Administration in mandamus and declaratory judgment for a ruling that the purchase of two ships for subsidized service by means of an intercorporate stock transfer was the legal equivalent of a direct purchase from its capital reserve fund, which would entitle it to a permanent tax exemption for the monetary value of the stock so expended. The district court held that since the only benefit to be derived from the relief sought would be reduced tax liability, resolution of the problem should be left to the tax authorities and the tribunals given jurisdiction to determine tax controversies. The Court of Appeals affirmed the dismissal of the complaint, accepting the government's statement that the Maritime Administrator's action on a matter of this kind could not bind the Internal Revenue Service or any court or tribunal called upon to review any future disallowance of the tax deduction already claimed by the plaintiff.

Staff: Bernard Cedarbaum (Civil Division)

COURT OF CLAIMS

MILITARY PAY

Where Government Has Notice of a Will, Obligation to Estate of Deceased Officer Is Not Discharged by Payment to Heir Prior to Qualification of Executor. Dorothy Mae Howell, individually and as Executrix of the Estate of Martin Frederick Howell, Jr., deceased v. United States (C.Cls., March 5, 1958). Plaintiff was the stepmother of Lt. Martin F. Howell, Jr., an Air Force officer, who was killed in action in Korea. During the time he was carried in a "missing in action" status, plaintiff sent a copy of his will to the Department of the Air Force. This instrument nominated plaintiff as executrix and named her the beneficiary of the officer's estate. On January 31, 1954, Lt. Howell was officially declared dead. Claims for his arrears of pay and allowances were submitted by plaintiff as stepmother and also by the natural mother of the decedent. Plaintiff had taken no steps to qualify as executrix under the will. The Act of June 30, 1906, 34 Stat. 750; as amended, 58 Stat. 795 (1944), 60 Stat. 30 (1946), 10 U.S.C. § 868

provided that the General Accounting Office might settle accounts of deceased personnel by paying the amount due to the decedent's heirs in a stated order of preference, "where no demand is presented by a duly appointed legal representative of the estate." The General Accounting Office allowed the claim of decedent's natural mother on March 10, 1954. On April 7, 1954, plaintiff was qualified and appointed executrix under the will and brought suit to recover the monies previously paid to the natural mother. The government joined the natural mother as third party defendant and filed a cross-claim against her, contingent upon the Court awarding judgment to plaintiff. The government then moved for summary judgment relying on Keoun v. United States, 191 F. 2d 438 (C.A. 8, 1951), wherein it was held that 10 U.S.C. 868 "gave the General Accounting Office the absolute right at any time" to pay a decedent's accounts to persons in the statutory order of preference "unless, before such payment was actually made", a demand had been presented by a "duly appointed legal representative of the estate". Such payment was held to have discharged the obligation of the government to the estate, leaving the heirs and claimants to resolve entitlement to the monies among themselves. The Court of Claims rejected the doctrine of the Keoun case and held that 10 U.S.C. 868 could not be invoked to discharge the government's obligation when payment had been made contrary to the intent of the deceased expressed in a testamentary instrument of which the government had notice. Rather, the Court said, the government is bound to afford the executor-designate a "reasonable opportunity to qualify" in order to carry out the intent of Congress that the legal representative should have priority and the expressed wishes of decedent should be accomplished.

Staff: Frances L. Nunn (Civil Division)

* * *

ANTITRUST DIVISION

Assistant Attorney General Victor R. Hansen

Complaint Filed Under Section 1 of Sherman Act and Section 7 of Clayton Act. United States v. Columbia Pictures Corporation, et al., (S.D. N.Y.). The above entitled civil antitrust suit against Columbia Pictures Corporation, Screen Gems Incorporated and Universal Pictures Company, Incorporated, was filed on April 10, 1958, and charges violations of Section 1 of the Sherman Act and Section 7 of the Clayton Act.

Columbia and Universal for many years have been and still are competitors in the production and theatrical distribution of feature films. Columbia's wholly owned subsidiary, Screen Gems, handles TV distribution of its parents pre-1948 feature films (few American films made after 1948 are available for TV distribution because of disagreements between producers and the unions representing actors, directors, and musicians on the share of TV distribution revenues to be paid to the unions). Screen Gems like others in the field, distributes its features by entering into sublicensing agreements with individual TV stations throughout the United States. The fees charged for such sublicensing vary greatly according to the age and quality of the picture, popularity of featured players and whether or not the picture has been previously televised in the area--the last being one of the most important factors.

In August 1957, Screen Gems was one of the five TV film distribution companies having a substantial number of pre-1948 feature films which had not yet been exhibited on TV. Universal had approximately 600 of such "first run" films comparable in quality to the Columbia films being distributed by Screen Gems. On August 2, 1957, Universal granted to Screen Gems an exclusive 14 year license for the TV distribution of its features. Performance of the agreement by Screen Gems was guaranteed by Columbia. Screen Gems guaranteed Universal payments of annual minimums totaling $20,000,000 and is to receive between 27 1/2% and 40% of the proceeds. Screen Gems further agreed that it would not license Universal features at terms less favorable than the terms at which it licenses comparable Columbia features.

The complaint alleges that Columbia, Screen Gems and Universal have been and are engaged in an unlawful conspiracy and combination in restraint of trade and commerce in the distribution and licensing of feature films for TV exhibition. It is contended that the distribution agreement between Screen Gems and Universal, is by its specific terms, an agreement to fix prices and to eliminate competition between Universal and Columbia. It is further contended that an unlawful restraint is inherent in any arrangement under which Screen Gems acts as a common distributor for its parent Columbia; and its parent's competitor, Universal--price fixing and elimination of competition being necessarily implied in such an arrangement.

The complaint also charges that the exclusive TV license granted by Universal to Screen Gems constitutes the acquisition of corporate assets, the effect of which may be to substantially lessen competition in the distribution of feature films for television exhibition, in violation of Section 7 of the Clayton Act; that as a result of the acquisition, Universal has been eliminated as a competitive factor in TV film distribution, and that there has been an undue reduction in the number of competing enterprises in the field; and that as a result of the acquisition "defendant Screen Gem's distribution and licensing of Columbia and Universal feature films for television exhibition may be carried on pursuant to an agreement among the defendants, as part of the acquisition contract, eliminating price and other competition between them and creating a combination in restraint of trade and commerce."

The remedy sought for both Section 1 and Section 7 violations is complete divestiture by Screen Gems of the exclusive license for the distribution of Universal features. The prayer also includes a request for a preliminary injunction against the further performance of the distribution agreement between Screen Gems and Universal.

Staff: John Sirigano, Jr. (Antitrust Division)

Assignee of Contract Carrier Permit Estopped to Challenge Scope of Assignor's Authority. Thomas P. Glaze and W. H. Conley v. United States, et al., (S.D. Ind.). This action was filed on June 25, 1956 to set aside an order of the Interstate Commerce Commission which denied Glaze's petition for reconsideration of a Commission decision refusing to reopen a "grandfather" clause proceeding. Glaze had authority to operate as a motor contract carrier. He received this authority as the result of a purchase from one Shorten who had in turn purchased it from Conley, the original "grandfather" holder. All transfers were subject to, and received, Commission approval. Glaze sought to reopen the proceeding which granted the original contract carrier permit to Conley in order to show that Conley should have been granted a certificate as a common carrier. Conley was joined as a party plaintiff in this court action.

The Government interposed three defenses: (1) That plaintiff Conley had no legal standing to bring the suit, (2) that the complaint failed to state a cause of action and (3) that the Commission did not abuse its discretion in refusing to grant Glaze's petition to reopen. A hearing was held at Indianapolis on April 3, 1958 before a three-judge district court. The Court sustained the first and second defenses and thus never reached the third. In a ruling from the bench the Court found that plaintiff Conley had no standing to bring the suit as he had transferred all interest in his permit. In upholding the second defense the Court said that Callanan Road Co. v. United States, 34 U.S. 507, prohibited Glaze attacking the extent of the authority issued to Conley but stated that its ruling did not prejudice

whatever rights Glaze may have, if any, under the holding of Nelson v. United States, 355 U.S. 554, to petition the Commission for an interpretation of his permit.

Staff: Charles R. Esherick (Antitrust Division)

Regular Rather Than Three-Judge Court Held Proper to Review I.C.C. Order Which Found Assailed Rates Not Shown to Be Unreasonable for Future and on Past Shipments Where Complaint Attacks Only Determination as to Past Rates and Denial of Reparations. Charles A. Waite and Elmer J. Carroll, a partnership doing business as C. A. Waite Company, et al. v. United States, (W.D. Pa.). On March 27, 1958 at Pittsburgh, Pa., Judge Willson rendered an opinion in favor of the United States and intervening defendants, and ordered the complaint dismissed.

Complaint filed December 11, 1956 against the United States sought to set aside an order of the Interstate Commerce Commission which held the assailed rates "not shown" to be unreasonable for the future or in the past and denied an award of reparation on numerous carloads of billets that were shipped from Minnequa, Colorado to destinations in Pennsylvania. The complaint was amended to attack only the Commission's determinations with respect to the reasonableness of rates on past shipments and denial of reparation. Consequently, it was set for trial before a regular district court rather than a three-judge court.

The Commission and interested railroads intervened as defendants. Being a suit solely in the nature of private litigation to recover money damages, the United States filed a neutral answer and left the shippers and carriers, the real parties in interest, to prosecute and defend their respective claims, and the Commission to defend its order.

Staff: Colin A. Smith (Antitrust Division)

* * *

In the latter instance, whether an opinion embodies a judgment depends upon (1) whether the judge has clearly declared his intention that it do so, and (2) in an action for money only whether the opinion embodies the essential elements of a judgment for money, i.e., whether "it determines or specif/ies/ the means for determining, the amount" and states facts necessary to compute interest." Where all of these elements clearly appear in the opinion and the judge indicates that final adjudication is intended, final judgment has been pronounced; and where the docket entry of the opinion contains these elements, judgment has been entered and the time for filing notice of appeal begins to run. In such a case the later filing and entry of a formal judgment would not constitute a second final judgment nor extend the time to appeal.

The majority opinion was written by Mr. Justice Whittaker, and Mr. Justice Frankfurter filed a separate dissent. Mr. Justice Harlan filed a separate dissent in which he suggests that the majority opinion will result in district judges giving "in their opinions in these 'money' cases an affirmative indication of intention regarding the finality or nonfinality of their decisions." United States Attorneys could here be of much help by urging, wherever possible, the district judges to spell out clearly their intentions. Further, if there should be any doubt in a particular case, the district judge should be requested to sign a formal judgment indicating his intention that the document is his final judgment. If the district judge refuses to sign the formal judgment because he intended his opinion to be a final adjudication, the appeal can proceed on that basis. Where the judge signs the formal judgment but doubt still exists as to when judgment was entered, notices of appeal can and should be filed from both the opinion and the formal judgment.

Staff: Karl Schmeidler (Tax Division); Leonard B. Sand (Office of the Solicitor General).

Judgment Entered After Expiration of Six-year Period of Limitation Held Valid Where Suit Was Actually "Begun" Prior Thereto. Hector v. United States (C. A. 5, March 18, 1958). The district court entered judgment for the United States, enforceable by execution for the total amount of income taxes and interest admittedly due and owing and timely assessed. The government's suit was begun within six-year statutory period for collection after assessment but judgment was entered after expiration of the statutory period. The authorities hold that a time limit is placed on the government's right to begin suit within the six-year statutory period for collection after assessment but that the right to initiate such a suit necessarily carries with it the implied right to judgment even though entered after the six-year period. The Court rejected taxpayer's contention that an in personam judgment against him infringed the six-year statutory period of limitation because its effect was to extend the six-year period within which taxes could be collected for another seven-year period, the life of a judgment under the applicable Florida statute.

Staff: S. Dee Hanson
(Tax Division)

Carry-Back and Carry-Over of Net Operating Losses Within Affiliated Group of Corporations Filing Consolidated Returns. Phinney and United States v. Houston Oil Field Material Company, Inc. (C. A. 5, February 26, 1958.) This litigation involved two issues with respect to the carry-back and carry-over of net operating losses within an affiliated group of corporations (taxpayers) filing consolidated returns under Section 141 of the 1939 Code. The district court agreed with taxpayer on both issues but the Fifth Circuit reversed.

A procedural issue was raised by taxpayers' motion to dismiss the appeal, in which it was urged that the Government's notice of appeal was not timely filed. Originally, this litigation was a suit for refund against Phinney, District Director, in which the sole issue was whether certain earnings were capital gains or ordinary income. The United States was allowed to intervene as party defendant, and as such raised the carry-over and carry-back issues. The capital gain issue went to a jury, which decided it adversely to the District Director, and he filed a motion for judgment n.o.v. or for a new trial on February 1, 1956. On August 2, 1956 (without having acted on the District Director's motion) the district court entered its final judgment in favor of the taxpayers on the jury verdict, and also in favor of the taxpayers on the carry-back and carry-over issues, which the court decided without submission to the jury. Thereafter, on October 1, 1956, the court overruled the District Director's motion for judgment n.o.v., etc. Within sixty days of this order -- but more than sixty days after final judgment, i.e., on November 24, 1956 -- the United States filed its notice of appeal from the rulings as to carry-over and carry-back. Phinney, the District Director, did not appeal from the final judgment as to the capital gain issue. In their motion to dismiss the appeal, taxpayers urged that, since the United States was not a party to the District Director's motion for judgment n.o.v., etc., the time of the United States for filing its notice of appeal ran from the date of entry of judgment, and hence that the notice of appeal was untimely. The Fifth Circuit denied the motion. It held that the finality of the judgment was suspended by the District Director's motion for judgment n.o.v., etc., both as to the movent and as to the United States, relying upon Rule 54(b) of the Federal Rules of Civil Procedure as amended in 1948.

Staff: Grant W. Wiprud; Davis W. Morton, Jr.
(Tax Division)

Production of Corporate Books and Records; Summons Provisions of the 1954 Code. National Plate & Window Glass Co., Inc. v United States. (C. A. 2, April 7, 1958). The summons issued by a special agent under the authority of Section 7602(1) and (2) of the Internal Revenue Code of 1954 requested the taxpayer corporation to produce, in connection with an investigation of its liability for the fiscal years, 1953 through 1956, certain generally designated books and records (e.g., cash receipt journals, payroll books, accounts receivable ledgers, et cetera), including "correspondence files" and

"memoranda". Taxpayer's motion to quash the summons was granted by the district court which stated no reasons for its action. The Court of Appeals reversed, with direction to deny the motion and to enforce the summons.

Taxpayer contended before the district court, in the hearing authorized by Section 7604(a) and (b) of the 1954 Code, first that since Tax Court proceedings were pending with respect to 1953, further investigation as to that year was automatically barred. However, the Second Circuit, adverting to its prior decision in Bolich v. Rubel, 67 F. 2d 894, held in effect that continued investigation by agents of the Internal Revenue Service was warranted as an aid to the Tax Court's power, under Section 6214(a) of the 1954 Code, to assess a deficiency for 1953 in an amount greater than that originally determined by the Commissioner. Taxpayer further contended that since there had been a previous inspection of its records for 1953, any additional checking would constitute an "unnecessary", or second inspection, within the meaning of Section 7605(b) of the 1954 Code. The Court of Appeals disagreed, holding that the previous inspection, at the most, had been only a cursory examination, and in any event, it had been made as an incident to the investigation of another related corporation. Moreover, even if the 1953 records had been previously examined with respect to the 1953 liability, the Court of Appeals observed that the records sought "may well have been pertinent to investigation of the appellee's tax liability for 1954-1956". Taxpayer also asserted that the demand for records was so broad as to violate its constitutional privileges under the Fourth Amendment. The Court of Appeals in effect held that the demand was not "out of proportion to the end sought" (McMann v. Securities and Exchange Commission, 87F. 2d 377, 379 (C.A. 2), and that the taxpayer's claim was "wholly lacking in substance" . Finally, taxpayer argued that the "correspondence files" and "memoranda" requested to be produced by the summons were not sufficiently identified and were not germane to the inquiry. The Court of Appeals disposed of this contention by citing the Supreme Court's recent opinion in Civil Aeronautics Board v. Hermann, 353 U.S. 322.

Staff: Meyer Rothwacks (Tax Division)

Court of Claims Decision

Statute of Limitations; Premature Assessments; Claimed Overpayments Based on Alleged Illegal Assessment and Collection; Plaintiff's Motion for Summary Judgment Denied. Lyddon & Co. v. United States (Ct. Cls., March 5, 1958). Plaintiff filed blank returns for 1942 and 1945 claiming that it was exempt from excess profits tax. As a result of audit of a return for 1941, the Commissioner determined that plaintiff did not qualify for exemption. In February, 1946, plaintiff filed so-called "amended" returns for the years 1942 to 1945, inclusive, which were completely filled out, including a computation of its tax liability, and forwarded them with a letter and a rider to each return. In both letter and rider, plaintiff stated that it believed itself to be exempt from excess profits tax and for

that reason no payment of tax was being made.

The Commissoner treated plaintiff's amended returns as if it had admitted liability and in March, 1946, assessed the taxes shown thereon. In May, 1946, the Commissioner sent plaintiff a notice of assessment and a demand for payment. In November, 1946, plaintiff filed a written protest in which it contended that the assessment was illegal and void; that the assessment of any taxes against it would consitute a deficiency and that accordingly it was entitled to a 90 day notice under Section 272 of the Internal Revenue Code of 1939. Throughout the administrative handling of this case, plaintiff and the Commissioner maintained their original positions, i.e., the Commissioner that the assessment was valid and the plaintiff that it was illegal and void. In 1951 within 6 years of the date of the assessment, but more than 3 years after the filing of its amended returns, plaintiff paid the tax which it now seeks to recover.

Plaintiff's motion for summary judgment was premised on its argument that the statute of limitations for assessment having expired prior to collection and there being no valid assessment to support such collection, the payment of the tax constituted an overpayment within the meaning of Section 3770(a)(2) of the Internal Revenue Code of 1939. The government's principal defense was that the assessment, even if premature, was not a complete nullity and was, at most, voidable rather than void. As an additional defense, the government contended that plaintiff had an alternative method of obtaining relief, i.e., it could have sought to enjoin the collection by taking proper action in the United States District Court under Section 272 of the Internal Revenue Code, and that having failed to do so and having paid the tax in question, it is not entitled to recover unless it can prove that it is entitled to recover on the merits. The majority of the Court of Claims agreed with the government's contention reaffirming the Court's prior decision in Lehigh Portland Cement Co. v. United States, 90 C. Cls. 36, wherein it had analyzed and discussed the cases of Ventura Consolidated Oil Fields v. Rogan, 86 F. 2d 149 (C.A.9, 1936); United States v. Yellow Cab Co., 90 F. 2d 699 (C.A. 7, 1937); and United States v. Barber, 24 Fed. Supp. 229, and declined to follow those cases in their conclusions that a premature assessment is void and enables a taxpayer to recover taxes which he in fact owed the government.

Staff: William T. Kane and Robert Livingston
(Tax Division)

District Court Decisions

Liens; Priority of United States and Surety; United State Law, Taxpayer-contractor Who Failed to Pay for Labor and Materials Had no Property Right, to Which Tax Lien Could Attach, in Funds Withheld from It by Owner. Fidelity and Deposit Company of Maryland v. New York City Housing Authority, et al. United States Intervenor. (S.D. N.Y.) Taxpayer, Caruso-Sturcey Corporation, entered into a contract with the New York City Housing Authority for certain construction work. Fidelity

and Deposit Company of Maryland, as surety on the contract, paid laborers and materialmen whom the taxpayer-contractor in breach of its contract had failed to pay. The amount paid by the surety was in excess of the unpaid amount held by the owner. The surety brought this action to recover the funds withheld by the owner. The United States intervened, claiming the fund for taxes due from the contractor.

The issue was one of prior rights to the fund as between the surety and the United States.

The District Court held that under federal law the tax lien was a prior claim against the fund and the government was entitled to recover the fund. On appeal, the Court of Appeals reversed, holding that the nature of the interest of the contractor in the fund, as distinguished from the priority of the Government, was to be determined by the law of the State of New York. Applying state law, as expressed in U. S. Fidelity and Guaranty Co. v. Triborough Bridge Authority, 297 N. Y. 31, the Court of Appeals held that the contractor had no property right in the withheld funds to which any lien of the government could attach and the case was remanded.

On remand, the District Court, in accordance with the opinion of the Court of Appeals, held that under state law the contractor had no rights in the fund to which a tax lien could attach, and the claim of the government was dismissed; it was held that the surety had an equitable lien on the fund.

Staff: United States Attorney Paul W. Williams and Assistant United States Attorney John S. Clark (S.D. N.Y.) Mamie S. Price (Tax Division).

Tax Lien Which Arose and Was Recorded After Conveyance of Real Property, But Before Deed of Conveyance Recorded, Held Inferior to Rights Acquired Under Deed. United States v. Beatrice Baxter Pledger, Individually and as Executrix of Estate of Harris A. Pledger, Deceased, et al. (N.D. Fla.) Income taxes for 1943 and 1944 were assessed against taxpayer in 1948, and notice of lien recorded on November 24, 1950. Taxpayer died in 1951. The government sought judgment for the taxes assessed, and for the amount of the cash surrender values of life insurance policies paid to the executrix soon after taxpayer's death, and to foreclose the tax lien on certain real property.

The facts were stipulated and it was agreed that the government was entitled to judgment for the taxes and the cash surrender values of the life insurance policies as of the date of death, plus interest thereon from date of payment to the executrix. The real property in question, located in Florida, was homesteaded by the taxpayer in 1923. His nephew worked for and assisted taxpayer in the occupancy required to homestead the property. Sometime after taxpayer secured a deed to the property, he conveyed it to the nephew, by deed dated July 15, 1941, but not recorded until December 20, 1954, the consideration being

"compensation for services rendered in helping homestead said property". Subsequently, by deed dated September 29, 1943, and recorded July 13, 1944, taxpayer conveyed to the nephew a 50-foot tract of land, which turned out to be a portion of the property covered by the original deed to Harris. In 1946 the nephew built a beach cottage on the 50-foot tract and has been in continuous possession of the property since that time.

The Government conceded that it had no valid claim against that 50-foot tract, but contended that the nephew did not have such possession of the remainder of the property as would defeat the tax lien thereon.

The Court held that under Florida law the nephew's possession of the entire tract was sufficient to defeat the tax lien, citing Florida cases. It further held that even though the deed was not recorded until after the tax lien had been recorded, the government was not of that class of "subsequent good faith creditors" that suffered because of the nephew's failure to record his deed prior to the filing of the tax lien.

Staff: United States Attorney George Harold Carswell and Assistant United States Attorney Wilfred C. Varn (N.D. Fla.) Leon F. Cooper, (Tax Division)

Tax Division Directory

A number of United States Attorneys have expressed a desire to have a copy of the Tax Division Directory of personnel in Washington. Accordingly, copies of the latest list showing the name, room number, and telephone extension of each employee in the Division is being transmitted under separate cover to the main and branch offices of each United States Attorney.

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ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

DEPARTMENTAL ORDERS AND MEMOS.

The following Memoranda applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 8 Vol. 6 dated April 11, 1958.

ORDER	DATED	DISTRIBUTION	SUBJECT
163-58	3-24-58	U.S. Attys.	Delegating to U. S. Attorneys Authority to Compromise Land-Condemnation Cases
164-58	3-24-58	U.S. Attys.	Delegating to Officers of the Lands Division Authority to Compromise Claims

MEMO	DATED	DISTRIBUTION	SUBJECT
193 S-2	4-3-58	U.S. Attys. & Marshals (Territories only)	Absentee Voting Information Chart
247	4-8-58	U.S. Attys. & Marshals	Inventory Reports and Property Records

Amended Transcript Rates for Court Reporting

Additional notices of increases in ordinary transcript rates for court reporting have been received and are compiled, with previous notices, on the next page.

Under the procedure authorized by the Judicial Conference, supplemented by the March 1958 action, to make the rates official it is only necessary for the local district court to fix the rates and for the clerk to certify them to the Director, Administrative Office of the United States Courts.

When this has been done, the United States Attorney may pay the increased rates without special authorization from the Department. Those United States Attorneys who have requested authorization to pay the increased rates will be guided accordingly.

NEW RATES FOR ORDINARY DELIVERY PURSUANT TO AUTHORIZATION OF JUDICIAL CONFERENCE OF MARCH 1958

Dist.	Orig.	Carbon	Date Court Order	Eff. Date
Ala., N.	65¢	30¢	3/24/58	
M.	65¢	30¢	3/27	4/1/58
S.	65¢	30¢	3/24	3/24/58
Alsk. 1	65¢	30¢	"	"
2	65¢	30¢	3/31/58	
3	65¢	30¢	3/27/58	
4	65¢	30¢	3/24/58	
Ariz.	65¢	30¢	3/25/58	
Ark. E.				
W.	65¢	30¢	3/24/58	
Cal. N.	65¢	30¢	3/24	3/24/58
S.	65¢	30¢	3/31	3/31/58
C.Z.				
Colo.				
Conn.				
Del.				
D.C.	65¢	30¢	3/24	3/24/58
Fla. N.	65¢	30¢	3/24	4/1/58
S.	65¢	30¢	3/31/58	
Ga. N.				
M.	65¢	30¢	4/1/58	
S.	65¢	30¢	3/28	3/28/58
Guam	65¢	30¢	3/27	4/1/58
Hawaii	65¢	30¢	3/24	3/24/58
Idaho	65¢	30¢	3/28	3/28/58
Ill. N.	65¢	30¢	3/25/58	
E.	65¢	30¢	3/27/58	
S.				
Ind. N.	65¢	30¢	3/27/58	
S.	65¢	30¢	3/25	3/25/58
Iowa N.	65¢	30¢	3/25/58	
S.	65¢	30¢	4/7	4/7/58
Kans	65¢	30¢	3/24	3/24/58
Ky. E.	65¢	30¢	3/24	3/24/58
W.	65¢	30¢	3/31	4/1/58
La. E.				
W.				
Maine	65¢	30¢*	3/24	3/24/58
Md.	65¢	30¢	3/27	4/1/58
Mass.	65¢	30¢	3/27/58	
Mich. E.				
W.	65¢	30¢	3/28	4/1/58
Minn.	65¢	30¢	3/26	4/1/58
Miss. N.	60¢	30¢	3/27/58	
S.				
Mo. E.	65¢	30¢	3/25	4/1/58
W.				
Mont.	65¢	30¢	3/27	4/1/58
Nebr.	65¢	30¢	4/2/58	
Nev.				
N.H.				
N. J.	65¢	30¢	3/24/58	
N. Mex.	65¢	30¢	3/31	4/1/58

Dist.	Orig.	Carbon	Date Court Order	Eff. Date
N.Y. N.	65¢	30¢	4/1	4/1/58
E.	65¢	30¢	3/25/58	
S.				
W.				
N.C. E.	65¢	30¢	3/26	4/1/58
M				
W.	65¢	30¢	3/28/58	
N.Dak.	65¢	30¢	3/24	3/24/58
Ohio N.				
S.	65¢**	30¢**	3/27	3/27/58
Okla.N.				
E.	65¢	30¢	3/24/58	
W.				
Ore.	65¢	30¢	3/25	3/25/58
Pa. E.	65¢	30¢	3/24	3/24/58
M				
W.	65¢	30¢	3/24	3/24/58
P. Rico	65¢	30¢	4/3	4/3/58
R. I.				
S. C. E.				
W.	65¢	30¢	3/31	4/1/58
S. Dak.	55¢	25¢	4/8	4/8/58
Tenn. E.	65¢	30¢	4/4	4/4/58
M.				
W.	65¢	30¢	3/25	3/25/58
Tex. N.	65¢	30¢	3/24/58	
E.	65¢	30¢	3/25/58	
S	65¢	30¢	3/27	3/31/58
W.	65¢	30¢	3/25/58	
Utah				
Vt.	65¢	30¢	3/26	3/26/58
Va. E.				
W.	65¢	30¢	3/25	4/1/58
V. I.				
Wash. E.				
W.				
W.Va. N.				
S.				
Wis. E.	65¢	30¢	3/26	3/26/58
W.	65¢	30¢	3/26/58	
Wyo.	65¢	30¢	3/25	4/1/58
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** Eastern Division

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Suspension of Deportation; Eligibility for Consideration Under More Than One Provision of Statute. Dessalernos v. Savoretti (United States Supreme Court, April 14, 1958). Certiorari to review decision of Fifth Circuit holding that alien was not eligible for suspension for deportation under section 244(a)(1) of Immigration and Nationality Act. Reversed.

The facts in this case were reported in the Bulletin, Vol. 5, No. 12, p. 372; 244 F. 2d 178. The Court of Appeals held that since the alien could not qualify for suspension of deportation under section 244(a)(5) of the Immigration and Nationality Act, his case could not be considered under section 244(a)(1), even though the case was literally within the letter of the latter provision. It was the government's contention that the various provisions relating to suspension of deportation were mutually exclusive.

In a per curiam decision by the majority of the Court, it said that it was stipulated by the parties in the district court that the sole question for decision was whether petitioner was entitled to have his application for suspension of deportation considered under section 244 (a)(1) of the Immigration and Nationality Act of 1952. It held that petitioner is so entitled. The judgment of the Court of Appeals was therefore vacated and the cause remanded to the district court with directions to enter an appropriate judgment declaring that petitioner is entitled to have his application for suspension of deportation considered by the United States Immigration and Naturalization Service under section 244(a)(1).

Mr. Justice Harlan, whom Mr. Justice Clark joins, would dismiss the writ for lack of jurisdiction. In his view the record fails to disclose a justiciable case or controversy because (1) the undisturbed administrative finding that petitioner "does not meet the requirement that his deportation would result in exceptional and unusual hardship to himself," establishes that petitioner is not entitled to suspension of deportation under either subdivisions (a)(1) or (a)(5) of section 244 of the Immigration and Nationality Act of 1952; and (2) the parties' stipulation in the district court is ineffective to confer jurisdiction on the Court to decide the question sought to be presented. See Swift & Co. v. Hocking Valley R. Co., 243 U.S. 281, 289; Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-241. In holding on this record that subdivision (a)(1) governs petitioner's case the Court has, in his view, rendered what in effect is an advisory opinion.

Mr. Justice Frankfurter would join Mr. Justice Harlan if he read the record to be as clear as the latter finds it to be. Being in sufficient doubt about the scope and meaning of the stipulation, he joins the Court's opinion. This leaves open, on the remand, the administrative determination of the issues under section 244(a)(1).

Staff: Maurice A. Roberts (Criminal Division)

Claim of Physical Persecution; Court Review of Administrative Decisions. Cantisani v. Holton (United States Supreme Court, April 14, 1958). In this case the Supreme Court denied certiorari to review the Seventh Circuit holding that the Attorney General did not abuse his discretion in denying an application for stay of deportation under section 243(h) of the 1952 Immigration and Nationality Act, filed by an Italian national who entered the United States illegally in 1949 and who alleged in such application that if he is deported to Italy he will be subject to persecution by Communist elements there.

(The facts in this case were reported in the Bulletin, Vol 5, No. 23, p. 683, 248 F. 2d 737).

Due process; Representation by counsel; Crime of Unlawful Entry Involves Moral Turpitude. DeBernardo v. Rogers (C.A., D.C., March 27, 1958). Appeal from decision upholding validity of deportation order. Affirmed.

The alien in this case was brought to the United States in 1912 when he was two years old. When he was scarcely more than 21, he had been sentenced to imprisonment for unlawful entry and armed robbery in New York state. He was ordered deported in 1932, but escaped from imprisonment and during his time at large committed robbery and was sentenced for that crime upon recapture.

In the lower court, the alien contended that he was denied due process when he was not provided with counsel at his deportation hearing. The appellate court said it was unnecessary to decide whether due process requires that counsel be appointed to represent an indigent defendant in a deportation proceeding, because the facts on which deportation was ordered in this case were not in issue. At the administrative hearing appellant admitted having been sentenced more than once to terms exceeding one year, and copies of the indictments, judgments and sentences were received in evidence. The legal question whether the crime of unlawful entry involves moral turpitude was an issue before the lower court, where the alien was represented by an attorney. He was therefore not prejudiced as to that question by being unrepresented at the administrative hearings. The lower court's decision that the crime involves moral turpitude was correct. Since the first two crimes committed by the alien and the sentences therefore were sufficient to sustain the deportation order, it was unnecessary to consider the question whether the third sentence was properly added to the proceedings.

Staff: Assistant United States Attorney John W. Kern, III (Dist. Col.)(United States Attorney Oliver Gasch and Assistant United States Attorney Lewis Carroll on the brief)

Review of Refusal to Grant Permission to Reapply for Admission to United States Nunc Pro Tunc; Lack of Good Moral Character. Gonzalez-Jimenez v. Del Guercio (C.A. 9, March 14, 1958). Appeal from decision upholding deportation order and denial of voluntary departure and refusal to grant permission to reapply for admission nunc pro tunc. Affirmed.

In a per curiam decision the appellate court said that the alien here sought judicial review by way of declaratory relief in respect to an order of deportation and a denial of voluntary departure from the United States and a refusal to grant permission nunc pro tunc to reapply for admission. As appellant was admittedly unlawfully in the United States following his fourth or fifth illegal entry, he had no ground for complaint with respect to the order for deportation. His principal argument here appeared to be that he should have been granted permission to reapply for admission into the United States nunc pro tunc.

The Court held that, as there was no right to be granted such permission to reapply as that which appellant sought, the only question before it was whether there was an abuse of discretion in denying this application.

The Court observed that it was reasonably apparent from the record that appellant knew of the necessity of making such an application before entering the United States and that he disregarded and neglected doing so, and that there was credible evidence in the record to sustain the finding of the immigration officers that he had made false statements on prior occasions which warranted a determination of his lack of moral character.

The Court stated that the false statements were given in testimony and would constitute perjury or false swearing; that, accordingly, it could not hold that the denial of this discretionary relief was arbitrary; that it did not overlook the hardship that resulted from the fact that appellant's wife was granted such relief while he was denied it, but that this furnished no ground for a reversal of the judgment below.

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OFFICE OF ALIEN PROPERTY

Assistant Attorney General Dallas S. Townsend

Trading With the Enemy Act; Whether Contingent Interest Is Property Interest Within Seizure Powers of Government Under Act. Herrmann v. Rogers (C.A. 9, April 2, 1958). Fred Nagel, an Idaho resident, created an inter vivos trust in 1946 in favor of fourteen named persons, all of whom were residents and nationals of Germany. The trustees were directed to make annual payments of the income with discretion, however, to withhold payment; in the event any of the beneficiaries came to the United States, the trustees were required to pay such beneficiary his designated share of the trust res. The trustees were also authorized to pay over the trust res at any time if they should find that the gift would not be subject to "confiscation by any government nor create sinews of war for any government antagonistic to the United States". If not sooner terminated, the trust was to terminate upon the death of the last of the named beneficiaries and the trust property was to be distributed as directed. In 1949 the Attorney General, acting under the authority of the Trading with the Enemy Act, seized all right, title and interest of all the beneficiaries in and to the trust. Demands were made upon the trustee to deliver over to the Attorney General the interests of the beneficiaries but the trustee refused to do so.

The district court granted the Attorney General's motion for summary judgment, finding that title to the property passed to the Attorney General by virtue of the vesting order and that the proceeding was a summary action for possession. The court held that the Attorney General was entitled to such trust funds as remained in the hands of the trustee but did not surcharge the trustee with the amount of the expenditures made to the beneficiaries after the date of the vesting order.

The Court of Appeals affirmed the lower court to the extent that it found the Attorney General entitled to immediate possession of the trust funds. The Court pointed out that the seizure provisions of the Act are "extremely comprehensive and all inclusive", and that contingent remainders are as vestible as vested remainders. The Court declined to follow the dictum in Brownell v. Edmunds, 209 F. 2d 349 (C.A. 4), saying "this dicta is not controlling, and is contrary to the authorities . . .". The Court of Appeals reversed the lower court to the extent that it surcharged the trustee with the sum expended by her on behalf of the beneficiaries prior to the date of the vesting order and failed to surcharge the trustee with the expenditures made by her on behalf of the beneficiaries subsequent to the date of the vesting order.

Staff: The case was argued by George B. Searls (Alien Property). With him on the brief were United States Attorney Sherman F. Furey, Jr., Assistant United States Attorney Marion J. Callister, (D. Idaho), and James D. Hill and Irwin A. Seibel (Office of Alien Property).

Trading With the Enemy Act; Whether Exercise of Attorney General's Discretionary Authority to Seize Enemy Property is Subject to Judicial Review. In the Matter of the Testamentary Trust of Herbert M. Paszotta, deceased (Appellate Court of Indiana, April 3, 1958). An Indiana resident died in 1943 leaving a will, executed earlier that year, by which he left the residue of his estate in trust with directions to pay the principal to his two German sisters "upon the cessation of hostilities" and, if the sisters did not survive that period, the trustee was to keep the money for herself. Both sisters survived the period and are still living. In 1950 the Attorney General, acting under the authority of the Trading with the Enemy Act, seized the interests of the sisters in the trust.

The trial court held that "cessation of hostilities" meant the formal termination of the state of war which did not occur until the adoption of the Joint Resolution to that effect in October, 1951 (65 Stat. 451). It then found that the sisters had merely an expectancy until they survived the termination of the war, that is, October, 1951. Accordingly it concluded that when the Attorney General's vesting order was issued in 1950 the sisters had no interest which was capable of seizure and that the Attorney General was, therefore, not entitled to their shares. Instead it awarded distribution to the sisters.

The appellate court, disagreeing with the trial court, held that "cessation of hostilities" in the will meant the "cessation of hostilities" proclaimed by the President to be effective December 31, 1946. Nevertheless, it affirmed on the ground that while the Attorney General's seizure authority is discretionary, the discretion is subject to judicial review and it was an abuse in this case to exercise the discretion in 1950 without more than a declaration that he regarded it in the national interest to do so.

Staff: The case was argued by Irwin A. Seibel. With him on the brief were United States Attorney Phil M. McNagny, Jr., and Assistant United States Attorney Kenneth C. Raub (N.D. Ind.) and George B. Searls (Office of Alien Property).

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