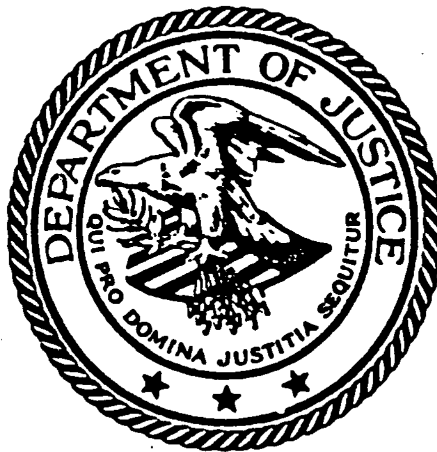
Published by Executive Office for United States Attorneys,
Department of Justice, Washington, D. C.

July 14, 1961

United States
DEPARTMENT OF JUSTICE

Vol. 9 No. 14



UNITED STATES ATTORNEYS
BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 9 July 14, 1961 No. 14

NEW APPOINTEES

The nominations of the following United States Attorneys have been confirmed by the Senate:

Illinois, Southern - Edward R. Phelps

Mr. Phelps was born August 28, 1904 in Macoupin County, Illinois and is married. He attended Northwestern University in Evanston from September 1926 to June 1927 and the University of Illinois at Urbana from September 19, 1927 to June 17, 1931 when he received his LL.B. degree. He was admitted to the Bar of the State of Illinois in 1931. From 1931 to 1948 he was an associate attorney with Mr. Jessie Peebles in Carlinville, Illinois, with the exception of the period from November 20, 1942 to February 4, 1946 when he served in the United States Navy and was honorably discharged as a Lieutenant. Since 1948 he has engaged in the private practice of law in Carlinville. He has also served as City Attorney for Carlinville from 1932 to 1936; Master-in-Chancery for Macoupin County from February 19, 1938 to February 20, 1942; and State's Attorney for Macoupin County from November 1948 to November 1956.

Pennsylvania, Western - Joseph W. Ammerman

Mr. Ammerman was born July 14, 1924 at Curwensville, Pennsylvania and is single. He attended Dickinson College in Carlisle, Pennsylvania and received his A.B. degree on June 6, 1948 and his LL.B. degree on June 4, 1950. He was admitted to the Bar of the State of Pennsylvania that same year. He served in the United States Army from February 17, 1943 to June 13, 1946 when he was honorably discharged as a Captain. For a few months in 1951 he was a partner in the firm of Urey and Ammerman in Clearfield, Pennsylvania and since that time he has engaged in the private practice of law with his brother in Clearfield. He also served as District Attorney for Clearfield County, Pennsylvania from 1952 to March 15, 1961.

Virginia, Western - Thomas B. Mason

Mr. Mason was born January 12, 1919 at Lynchburg, Virginia, is married and has two children. He attended Hampden-Sydney College from September 1936 to June 1938 and the University of Virginia from September 16, 1938 to June 9, 1941 when he received his LL.B. degree. He was admitted to the Bar of the State of Virginia in 1940. He served in the United States Navy from April 28, 1942 to April 10, 1946 when he was honorably discharged as a Lieutenant. From April 1946 to March 1947 he was an attorney with Ferrow and Rosenberg and from 1947 to 1955 he was an associate attorney with Mr. Thomas Kilpatrick, both in Lynchburg. Since September 1, 1955 he has been employed by the Peoples National Bank and Trust Company of Lynchburg as a trust officer and on January 1, 1961 he was promoted to Vice President in charge of the Trust Department.

Washington, Eastern - Frank R. Freeman

Mr. Freeman was born October 24, 1911 at Desmet, Idaho, is married and has five children. He entered Gonzaga University at Spokane on August 31, 1932 and received his LL.B. degree on May 26, 1938. He was admitted to the Bar of the State of Washington that same year. From 1938 to 1940 he was a law clerk in the firm of Davis, Heil and Davis and from 1940 to 1944 he engaged in the practice of law with Mr. John F. Kelley, both in Spokane. On August 14, 1944 he was appointed as Assistant United States Attorney for the Eastern District of Washington and served until his voluntary resignation on October 28, 1953. Since that time he has been a partner in the firm of Erickson and Freeman in Spokane. He was also an instructor at the Gonzaga University Law School from 1949 thru 1959.

Wyoming - Robert N. Chaffin

Mr. Chaffin was born July 13, 1905 at Avalon, Missouri and is married. He attended Park College in Parksville, Missouri from 1923 to 1926; the University of Washington during the year 1926-27, and was awarded his A.B. degree by Park College in June 1927. From 1927 to 1932 he was employed at the Central Garage, Cody, Wyoming and from 1932 to 1943 he operated a bulk sales agency for the Standard Oil Company in Torrington, Wyoming. He served in the United States Army from February 23, 1943 to October 13, 1945 when he was honorably discharged as a Staff Sergeant. He entered the University of Wyoming on January 7, 1946 and received his LL.B. degree on June 2, 1947. He was admitted to the Bar of the State of Wyoming that same year. For the next two years he engaged in the private practice of law in Torrington and since February 1949 he has been a partner in the firm of Chaffin and Maier there. He has also served as Torrington City Police Judge from 1950 to 1960 and as U.S. Commissioner at Torrington since December 20, 1949.

The names of the following appointees as United States Attorneys have been submitted to the Senate:

New Jersey - David M. Satz, Jr.

As of July 7, 1961, the score on new appointees is: Confirmed - 51; Nominated - 5.

The following United States Attorneys, whose nominations have been confirmed, have not yet entered on duty:

New Hampshire - William H. Craig, Jr.
Texas, Northern - Harold B. Sanders, Jr.
Texas, Southern - Woodrow B. Seals
Texas, Western - Ernest Morgan

The following changes should be made in the list of United States Attorneys:

Oregon - Sydney I. Lezak (Acting)
Pennsylvania, Western - Joseph S. Ammerman (Court Appointment)
Tennessee, Western - Thomas L. Robinson (Court Appointment)

MONTHLY TOTALS

With the exception of triable and other criminal cases, totals in all categories of work pending in United States Attorneys' offices rose during the month of May. The following analysis shows the number of items pending in each category as compared with the totals for the previous month:

	April 30, 1961	May 31, 1961	
Triable Criminal	7,192	7,157	- 35
Civil Cases Inc. Civil Less Tax Lien & Cond.	14,046	14,165	+ 119
Total	21,238	21,322	+ 84
All Criminal	8,741	8,727	- 14
Civil Cases Inc. Civil Tax & Cond. Less Tax Lien	16,903	17,029	+ 126
Criminal Matters	10,279	10,431	+ 152
Civil Matters	12,962	13,098	+ 136
Total Cases & Matters	48,885	49,285	+ 401

Both filings and terminations of civil cases continue to show a decrease from the comparable period of the previous fiscal year. In the criminal field, filings increased but terminations dropped slightly. As a result of the reduction in the number of total terminations, the pending caseload registered an increase of 1,330 cases, or almost five percent. The breakdown below shows the pending totals on the same date in fiscal 1960 and 1961:

	1st 11 Months F.Y. 1960	1st 11 Months F.Y. 1961	Increase or Decrease Number	%
Filed				
Criminal	28,496	28,708	+ 212	+ 0.74
Civil	22,607	21,801	- 806	- 3.57
Total	51,103	50,509	- 594	- 1.16
Terminated				
Criminal	27,643	27,628	- 15	+ 0.05
Civil	20,898	20,150	- 748	- 3.58
Total	48,541	47,778	- 763	- 1.57
Pending				
Criminal	8,369	8,727	+ 358	+ 4.28
Civil	19,717	20,689	+ 972	+ 4.93
Total	28,086	29,416	+1,330	+ 4.74

Total criminal and civil case filings and terminations during May exceeded those for the preceding month and reached the third highest level of the past eleven months. Set out below is an analysis by months of the number of cases filed and terminated.

	Filed			Terminated		
	Crim.	Civ.	Total	Crim.	Civ.	Total
July	1,709	1,863	3,572	1,600	1,463	3,063
Aug.	2,346	2,304	4,650	1,772	1,906	3,678
Sept.	3,201	1,897	5,098	2,328	1,798	4,126
Oct.	2,551	1,990	4,541	2,977	2,005	4,982
Nov.	2,479	1,889	4,368	2,832	1,627	4,459
Dec.	2,534	1,753	4,287	2,617	1,816	4,433
Jan.	2,574	1,914	4,488	2,513	1,797	4,310
Feb.	2,883	1,840	4,723	2,346	1,751	4,097
March	2,983	2,137	5,120	3,159	2,045	5,204
April	2,666	2,095	4,761	2,726	2,036	4,762
May	2,782	2,119	4,901	2,858	1,906	4,764

During the month of May, United States Attorneys reported collections of $2,556,971. This brings the total for the first eleven months of fiscal year 1961 to $31,803,028, an increase of $3,606,986, or 12.7 percent, over the $28,196,042 collected during the first eleven months of fiscal 1960.

During May, $7,536,126 was saved in 103 suits in which the Government as defendant was sued for $9,267,700. Fifty-nine of them involving $2,849,560 were closed by compromises amounting to $603,585, and 22 of them involving $2,685,710 were closed by judgments against the United States amounting to $1,127,989. The remaining 22 suits involving $3,732,430 were won by the Government. The total saved for the first eleven months of the fiscal year amounted to $37,468,459. This is a decrease of $2,798,601, or 6.9 percent, from the $40,267,060 saved during the comparable period of fiscal 1960.

DISTRICTS IN CURRENT STATUS

As of May 31, 1961, the districts meeting the standards of currency were:

CASES

Criminal

Ala., N.	Conn.	Ill., E.	La., E.	Mo., W.
Ala., M.	Del.	Ill., S.	La., W.	Mont.
Ala., S.	Dist. of Col.	Ind., N.	Maine	Nev.
Alaska	Fla., N.	Ind., S.	Md.	N.H.
Ariz.	Fla., S.	Iowa, N.	Mass.	N.J.
Ark., E.	Ga., N.	Iowa, S.	Mich., E.	N.M.
Ark., W.	Ga., S.	Kan.	Minn.	N.Y., N.
Calif., S.	Idaho	Ky., E.	Miss., N.	N.Y., E.
Colo.	Ill., N.	Ky., W.	Mo., E.	

CASES (Cont'd)

Criminal (Cont'd)

N.Y., W.
N.C., E.
Ohio, N.
Ohio, S.
Okla., N.
Okla., E.
Okla., W.
Ore.
Pa., E.
Pa., M.
Pa., W.
P.R.
R.I.
S.D.
Tenn., E.
Tenn., W.
Tex., N.
Tex., E.
Tex., S.
Tex., W.
Utah
Va., E.
Va., W.
Wash., E.
Wash., W.
W. Va., S.
Wis., E.
Wis., W.
Wyo.
C.Z.
Guam
V.I.

CASES

Civil

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

MATTERS

Criminal

Ala., M.
Ala., S.
Ariz.
Ark., E.
Ark., W.
Calif., N.
Calif., S.
Colo.
Fla., N.
Ga., S.
Hawaii
Idaho
Ill., E.
Ill., S.
Ind., N.
Ind., S.
Iowa, N.
Iowa, S.
Ky., E.
Ky., W.
La., W.
Me.
Md.
Mass.
Miss., N.
Miss., S.
Mo., E.
Mont.
Neb.
Nev.
N.J.
N.M.
N.C., M.
Okla., N.
Okla., E.
Okla., W.
Pa., E.
Pa., M.
Pa., W.
S.D.
Tenn., W.
Tex., E.
Tex., S.
Utah
Wash., E.
W.Va., N.
W.Va., S.
Wis., W.
Wyo.
C.Z.
Guam

MATTERS

Civil

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

JOB WELL DONE

The United States Attorney for the Northern District of Georgia has expressed appreciation to the Department for the services of Assistant United States Attorney Frank H. Cormany, Sr., Eastern District of South Carolina, in handling the trial of condemnation cases, reporting that the judge has stated that he was particularly pleased with Mr. Cormany's conduct.

* * *

ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

MEMOS AND ORDERS

The following Memoranda applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 11, Vol. 9, dated June 2, 1961.

MEMO	DATED	DISTRIBUTION	SUBJECT
294	5-24-61	U.S. Attys & Marshals in State of Illinois	Illinois Sales Tax
277 S-1	6-5-61	U.S. Attys	Public Law 86-257 (Labor-Management Reporting and Disclosure Act of 1959)
295	5-31-61	U.S. Attys & Marshals	Code of Ethics
246-61	6-29-61	U.S. Attys & Marshals	Consent judgment policy
296	6-15-61	U.S.Attys & Marshals	Report of Outstanding Obligations
278-S2	6-28-61	U.S. Attys	Handling of Actions under the Social Security Act

* * *

ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

Salt Companies Indicted. Sherman Act, United States v. Morton Salt Company, et al. (D. Minn.) A federal grand jury sitting in St. Paul returned an indictment on June 28, 1961 charging the Morton Salt Company, International Salt Company, Diamond Crystal Salt Company and the Carey Salt Company with a conspriacy to fix the prices of rock salt. The four companies involved are the principal producers of rock salt, and mine and sell approximately 75 percent of the rock salt sold to municipal and state agencies for deicing control purposes.

The indictment charges that for many years the defendants and a group of co-conspirators have engaged in an unlawful combination and conspiracy to fix rock salt prices by agreeing to quote list prices on bids to municipal and state authorities; to adhere to an industry-established multiple basing point system; to communicate with each other for the purpose of exchanging information concerning prices and to notify each other in advance of contemplated changes in mine prices.

The indictment is the result of an investigation started in late 1959 by the Chicago Office. It was undertaken because of a great number of complaints submitted by purchasing officials to the effect that nearly every time that they called for rock salt bids the bids were identical.

Staff: Edward R. Kenney and Herbert F. Peters.
(Antitrust Division)

Individual Dismissed in Sherman Act Case. United States v. National Dairy Products Corporation and Raymond J. Wise. (W. D. Missouri). On June 14, 1961, Judge R. Jasper Smith dismissed the defendant Raymond J. Wise from charges under Section 1 of the Sherman Act since the acts with which he was charged were done on behalf of and as a representative of the defendant National Dairy Products Corporation. The Court said that under such circumstances he should have been indicted under Section 14 of the Clayton Act and that "an individual, charged solely in his representative capacity and not in any degree on an individual basis for his own personal account, may not be charged with a violation of Section 1 of the Sherman Act."

The Court further stated: "Under clear Congressional interpretations, the Sherman Act governs the prosecution and punishment of principals, i.e., corporations and individuals acting on their own behalf, while Section 14 of the Clayton Act covers the prosecution and punishment of individuals who, as corporate officials, took part in the corporate violation. This interpretation is supported by the wording and legislative history of Section 14, and is in accord with the fundamental principle that courts are bound to give effect to the various sections

of legislation and should avoid a construction which would render a statute a nullity. Any other interpretation would leave Section 14 without content or force."

Staff: Earl A. Jinkinson, James E. Mann, and Robert L. Eisen
(Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General William H. Orrick, Jr.

SUPREME COURT

VETERANS' HOME LOAN GUARANTY PROGRAM

Right of United States to Be Indemnified By Defaulting Veteran Whose Mortgage Was Insured Pursuant to Veterans' Home Loan Guaranty Program. United States v. Shimer (June 12, 1961). Under the G. I. home loan program (38 U.S.C. 1801-1824) Shimer, a veteran, bought a home subject to a lender's $13,000 mortgage, upon which the maximum guaranty of the United States was $4,000. The veteran defaulted shortly after purchase, and the lender bought in the house for $250 at a sheriff's sale after foreclosure. The lender claimed and the V.A. paid the full $4,000 guaranty.

The United States sued the veteran for recovery of the amount it had paid the lender. The district court held that by virtue of the Pennsylvania Deficiency Judgments Act (which required the lender to accept the house as full satisfaction of the mortgage debt) the veteran owed nothing to the lender at the time the V.A. had paid on the guaranty, so that V.A. was under no legal requirement to make the payment. It ruled that since by regulation the V.A. could recoup from the veteran only amounts it was required to pay on account of the veteran's liabilities, it could not recover here. The Third Circuit affirmed, finding a design in the V.A. regulations to permit state law to determine the amount with which the mortgage debt should be credited as a result of the foreclosure disposition of the house. 276 F. 2d 792.

The Supreme Court reversed. It found that the Veterans Administrator's regulations, authorized by the Servicemen's Readjustment Act, were "intended to create a uniform system for determining the Administration's obligation as guarantor, which in its operation would displace state law." The Court held specifically that the regulations explicitly covered the amount to be credited against the debt in the foreclosure sale situation presented by the facts, required the V.A. to pay the lender, and were designed to "provide the exclusive procedure" for such accounting. This result accords with the statutory purpose of making the guaranty "operate as the substantial equivalent of a down payment * * * in order to induce prospective mortgagee-creditors to provide 100% financing for a veteran's home." In effect, the guaranty is a deferred down payment which provides the lender equivalent security for his loan.

Staff: Wayne G. Barnett (Assistant to the Solicitor General) and Anthony L. Mondello (Civil Division)

COURTS OF APPEALS

FALSE CLAIMS ACT

Application for Treatment in Veterans Administration Hospital for Non-service Connected Illness Is "Claim" Within Meaning of False Claims Act. Alperstein v. United States (C.A. 5, June 21, 1961). By virtue of 38 U.S.C. 610(a)(1) (formerly 38 U.S.C. (1952 ed.) 706), a veteran is entitled to receive treatment in a Veterans Administration facility for a non-service connected disability if he is unable to defray the necessary expenses of hospitalization. The statute further provides (38 U.S.C. 622) that the veteran's statement under oath shall be accepted as sufficient evidence of such inability. In this case, the Government invoked the civil sanctions of the False Claims Act against a veteran who, on two separate occasions, obtained treatment in a Veterans Administration hospital by willfully and knowingly misrepresenting under oath his financial status on both the standard V.A. application form and the addendum thereto. The district court entered judgment against the veteran for double the actual cost of his hospitalization, plus $2,000 for each false representation. In doing so (183 F. Supp. 548), the court expressly refused to follow the decision of the Court of Appeals for the Tenth Circuit in United States v. Borth, 266 F. 2d 521. In the Borth case, it had been held that applications for hospitalization in Veterans Administration facilities are not within the reach of the False Claims Act. The reasoning of the Tenth Circuit was that the Act embraces only claims for money or property and that, notwithstanding the fact that it involves substantial cost to the United States, a claim for hospitalization does not meet that standard.

On appeal, a divided Fifth Circuit affirmed per curiam. Like the district court, the majority indicated its disagreement with the Borth decision. It stated that it was "convinced that the filing of such false affidavit and application for hospitalization, involving as it does immediate outlay by the Government, of substantial sums of money and the receipt by the patient of services, facilities, food and drugs of substantial cost to the Government, falls within the purview of the False Claims Act." It added that it could not "better state the facts or [its] views on the case in issue than did the District Court in its full and able opinion." In dissent, Judge Cameron stated his belief that the Borth opinion was "unanswerable".

Staff: Alan S. Rosenthal and Howard E. Shapiro (Civil Division)

SOCIAL SECURITY ACT

Executrix of Estate Held Not Engaged in "Trade or Business" of Administering Estate for Purposes of Social Security Coverage. McDowell v. Ribicoff (C.A. 3, June 16, 1961). Plaintiff applied for

social security payments, alleging she had been self-employed for the requisite number of quarters of coverage under the Social Security Act. The pivitol issue underlying her application was whether she had been engaged in the "trade or business" of administering her aunt's $123,000 estate. The Secretary found that under the applicable regulations she had not been engaged in extensive activity over a prolonged period and accordingly denied her application. The district court reversed the Secretary, holding that there was no substantial evidence to support the finding that she had not been engaged in the "trade or business" of administering the estate in question.

The Court of Appeals reversed, holding that the Secretary's decision was supported by substantial evidence. In so holding, the Court of Appeals delineated the factors which must be considered in defining "trade or business" as it is used both under the Social Security Act and Internal Revenue Code. It emphasized the need for "extensive activity over a substantial period of time during which the taxpayer holds himself out as selling goods or services." The Court specifically upheld a Revenue Ruling defining what constitutes the "trade or business" of administering an estate, and rejected the earlier decision in Wallace's Estate v. Commissioner, 101 F. 2d 604 (C.A. 4), which had set forth different criteria for defining the same phrase.

Staff: Ronald A. Jacks (Civil Division)

DISTRICT COURTS

FEDERAL EMPLOYEES GROUP LIFE INSURANCE

Deceased Federal Employee Held Not Insured Where Prior Waiver of Federal Group Life Insurance Coverage Had Not Been Cancelled Upon Reentry Into Federal Employment. Hicks v. United States (D. D.C., June 13, 1961). Plaintiff's deceased daughter on August 27, 1954 executed a waiver of life insurance coverage under the Federal Employees Group Life Insurance Act of 1954, 5 U.S.C. 2091-2103. On September 10, 1954, she resigned from her position with the State Department. On May 13, 1959, she reentered Government service upon being employed by the Post Office Department. On her employment affidavit she indicated that no waiver of insurance was outstanding and, accordingly, a payroll deduction under the Act was authorized. The decedent also executed a designation of beneficiary, naming her mother as beneficiary of her insurance. She died on June 9, 1959. As the employee's personnel file, received after her death, disclosed the waiver and did not contain evidence that there had ever been an application for cancellation thereof, the Post Office Department declared that she was not subject to the Act, proffered the return of the payroll deductions, and declined to certify her coverage to the insurance carrier.

Plaintiff brought suit alleging that upon reemployment the decedent had requested coverage under the Act and that the payroll deduction of the appropriate sum as a premium payment caused the decedent to assume that her life was fully insured. The Government moved for summary judgment on the ground that the deceased was not insured because the waiver executed in August 1954 had never been cancelled before her death as provided in 5 C.F.R. 37.6, and was therefore in effect. The Government pointed out that the payroll deductions were made because of the apparent eligibility of decedent for insurance based on her statement that there was no waiver outstanding. The District Court granted the Government's motion and dismissed the complaint.

Staff: United States Attorney David C. Acheson and Assistant United States Attorney Edmond F. McKeown, Jr. (D. D.C.); Andrew P. Vance (Civil Division)

Designation of Non-juridical Entity as Beneficiary of Federal Group Life Insurance Policy Held Invalid. United States v. Metropolitan Life Insurance Co. (N.D. N.Y., May 29, 1961). An employee of the Trust Territory of the Pacific Islands, under the jurisdiction of the Department of the Interior, designated "Marshallese Scholarships, c/o Keith Smith, Mieco, Majuro, M.I." as the beneficiary of her federal employees group life insurance policy. "Marshallese Scholarships", an informal gathering of individuals interested in the education of Marshallese children, had no actual legal existence at the time of the employee's death, and the trustee named in the designation could not be located. The High Commissioner of the Trust Territory claimed the proceeds as parens patriae with the intent of carrying out the decedent's wishes through a Marshallese Scholarship Fund which had been started by the Trust Territory Government.

Suit was filed by the United States ex rel. The Trust Territory against the insurance carrier. The administratrix of decedent's estate was permitted to intervene. The suit was tried and briefed on the question of the applicability of the cy pres doctrine to the designation. The Court, however, decided that 5 C.F.R. 37.10, which limited the classes of beneficiaries that might be designated to "any person, firm, corporation, or legal entity" invalidated the designation since it did not fall within the permitted classes, and therefore the estate took in accordance with the provisions of 5 U.S.C. 2091, et seq.

Staff: United States Attorney Justin J. Mahoney and Assistant United States Attorney Robert Contiguglia (N.D. N.Y.); Andrew P. Vance (Civil Division)

FEDERAL TORT CLAIMS ACT

Government Not Liable for Staphylococcus Infection Contracted in Veterans Administration Hospital. Dickinson v. United States (W.D. Wash., May 22, 1961). In February 1959 plaintiff underwent surgery for hemorrhoids at the Veterans Administration Hospital in Seattle, Washington. Subsequently, plaintiff suffered a staphylococcus infection, which resulted in serious injury. Negligence in the administration of a caudal type anesthesia and in failing to diagnose and treat the infection was charged. Recovery of $111,000 was sought. Staphylococcus infections have been a very serious problem for hospitals in recent years. Within the last year a Memphis hospital was found liable for $25,000 in connection with such an infection, and only last March a hospital in Spokane, Washington, was found liable for $67,839 for such an infection. In addition to the instant case, two other staphylococcus cases against the Government are now pending, one in Connecticut and one in Arkansas. The case was highly technical; a total of nine physicians testified as medical experts. At the conclusion of the trial, Judge Bowen announced his decision in favor of the Government; and, on May 22, 1961, appropriate findings of fact and conclusions of law were entered. This is the first "staph" case under 28 U.S.C. 1346(b) to be tried; and it is believed that it will serve as a very useful guide in indicating the extensive technical nature of the evidence required to successfully defend such a suit. Although Judge Bowen did not write an opinion, his findings of fact and conclusions of law should be of material assistance.

Staff: United States Attorney Charles P. Moriarty and Assistant United States Attorney Joseph C. McKinnon (W.D. Wash.)

INTEREST

Award of Interest Against Plaintiff in Interpleader Who Posts Bond Instead of Paying Money Into Court Denied. Phoenix Insurance Co. v. Guy B. Iacona, et al. (D. N.J., April 20, 1961). A corporation which was erecting an apartment project furnished a performance bond. Upon default, the surety company brought an interpleader action against numerous suppliers, lienors, and other creditors. Federal Housing Administration was named a defendant because it had guaranteed the principal mortgage. Because the plaintiff in interpleader posted a bond instead of paying into court the money which it admitted owing, one of the defendants asked the Court to charge interest against the plaintiff from the date of the filing of the interpleader petition. The District Court denied this prayer, holding that, since Congress had permitted the alternative of posting a bond in the Federal Interpleader Statute, 28 U.S.C. 1335, interest should not be charged unless the

stakeholder was found to be guilty of unreasonable delay in bringing the interpleader action or other improper conduct.

Interest Allowed Only from Date of District Court Judgment After Mandate, Not from Date of Earlier Erroneous Judgment, on Amount by Which Earlier Judgment Was Augmented on Appeal. United States v. Hougham (S.D. Cal., April 10, 1961). In 1954, the United States brought suit against defendants for their violations of the fraud provisions of the Surplus Property Act, and sought to recover, under Section 26(b)(2) of that Act, twice the consideration which defendants had paid for the property they fraudulently obtained. The amount of the consideration was known from the start, and twice that amount totaled $159,025.32. The District Court found fraud, and granted judgment for the United States under Section 26(b)(1) of the Act for only $8,000, computed as one $2,000 forfeiture for each of four fraudulent acts, with interest at the State rate of 7% from the date of judgment. On appeal by both parties, the Court of Appeals affirmed (270 F. 2d 290 (C.A. 9)), and the $8,000 judgment against defendants became final when they failed to petition for certiorari. They then paid $8,000 plus interest to the United States. On writ of certiorari, the Supreme Court held that the United States was entitled to a judgment in accordance with Section 26(b)(2). The Court's mandate was not explicit as to what the judgment award or the interest award should be.

On remand in the District Court, defendants urged that Section 26(b)(2) be interpreted to require a judgment for the single amount of consideration for the property, so that when this amount is added to the equivalent amount received by the Government at the time of sale, the statutory requirement of "twice the consideration" would be met. The District Court rejected this interpretation and entered judgment for twice the single amount of consideration, or $159,025.32. The District Court then went on to hold that interest would be allowed only from the date of its entry of the $159,025.32 judgment and not from the date of the earlier erroneous judgment. The result of this ruling is to deny the United States 7% interest on $151,025.32 ($159,025.32 less $8,000) from October 18, 1957 (date of entry of the $8,000 judgment) to April 10, 1961. The Solicitor General has authorized an appeal.

Staff: United States Attorney Laughlin E. Waters and
Assistant United States Attorney John R. Schell
(S.D. Cal.)

SOVEREIGN IMMUNITY

Counterclaims Against United States in Excess of $10,000; Crossclaims Against Housing and Home Finance Agency and Its Administrator. United States v. Aleutian Homes, Inc. (D. Alaska, April 20, 1961). Aleutian Homes, Inc., undertook erection of prefabricated housing near a United States naval base. Housing and Home Finance Agency financed the project by a first mortgage loan. When the corporation fell into financial difficulties, it entered into a "completion agreement" with its

creditors. The Government was not a party to this agreement, but the agreement gave HHFA control over the project, and HHFA extended further credit. The president of the corporation assigned part of the corporate revenues to one Dougherty. The latter's successors in interest were joined as defendants when the United States ultimately filed foreclosure. They filed counterclaims against the United States and crossclaims against HHFA and the Administrator, alleging that they had failed to receive their expected share of the revenues as the result of improper management of the project while under the control of HHFA pursuant to the "completion agreement". A motion to dismiss the counterclaims was sustained on the ground that they were suits against the United States which did not come within the Tort Claims Act and which, if considered to be based upon contract, were in excess of $10,000. The crossclaims against HHFA were dismissed on the ground that that agency can not be sued as such. While there is a statute under which the Administrator can be sued, the Court dismissed the crossclaims as to him because the relief sought was essentially against the United States Treasury rather than against the Administrator. As a further ground of dismissal, the Court pointed out that the crossclaimants were not parties to the "completion agreement" and hence had no standing to sue on it.

Staff: United States Attorney Warren C. Colver and Assistant United States Attorney James R. Clouse, Jr. (D. Alaska); Robert Mandel (Civil Division)

* * *

CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

New Orleans Airport Desegregation Suit. United States v. City of New Orleans, et al. (E.D. La.). On June 26 the Department filed suit in the Eastern District of Louisiana for an injunction to halt asserted discrimination against Negroes at facilities at Moisant International Airport, New Orleans. The complaint alleges that the present policy of refusing service to Negroes in certain of the airport restaurant facilities violates the terms of a grant agreement entered into between the United States and the City of New Orleans under the Federal Aid to Airports Act. The complaint also alleges a violation of the non-discrimination provision of the Federal Aviation Act of October 23, 1958 (49 U.S.C. 1374(b)) and that the practices complained of impose an unconstitutional burden upon interstate commerce. A motion for preliminary injunction has been filed by the Department, but the date for the hearing has not yet been set.

Staff: United States Attorney M. Hepburn Many (E.D. La.); St. John Barrett and John L. Murphy (Civil Rights Division)

* * *

CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

FAIR LABOR STANDARDS ACT

Large Fines Imposed in Fair Labor Standards Act Case. United States v. First National Bank of Hazardville and Ralph F. Birkenshaw, Jr. (D. Conn.). On April 12, 1961 an information was filed charging defendants with failure to pay the statutory overtime and with two record-keeping violations. In behalf of himself and the bank, Birkenshaw entered a plea of nolo contendere to the overtime charge. A finding of guilty was entered by the Court as to the first count and the two record-keeping counts were dismissed. The bank was charged with failure to pay 19 employees $2,129.50 in overtime wages. During the proceedings it was disclosed that after a 1958 investigation revealed failure to pay minimum wages to 4 employees, the bank required the employees to "kickback" the checks given in restitution. In referring to these "kickbacks," Judge Robert P. Anderson said that "this is the most flagrant violation that has ever come to my attention," and he proceeded to impose the maximum fines provided by the Act on both the bank and its general manager. The $10,000 fine levied against Birkenshaw and the $10,000 fine against the bank (total fines of $20,000 plus $40 costs) are the largest ever imposed in New England under the Fair Labor Standards Act since its enactment twenty-three years ago. The sentences indicate a healthy awareness of the importance and value of this law, not only to the individuals directly affected but also to the community and the nation; and they judicially reflect the presidential and congressional recognition of the importance of the Fair Labor Standards Act evidenced by the liberalization of its terms and broadening of its coverage by the recent extensive amendments.

Staff: United States Attorney Harry W. Hultgren, Jr.; Assistant United States Attorney Victoria Roschefsky (D. Conn.).

FEDERAL FOOD, DRUG, AND COSMETIC ACT

Mishandling of Physicians' Samples Results in Numerous Seizure Actions; Food and Drug Administration Finds Such Mishandling Can Affect Public Health; Serious Misbranding Violations Involved. During June the United States Attorneys for the Southern District of New York, the District of New Jersey and the Northern District of Illinois, pursuant to the request of the Food and Drug Administration, filed libel proceedings to seize a total of 10 lots of physicians' drug samples in the hands of repackers-distributors. These samples were obtained by purchase from physicians or by exchanging the surplus drug samples for everyday office items of which physicians are in need. It appears that such arrangements are not uncommon in many localities throughout the country, although only a small minority of physicians generally dispose of their samples improperly. Some drug detail men

(salesmen) supplement their income by selling their samples directly to the repacker; in some instances the detail men sell directly to druggists. The end result is that the improperly handled drug samples end up in drug stores, having been bought at often substantial discounts from regular prices.

The repackaged drugs include nationally known items such as Diuril, Hydrodiuril; Chloromycetin, Aureomycin, Terramycin and other antibiotics; Equanil and Placidyl, tranquilizers; Premarin, a hormone; Thorazine, a central nervous system depressant; Tofranil, a potent drug for treating mental depression; Dexedrine, a strong stimulant; and numerous other drugs. There are no accurate statistics as to the total number of samples which are annually given physicians by the drug industry. However, records of a now defunct repacking firm indicate that one Brooklyn physician was supplying drugs to the repacker to the extent of some $10,000 a year. One seizure involved stock worth more than $50,000.

Some of the products in these samples are "New Drugs," permitted by the Food, Drug, and Cosmetic Act to be marketed only when prepared and packaged under special controls to insure safety maintenance of identity, strength and proper labeling; and some are antibiotics requiring certification of every batch for safety and efficiency. The conditions found in repackaging of the physicians' samples short-circuit or nullify the essential safety controls required by the Act. Protective labeling required by the law is frequently removed and has resulted in serious mix-ups in the drugs in at least two repackaging establishments. Also, removing the "Caution" admonition required on prescription drugs could cause a dangerous drug to be used without medical supervision with possibly serious consequences. Some of the repacking operations are virtually one-man establishments where the operator himself does the repacking. In the larger establishments, there may be several employees some of whom are wholly untrained. In one instance two high school students were employed to do the repacking and mixed two different types of tablets together. In some establishments the repacked drug is either unlabeled or labeled only with its name.

It is anticipated that United States Attorneys will be requested to institute additional seizure actions or take other legal steps which are justified by the disclosures resulting from the widespread investigation into this repackaging situation. The Criminal Division is prepared to cooperate fully with the United States Attorneys and the Food and Drug Administration in these matters.

MAIL FRAUD

Knitting Machine Work-at-Home Scheme. United States v. Ben Okum, Ephraim Ross, et al. (W.D. Mo.). On May 21, 1961, verdicts of guilty were returned against three defendants, who had been charged with mail fraud (11 counts) and conspiracy (1 count). The charges against two other defendants had been dismissed at the conclusion of the trial.

The convictions resulted from the operation of a "work-at-home" scheme, involving the sale of knitting machines. These machines, for which $60 each was paid to the importer, were sold to the ultimate purchasers for $385, plus financing charges. The defendants promised to give lessons in the operation of the machines, and to purchase the finished garments.

Approximately $25,000 was obtained by defendants during the four months they operated the scheme in the Kansas City area, after which they closed their office and left town.

Staff: United States Attorney F. Russell Millin;
Assistant United States Attorney J. Whitfield Moody
(W.D. Mo.).

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Declaratory Judgment; Summary Judgment - Issue of Fact. Ullah v. Hoy (S.D., Calif., June 15, 1961.) Plaintiff had instituted proceedings under 5 U.S.C. 1009 et seq., for a judgment declaring that he is not subject to deportation. He alleged that he had made an application for voluntary departure which had been denied.

In his answer, defendant denied that allegation and at a pre-trial conference the District Court ordered the complaint dismissed. The Court of Appeals held (278 F.2d 194) that the dismissal was improper since the pleadings created a genuine issue of fact which was not disposed of by affidavit, deposition, testimony or admission of the plaintiff. (See Bulletin, Vol. 8, No. 12, p. 377).

On remand, plaintiff testified that he never applied for voluntary departure and did not and does not now want it. The Court found that the record of the administrative deportation proceedings contained reasonable, substantial and probative evidence to support the finding of deportability and the order of deportation.

Judgment for defendant.

Judicial Review of Deportation Order; Excludable at Entry - Psychopathic Personality (Homosexual). Harb-Quiroz v. Neelly (C.A. 5, June 23, 1961). This is an appeal from a judgment of the District Court (W.D., Texas) affirming an administrative order of deportation based on a finding that plaintiff is a homosexual and, under 8 U.S.C. 1182(a)(4), she was excludable as a psychopathic personality at the time of her entry. (See Bulletin, Vol. 8, No. 24, p. 721)

In affirming the judgment below the Court of Appeals said, "Whatever the phrase 'psychopathic personality' may mean to the psychiatrist, to the Congress it was intended to include homosexuals and sex perverts."

EXCLUSION

Declaratory Judgment; Revocation of Parole and Custody of Excluded Alien; Hearing on Revocation. Ahrens v. Masferrer-Rojas (C.A. 5, June 30, 1961) Masferrer-Rojas, a Cuban Senator during the Batista regime, was ordered excluded and deported in 1959 but was permitted to be at large in the United States on parole under the provisions of 8 U.S.C. 1182(d)(5). In April 1961 the Attorney General determined that his continued enlargement in a parole status was not in the public interest and the appellant (District Director) revoked his parole on written notice and took him into custody.

The District Court (S.D., Fla.), in a declaratory judgment action, ordered his release from custody and enjoined the District Director from molesting him or from taking him into custody again except to effect his actual deportation to a country outside the United States. It held, as a matter of law, that the District Director, the Attorney General's delegate, could not hold an excluded alien in custody where deportation was not imminent. The District Director appealed from that judgment.

The Court of Appeals held that neither the statute nor the regulation provides for a hearing preliminary to the revocation of an alien's parole under 8 U.S.C. 1182(d)(5) and the regulation (8 CFR 212.5) clearly negatives the necessity for a hearing. (It distinguished U. S. ex rel. Paktorovics v. Murff, 260 F.2d 610 on that issue.)

It also held that under the circumstances of this case there was no abuse of discretion in the revocation of parole since the Secretary of State had advised that Masferrer-Rojas' continued presence at large was prejudicial to our national interest from the point of view of our foreign relations. That the Attorney General when unable to immediately deport him could legally hold him in custody was settled in 1953, the Court said, in Shaughnessy v. Mezei, 345 U.S. 206.

Reversed, with directions that judgment be entered dismissing the complaint and returning plaintiff (appellee) to the custody of the District Director.

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Contempt of Congress; Communications Industry. Frank Grumman v. United States (C.A. D.C., June 30, 1961). The Court of Appeals for the District of Columbia unanimously affirmed appellant's conviction under 2 U.S.C. 192 for refusing to answer a question put to him at hearings of a subcommittee of the House Committee on Un-American Activities held on July 18, 1957. At the opening of the hearings, the subcommittee chairman stated that the committee was interested in the position and influence in the communication industry of members of the Communist Party and of organizations dedicated to furthering the Communist objective. He then read into the record a resolution adopted by the full committee, under which the subcommittee was then acting, which authorized hearings for the purpose of considering whether or not members and disciples of the Communist Party were at that time employed in the media used in the transmission of communications vital to the national defense and internal security, in order that legislation concerning espionage and sabotage might be considered. The subcommittee then called one Michael Mignon who, after admitting his former concurrent memberships in the Communist Party and the American Communications Association, named Grumman as a one-time Communist and a present member of the same union. The following day, Grumman appeared and testified that he was presently the Secretary-Treasurer and a past president of a local of the American Communications Association. When questioned about his alleged Communist affiliation, he filed with the subcommittee a prepared statement which objected to inquiry into his beliefs and associations as violative of his freedoms of speech, press, and assembly. Subcommittee counsel and chairman explained in detail the pertinency of the questions to an inquiry into Communist infiltration into communication facilities. Appellant was convicted on one count which charged his refusal to answer whether Mignon had been correct in asserting that Grumman had sat in closed Communist cell meetings with him.

The Court, speaking through Judge Bastian, briefly disposed of appellant's contentions on the basis of clear-cut Supreme Court precedents in the contempt of Congress area. First, Barenblatt v. United States, 360 U.S. 109, was cited as establishing that a preliminary question of the sort asked petitioner was clearly pertinent, as showing beyond dispute that the subcommittee was acting pursuant to a valid legislative purpose, and as settling the issue of Congressional authorization of an interrogation such as occurred here. Under the ruling in Wilkinson v. United States, 365 U.S. 399 (9 Bull. 151), appellant's First Amendment right to privacy was balanced against the right of the Government to learn conditions necessary for a conclusion as to the need for legislation, and the Court held that the importance of the communications industry in the event of enemy attack or in the event of internal disaster or civil disorder is too patent to require discussion. Braden v. United States, 365 U.S. 431 (9 Bull. 152), and Sinclair v. United States, 279 U.S. 263, were cited by the Court to strike down appellant's good-faith contention, for a mistake of law, in this case a reliance

upon Watkins v. United States before the decision in Barenblatt, is no defense to a prosecution under Section 192. The Court concluded by examining the facts in the light of the recent Supreme Court decision in Deutch v. United States (9 Bull. 408) and found that, far from straying from its announced subject under inquiry, the committee had narrowed the subject under inquiry and had asked questions clearly pertinent thereto. Judge Bazelon concurred in the result.

Staff: Assistant United States Attorney William Hitz argued the case. With him on the brief were former United States Attorney Oliver Gasch, former Assistant United States Attorney Carl W. Belcher, and Assistant United States Attorney Doris H. Spangenburg (D.C.).

Contempt of Congress; Communications Industry. Bernard Silber v. United States (C.A. D.C., June 30, 1961). In a companion case to Grumman v. United States, supra, the Court of Appeals for the District of Columbia unanimously affirmed appellant's conviction under 2 U.S.C. 192 for refusing to answer three questions put to him during the same hearings at which Grumman was called. At the commencement of the proceedings on August 2, 1957, the chairman announced that the hearing was a continuation of the July 17, 1957, hearings, read into the record the authorizing resolution quoted in Grumman, and stated that the committee hoped to obtain additional information respecting Communist penetration into and control over the communications industry. Silber then testified that he had been a member of the Communist Party some years previously, and that in his work for Western Union Telegraph he had handled Government coded messages. He refused to answer whether the person who recruited him in the Party was a communications worker, whether any of his union's officers were members of the Party at the time he was a member, and whether any of the present officers of his union were members when he was. The pertinency of these questions to the subject matter under inquiry was fully explained to him.

The Court pointed out that it had disposed of the issues of legislative purpose, Congressional authorization, and First Amendment rights in the Grumman opinion. The Court then found that the questions were clearly pertinent, remarking that it would be difficult to imagine questions more pertinent to an effort to discover the identity of persons possessing the very information the committee sought. It was proper to exclude expert testimony on the question of balancing the private and governmental interests, the Court continued, for the balancing process is strictly a matter of law for decision by the Court. Dealing with appellant's contention that the Committee lacked probable cause for calling him in that he was not identified by prior witnesses as a Communist, the Court held that a prospective witness need not have actually been named as a Communist by a prior witness before he may legally be called by an investigating committee. The Committee had probable cause to inquire whether Silber was a Communist inasmuch as it knew that he had access to Government coded messages at Western Union, that he was a member of the American Communications Association, and that it had been alleged in some 1940 union

litigation that he was a "Red". His affirmative answer to the question as to Party membership was then in and of itself sufficient to support the questions following.

Judge Bazelon concurred in the result.

Staff: Assistant United States Attorney William Hitz argued the case. With him on the brief were former United States Attorney Oliver Gasch, former Assistant United States Attorney Carl W. Belcher, and Assistant United States Attorney Doris H. Spangenburg (D.C.).

Contempt of Congress; Prejudicial Evidence. United States v. Sidney Turoff (C.A. 2, June 26, 1961). On appeal from a conviction in the District Court for the Western District of New York under 2 U.S.C. 192 for refusing to answer questions allegedly pertinent to an inquiry being conducted by a subcommittee of the House Committee on Un-American Activities, the Court of Appeals for the Second Circuit reversed and remanded on the ground that there was admitted into evidence for the jury's consideration material which was highly prejudicial to the accused. Appellant appeared on October 1, 1957, before a subcommittee which was conducting hearings in Buffalo, New York, on the following topics: foreign Communist Party propaganda in the Buffalo area; execution of the laws concerning registration of Communist-controlled printing equipment; Communist infiltration into Buffalo industrial, civic and political organizations; and misuse of passports by subversives. He was there identified by another witness, one Alan Dietch, as the person to whom Dietch had previously sold certain printing equipment to be used, Dietch understood, in the Communist Party underground. Turoff then testified that he, while a member of the Communist Party, had requested Dietch to make such a purchase and had received the equipment, although Dietch had not sold it to him. He went on to detail his experiences with the Communist Party from the time of his joining in April 1947 to the time of his voluntary disassociation from it in April 1957, describing the organizational units and operations of the Party with which he was familiar. At this point Turoff was posed the two questions which formed the basis for the two counts on which he was convicted; who were the members of the steel section of the Communist Party to which he was attached as of April 1957; and, to whom did he deliver the printing equipment delivered to him by Dietch. In response to Turoff's request for the purpose of the questions, counsel for the subcommittee offered explanations of pertinency. After being directed to answer, Turoff persisted in his refusals. On trial to a jury, the prosecution introduced, without defense objection, the transcript of the subcommittee hearing which included Turoff's testimony concerning his Party activities. When the prosecution began to read the entire transcript to the jury, appellant's counsel objected, contending that only the alleged contempts were relevant to proof of the crime. The objection was overruled as not having been taken early enough. Government counsel then read to the jury all of the hearing testimony concerning Turoff's personal knowledge of the Communist Party, as well as the testimony containing the alleged contempts. This exhibit was taken by the jury at the conclusion of the case into the jury room.

Judge Waterman, speaking for a unanimous court, held that it was error to admit into evidence for jury consideration the entire colloquy. The Government had contended that Turoff's preliminary testimony was relevant to two issues of fact, namely: whether defendant's refusal was knowing and wilful; and, whether defendant had been made aware of the pertinency of the two questions. The Court pointed out that the ultimate question for jury decision is the knowingness of the refusal, but that awareness of pertinency bears upon that issue. Thus, the Court reasoned, all that is admissible for the jury's consideration on this issue is the committee's explanations to the witness of the pertinency of the interrogatory. Actual pertinency of the question to the subject under inquiry being a matter of law, material relevant solely to that issue should have been presented only to the judge. The Court had no doubt that the preliminary testimony, entirely irrelevant to any issue for the jury, was highly prejudicial to defendant. He had admitted to active participation in the Communist conspiracy, detailed his activities therein, and revealed that for a period of years he had used an alias. The Court felt that it was obvious that one who is or was a Communist conspirator is disadvantaged in a jury trial, notwithstanding the judge's charge that the jury should not concern itself with whether or not defendant was a Communist.

Appellant's objection to the admission of the exhibit was held to have been seasonably made. When the exhibit was offered, the Court reasoned, counsel could properly have assumed that it was intended for the court's use on the legal issue of actual pertinency. The objection made when the prosecution began to read the transcript to the jury was not unreasonably delayed, inasmuch as it was made at the first moment the improper use became apparent.

Staff: Robert L. Keuch (Internal Security) argued the case. With him on the brief were United States Attorney Neil R. Farmelo (W.D. N.Y.) and George B. Searls (Internal Security).

* * *

LANDS DIVISION

Assistant Attorney General Ramsey Clark

Quiet Title Action: Construction of Deeds: Res Judicata Administrative Decision. Ivan Murray and John P. Mullaney v. United States (C.A. 8, June 15, 1961.) This is a quiet title action instituted by the United States against the former owner of certain property which he had previously conveyed to the Government. The interest in dispute consisted of a one-half interest in the oil, gas and other minerals in the land. The former owner had purchased the property at a county tax sale, receiving a deed from the county which reserved the one-half mineral interest to the county. The warranty deed to the United States from the former owner was made "subject to" certain outstanding easements and reservations, including the one-half mineral interest, which had been previously reserved by the county. However, after the conveyance to the United States, the Supreme Court of North Dakota, wherein the property was situated, held that the county had no authority to reserve the mineral interest. Meanwhile, the Secretary of the Interior had issued an oil and gas lease covering the entire interest in the land. After the state court decision, the Secretary canceled the lease and issued an administrative opinion to the effect that the United States had not acquired the one-half mineral interest, which had been reserved by the County. The district court held that the Secretary's decision was erroneous and that the United States acquired all interest that its grantor had.

The Court of Appeals, in affirming the district court, held that the intention of the parties drawn from the whole deed must govern. Thus, the language of the deed did not reserve the disputed interest but was designed solely to protect the grantor on his warranties. Attendant circumstances, if resort thereto is necessary, the Court stated, completely supported this conclusion. In response to the former owner's contention that the administrative decision was res judicata, the Court held that the Secretary had no jurisdiction to make a judicial determination of title under the applicable statute. Mineral Leasing Act for Acquired Lands of 1947, 61 Stat. 913, 30 U.S.C. 351, et seq.

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

Noise of Jet Aircraft; Compensability; Remand for Fact-finding. Batten v. United States (C.A. 10, June 20, 1961). In this case several residents of a subdivision adjacent to an Air Force Base sought compensation for the alleged taking of property as a result of the noise, fumes and vibration. After trial, the district court did not make findings but held, on the basis of the allegations of the complaint, that since there were no flights over the property compensation could not be recovered.

On appeal, the United States, while contending that the decision was correct, urged the Court to remand the case for findings as to the actual facts. The Court of Appeals did so, stating that an important question of constitutional law ought to be resolved on the established facts and should not be disposed of on the bare averments of the complaint. The case was remanded for findings.

Staff: Roger P. Marquis (Lands Division)

* * *

TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
Appellate Decision

Accrual Method of Accounting - Inclusion in Income of Advance Receipts for Future Services. American Automobile Association v. United States (Supreme Court, June 19, 1961). Taxpayer, filing its returns on a calendar year-accrual basis, reported as gross income only that portion of its annual receipts from membership dues which ratably corresponded to the number of months of the membership year occurring within the taxable year of receipt. The remaining portion of the dues receipts were not reported until the following taxable year at which time they were ratably included in gross income according to the number of months of the membership year occurring in that taxable year. The Commissioner determined deficiencies on the ground that taxpayer should have included the entire amount of its dues receipts in income for the taxable year of receipt. Taxpayer paid the deficiencies and sued for a refund.

The Court of Claims, despite its findings that taxpayer's method of accounting accorded with "generally accepted commercial accounting principles," and that substantially the same result would have been produced had the taxpayer allocated its dues receipts according to the average monthly cost of servicing its members, held, on the authority of Automobile Club of Michigan v. United States, 353 U.S. 180, that "for Federal income tax purposes" taxpayer's system of reporting its annual dues receipts was "purely artificial." The Supreme Court, expressly recognizing the conflict between the instant case and Bressner Radio, Inc. v. Commissioner (involving a similar method of accounting with respect to "prepaid" receipts for service guaranties) granted certiorari and affirmed. The Court pointed out that whereas the method employed might be appropriate for commercial accounting purposes, it "fails to respect the criteria of annual tax accounting" required under Section 41 of the 1939 Code and Section 441 of the 1954 Code. For tax purposes, revenue is exacted from the dues of each individual member, and the entire amount of such dues must be included in income where, as of the close of the tax year, the liability to render services to the member is entirely contingent upon the member's demand and unrelated to "fixed dates after the tax year". Taxpayer's statistical computations of average monthly cost per member on a group basis are "without determinant significance" since "the federal revenue cannot be made to depend upon average experience in rendering performance and turning a profit." The Court also observed that its conclusion in favor of the Government was required by pertinent legislative history which shows that Section 452 of the 1954 Code expressly authorized the very method of accounting employed by taxpayer in the instant case, but that Congress retroactively repealed Section 452 in 1955 and has subsequently refused to reenact it, even on a modified basis, despite repeated legislative efforts to the contrary.

Staff: Assistant Attorney General Louis F. Oberdorfer, Harry Baum and Burt J. Abrams (Tax Division).

District Court Decisions

Government Entitled to Proceeds of Sale of Property Subject to Tax Lien, to Extent of Taxpayer's Liability to Government. Buyer Required to Pay Installment Payments Directly to Government, Instead of to Taxpayer. In Event of Default, Property to Be Sold, With Proceeds Available to Extinguish Government's Claim. United States v. James M. Folsom, et al. (N.D. Georgia, April 6, 1961.) This suit was instituted to foreclose federal tax liens outstanding against James M. and Martha P. Folsom, asking for a judicial sale of the property involved. At the time of the assessments, Martha P. Folsom owned the property, which she later contracted to sell to one of the defendants, who was acting in his capacity of VFW Post Commander. The VFW was the real purchaser, and intervened in this action to protect its equity, after the Court ruled that although it was not originally named a defendant, it would be bound by the decision.

The principal problem in this case was that of defining Mrs. Folsom's property interest, if any, to the real estate conveyed by her. The sale contract was not in writing, but there had been some part performance by the VFW, inasmuch as they had gone into possession and made some of the payments (although they were in default), to a mortgagee which had a claim senior to the tax lien. The VFW post contended that title had vested in it and that as a purchaser, it was protected from the tax lien. Georgia statute law recognizes that part performance of an oral contract gives the purchaser a cause of action for specific performance. However, the Government argued, and the Court concluded, that until such an action was brought and successfully concluded, title remained in the taxpayer.

The Court held that the VFW still owed taxpayer better than $22,000, and that the taxpayer owed the Government better than $19,000 in taxes, exclusive of interest. It accordingly ruled that the VFW should pay off its obligation to the Government directly, until its obligation to the taxpayer, or her's to the Government was fully satisfied. The Court did not decree that the property should be sold at judicial sale, but provided that taxpayer should execute a warranty deed to the VFW to be held in escrow until it paid off its liability to taxpayer. The Court did hold, however, that upon a default in payment of any monthly amount by the VFW, the Court would enter an appropriate order of sale.

Staff: United States Attorney Charles D. Read, Jr., Assistant United States Attorney Slaton Clemmons (N.D. Ga.) and Robert A. Mills (Tax Division)

Refund Suits; Right of Nontaxpayer to Bring Suit Against Government Under 28 U.S.C. 1346(a). J.A. Peterson-Tomahawk Hills, Inc. v. United States (D. Kansas, May 1, 1961.) Taxes were assessed against Westpfahl, a contractor, and were subsequently paid by plaintiff, the developer for whom Westpfahl worked, from a fund due from plaintiff for work on the contract. Payment was made as a result of a notice of levy, and in this action plaintiff contended that except for a small part of the total taxes

paid, the materialmen of Westpfahl, rather than Westpfahl himself, were entitled to the fund. Plaintiff contended that Westpfahl had no property right in the fund except for the part of it which represented plaintiff's obligation on the contract over and above the claims of the materialmen. Plaintiff, a Kansas corporation, had filed a claim for refund with the District Director of Internal Revenue in Kansas City, Missouri (Westpfahl lived in Missouri), and upon its disallowance, had commenced this suit naming the United States as sole defendant, in the District Court in Kansas.

The Government moved to dismiss on two grounds. It first argued that a suit against the sovereign under Section 1346(a) could be maintained only by the party against whom the taxes had been assessed, and not a third party. See First National Bank of Emlenton v. United States, 265 F. 2d 297 (C.A. 3, 1959). Secondly, it contended that even if the materialmen and not the taxpayer had the right to the fund, plaintiff certainly had none and would be unjustly enriched if it recovered.

The Court, in dismissing the case, indicated agreement with both positions, stating that it had been unable to locate any decision "wherein a refund suit was maintained by a party other than the one who owed and paid the taxes." However, the Court ruled for the Government on the basis of plaintiff's lack of standing to sue, pointing out that plaintiff had no claim to the funds even though the materialmen might. The case law in the area of suits by third parties seems to indicate that the District Director and not the United States is the proper party.

Staff: United States Attorney Newell A. George (D. Kan.); and Robert A. Mills (Tax Division)

* * *

INDEX

Subject	Case	Vol.	Page
A			
ANTITRUST MATTERS			
Sherman Act: Individual Dismissed in Sherman Act Case	U.S. v. Nat'l Dairy Products Corp. and Raymond J. Wise	9	432
Salt Companies Indicted	U.S. v. Morton Salt Co., et al.	9	432
B			
BACKLOG REDUCTIONS			
Districts in Current Status		9	428
Monthly Totals		9	427
C			
CIVIL RIGHTS MATTERS			
New Orleans Airport Desegregation Suit	U.S. v. City of New Orleans, et al.	9	441
D			
DEPORTATION			
Declaratory Judgment; Summary Judgment - Issue of Fact	Ullah v. Hoy	9	445
Judicial Review of Deportation Order; Excludable at Entry - Psychopathic Personality (Homosexual)	Harb-Quiroz v. Neelly	9	445
E			
EXCLUSION			
Declaratory Judgment; Revocation of Parole and Custody of Excluded Alien; Hearing on Revocation	Ahrens v. Masferrer-Rojas	9	445
F			
FAIR LABOR STANDARDS ACT			
Large Fines Imposed in Fair Labor Standards Act Case	U.S. v. First Nat'l Bank of Hazardville and Birkenshaw, Jr.	9	442

Subject	Case	Vol.	Page
F (Contd.)			
FALSE CLAIMS ACT			
Application for Treatment in V. A. Hospital for Non-service Connected Illness is "Claim" Within Meaning of Act	Alperstein v. U.S.	9	435
FEDERAL EMPLOYEES GROUP LIFE INSURANCE			
Employee Held Not Insured Where Prior Waiver of Insurance Coverage Not Cancelled Upon Reentry Into Federal Employment	Hicks v. U.S.	9	436
Designation of Non-Juridical Entity as Beneficiary Held Invalid	U.S. v. Metropolitan Life Ins. Co.	9	437
FEDERAL FOOD, DRUG, AND COSMETIC ACT			
Mishandling of Physicians' Samples Results in Numerous Seizure Actions; Food and Drug Admin. Finds Such Mishandling Can Affect Public Health; Serious Misbranding Violations Involved		9	442
FEDERAL TORT CLAIMS ACT			
Govt. Not Liable for Staphylococcus Infection Contracted in V.A. Hospital	Dickinson v. U.S.	9	438
I			
INTEREST			
Interest against Plaintiff in Interpleader Who Posts Bond Instead of Paying Money Into Court Denied	Phoenix Ins. Co. v. Iacona, et al.	9	438
Interest Allowed from Date of District Court Judgment After Mandate, Not from Date of Earlier Erroneous Judgment, on Amount by Which Earlier Judgment Was Augmented on Appeal	U.S. v. Hougham	9	439

Subject	Case	Vol.	Page
I (Contd.)			
INTERNAL SECURITY MATTERS			
Contempt of Congress Communications Industry	Grumman v. U.S.; Silber v. U.S.	9	447
Contempt of Congress Prejudicial Evidence	U.S. v. Turoff	9	449
L			
LANDS MATTERS			
Noise of Jet Aircraft; Compensability; Remand for Factfinding	Batten v. U.S.	9	451
Quiet Title Action; Construction of Deeds; Reproduction of Administrative Decision	Murray and Mullanev v. U.S.	9	451
M			
MAIL FRAUD			
Knitting Machine Work-at-Home Scheme	U.S. v. Okum, Ross, et al.	9	443
O			
ORDERS & MEMOS			
Applicable to U.S. Attorneys Offices		9	431
S			
SOCIAL SECURITY ACT			
Executrix of Estate Held not Engaged in "Trade or Business" of Administering Estate	McDowell v. Ribicoff	9	435
SOVEREIGN IMMUNITY			
Counterclaims Against U.S. in Excess of $10,000; Crossclaims Against Housing and Home Finance Agency and Administrator	U.S. v. Aleutian Homes, Inc.	9	439

Subject	Case	Vol.	Page
T			
TAX MATTERS			
Accrual Method of Accounting; Inclusion in Income of Advance Receipts for Future Services	American Automobile Assn. v. U.S.	9	453
Liens; Purchaser of Foreclosure Sale Required to Pay Installments to Govt. in Satisfaction of Lien	U.S. v. Folsom, et al.	9	454
Refund Suits; Right of Non-taxpayer to Bring Suit Against Govt. Under 28 U.S.C. 1346(a)	J.A. Peterson-Tomahawk Hills, Inc. v. U.S.	9	454
V			
VETERANS' HOME LOAN GUARANTY PROGRAM			
Right of U.S. to Be Indemnified by Defaulting Veteran Whose Mortgage Was Insured Pursuant to Veterans' Home Loan Guaranty Program	U.S. v. Shimer	9	434