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RESTRICTED TO USE OF

DEPARTMENT OF JUSTICE PERSONNEL

UNITED STATES ATTORNEYS BULLETIN

Vol. 4 November 9, 1956 No. 23

IMPORTANT NOTICE

United States Attorneys are again reminded that the taking of an appeal without prior authorization from the Department is specifically prohibited. In this connection attention is invited to Title 6, Pages 1 to 3 of the United States Attorneys Manual, which show that the Solicitor General is to determine whether an appeal is to be taken and that no appeal should be taken (except to protect the running of the time for appeal) without prior express authorization. United States Attorneys are requested to comply with Departmental policy in this respect.

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PARTICIPATION OF INTERNAL REVENUE SERVICE ATTORNEYS IN THE TRIAL OF CRIMINAL PROSECUTIONS.

It has recently come to our attention that attorneys of the Internal Revenue Service have on occasions taken part in the actual trial of criminal tax cases without specific authorization by the Attorney General. The trial of criminal tax cases is the responsibility of the United States Attorneys and wherever possible such prosecutions should be conducted by them and their Assistants. In the rare instances in which this is not feasible and it is desired to have the case tried wholly or in part by an attorney employed by the Internal Revenue Service, notification should be given to the Tax Division in Washington well in advance of the trial date. If the reasons stated are satisfactory, the Attorney General will issue a letter appointing the Internal Revenue Service attorney a Special Assistant to the United States Attorney for purposes of the particular case. In the future, Internal Revenue Service attorneys may not participate in these cases without such a written authorization.

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JOB WELL DONE

The District Postal Inspector has written to United States Attorney Jack D. H. Hays, District of Arizona, congratulating Assistant United States Attorney William E. Eubank upon his excellent work in the preparation for trial and the presentation of a recent mail fraud case. The letter stated that the case was more than usually difficult to present, but Mr. Eubank made himself so thoroughly familiar with the facts and the points to be covered as to make clear to the jury the scheme as charged in the indictment.

The Acting Assistant General Counsel, Department of Agriculture, has written to United States Attorney Oliver Gasch, District of Columbia, thanking him for the courtesy extended by his office in

connection with a recent case and commending in particular Assistant United States Attorney E. Riley Casey for his ability to assimilate quickly the facts in a rather technical field and for the legal ability he demonstrated in his handling of both the pleadings and the oral argument.

The Regional Attorney, Wage and Hour and Public Contracts Division, Department of Labor, has written to United States Attorney Frederick W. Kaess, Eastern District of Michigan, expressing appreciation for the excellent results which were obtained by Mr. Kaess and Assistant United States Attorney Robert E. DeMascio in a recent Wage and Hour case. The letter stated that the Department of Labor is pleased with the fine which the Court imposed in the case and the order covering restitution of back wages.

The Supervisor in Charge, Alcohol and Tobacco Tax Division, Internal Revenue Service, has written to United States Attorney Donald E. Kelley, District of Colorado, commending the work of Assistant United States Attorney John S. Pfiefer for his handling of two recent cases under the Federal Firearms Act. The letter stated that the manner in which the Government's allegations were presented to the jury through the skillful questioning of difficult witnesses and the knowledge of the law as displayed in arguments before the Court were indicative of the time and effort spent by Mr. Pfiefer on the cases.

The Regional Solicitor, Department of the Interior, has written to United States Attorney C. E. Luckey, District of Oregon, expressing appreciation of the efforts of Mr. Luckey and his staff in negotiating a successful settlement of a recent fire trespass case which, the letter stated, was a difficult one to handle in view of its age and the lack of evidence on damages. The case was primarily handled by Assistant United States Attorney Robert R. Carney.

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INTERNAL SECURITY DIVISION

Assistant Attorney General William F. Tompkins

IMMUNITY ACT

Witness before Grand Jury - Contempt. United States v. Edward J. Fitzgerald (S.D. N.Y.). Following affirmance of his conviction for contempt by the Court of Appeals for the Second Circuit (Bulletin, Vol. 4, No. 15), Fitzgerald petitioned the Supreme Court for certiorari. On October 8, 1956, the Supreme Court denied Fitzgerald's petition for certiorari.

Fitzgerald had been free on bail and on October 29, 1956 he surrendered himself and commenced serving his sentence. Fitzgerald is the first person to go to prison for contempt under the Immunity Act of 1954, 18 U.S.C. (Supp. II) 3486.

In the only other case in which the Immunity Act has been applied, William Ludwig Ullmann, after the Supreme Court upheld the validity of the Act, purged himself of contempt.

Staff: Assistant United States Attorney Thomas A. Bolan (S.D. N.Y.)

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

Assistant Attorney General Warren Olney III

ENFORCEMENT OF STATUTES AGAINST LABOR RACKETEERING

With respect to violations of the Federal Anti-Racketeering statute (Hobbs Act), 18 U.S.C. 1951, the records of the Department of Justice show no criminal cases filed in the years 1945, 1946 or 1947. In 1948 one criminal case was filed involving six defendants, four of whom were found guilty and two of whom were acquitted. The records show no Hobbs Act cases filed in 1949 and only one case in 1950 in which both a labor leader and a union local were convicted. According to the records only one case under the Hobbs Act was filed in 1951, with 12 defendants, all of whom were eventually dismissed and no cases filed in 1952.

During these same years with respect to the violations of the Labor Management Relations Act (Taft-Hartley Act), 29 U.S.C. 186, which was not enacted until 1947, the Department's records show no criminal cases filed in 1947; one criminal case was filed in 1948 with two defendants, both of whom were dismissed; one case filed in 1949 in which one defendant was found guilty and the second dismissed and no criminal cases filed in the years 1950, 1951 and 1952.

The Department's records covering the period January 1, 1953 to June 30, 1956 disclose the following:

18 USC 1951 (Hobbs Act)	Indictments	Defendants	Convictions
Jan. 1, 1953 - Dec. 31, 1954	56	126	39
Jan. 1, 1955 - Dec. 31, 1955	11	16	39
Jan. 1, 1956 - June 30, 1956	8	23	7
TOTAL	75	165	85
29 USC 186 (Taft-Hartley)			
Jan. 1, 1953 - Dec. 31, 1954	14	23	7
Jan. 1, 1955 - Dec. 31, 1955	5	15	14
Jan. 1, 1956 - June 30, 1956	4	7	1
TOTAL	23	45	22
GRAND TOTAL	98	210	107

During the calendar year 1955 the Department of Justice received 53 complaints, involving 102 defendants, alleging violations of the Taft-Hartley Act; during the same period the Department recevied 495 complaints, involving 720 defendants, alleging violations of the Hobbs Act. During the first eight months of 1956 the Department has received 35 complaints, involving 48 defendants, alleging violations of the Taft-Hartley Act; during the same period the Department received 331 complaints, involving 436 defendants, alleging violations of the Hobbs Act.

BANK ROBBERY

Conspiracy and Accessory after the Fact. United States v. Linwood Roberto White, Philip Gratten Anthony and Henrietta Mabel Anthony (M.D. Pa.) On October 10, 1955, a federal grand jury returned a joint indictment against Linwood Roberto White, Philip Gratten Anthony and Henrietta Mabel Anthony in eight counts charging all three defendants with violation of 18 U.S.C. 2113 and 18 U.S.C. 371 and charging the Anthonys with violation of 18 U.S.C. 3. White pleaded guilty to all four counts in which he was charged and was sentenced to a total of 10 years. Following a trial by jury the Anthonys were found guilty on all counts in which they were charged. Philip Gratten Anthony was sentenced to a total of $4\frac{1}{2}$ years and Henrietta Mabel Anthony was sentenced to 2 years.

On September 12, 1955, White attempted to rob the Ulster Bank of Ulster, Pennsylvania, at the point of a gun but when a bank employee touched off the burglar alarm he fled without obtaining any money. The Anthonys waited nearby in the getaway car in which all fled.

After the jury returned the verdict of guilty, defendant Henrietta Anthony moved in arrest of judgment, for judgment of acquittal and for a new trial. She contended, among other things, that a husband and wife cannot conspire with each other. In denying the motion the trial judge stated that there are some cases adhering to the fiction of single entity and other cases, because of Married Woman's Emancipation Acts, hold that the fiction is obsolete, but that all cases hold the unity doctrine inapplicable where, as in the instant case, there is a third party in the conspiracy.

Staff: United States Attorney J. Julius Levy; Assistant United States Attorney Edwin Kosik (M.D. Pa.)

LIQUOR REVENUE

Conspiracy to Violate the Internal Revenue Liquor Laws. United States v. Thompson, et al. (E.D. S.C.) In June, 1956, a federal grand jury returned an indictment charging Randolph (Buster) Murdaugh, Haskell Thompson and 27 other defendants with having conspired over a period of several years to violate the internal revenue liquor laws. The case attained wide notoriety in South Carolina because Murdaugh, at the time of his indictment, held the office of Solicitor for the 14th Judicial District of South Carolina, and Thompson was Sheriff of Colleton County. Also named as a defendant was a district magistrate, Berkley C. Wood; while another magistrate of Colleton County, Herman M. Tuten, named as a co-conspirator, appeared as a witness for the government and admitted having participated in the conspiracy.

Before the trial, the Court over the strenuous objection of the government granted the defendants' motion for disclosure of the names of the government witnesses. This was followed by very questionable practices on the part of some of the defendants and their attorneys, during which government witnesses were threatened, attempts were made to influence them by promises of reward for themselves or members of their families, and at least one attempt was made to intimidate or influence the United States Attorney.

Trial commenced on September 17, 1956, and continued daily until October 1, the Court remaining in session from 9:30 A.M. until as late as 10:30 P.M. The defense resorted to some highly questionable tactics, all apparently designed to bring about an acquittal or mistrial as to Solicitor Murdaugh, even at the risk of sacrificing the remaining defendants. Strange incidents occurred during the trial which sorely taxed the patience of the prosecutor. At one time, one of the government's principal witnesses, after having testified previously in court, came to the United States Attorney and told him that he had lied on the stand. Brought before the Court, however, he would admit only that his testimony had been erroneous in certain very immaterial respects which did not affect the issues in the case. Oddly enough, too, the foreman of the jury, immediately before the case was to go to the jury for deliberation having received a telephone call informing him that his father was dying, declined to accept the court's proffer of release although an alternate juror was still present and available to take the foreman's place. It has been admitted by the foreman that he attended school with a brother of the defendant, Murdaugh, and in fact had dinner with him shortly before the trial began.

Despite the difficulties encountered in the prosecution, the jury returned a verdict of guilty against 18 of the 23 defendants who went to trial. Although acquitted, Solicitor Murdaugh was publicly castigated for his unethical practices by Judge Walter E. Hoffman of the Eastern District of Virginia who presided at the trial. The Judge deplored the fact that Murdaugh, who is an unopposed candidate for the office of Solicitor, and therefore assured of election, will on January 1, 1957, inevitably resume the office from which he resigned following his indictment. Judge Hoffman indicated that, were he in Murdaugh's place, he could not go back and face his people much less resume public office. The Judge also felt it necessary publicly to call attention to the fact that it is a separate and distinct offense for anyone to threaten a person who has testified in a court proceeding.

Sheriff Thompson, who drew the heaviest penalty, received a sentence of seven years' in prison and a fine of $3,000. Terms of three years each were also imposed on the deputy-sheriffs and the magistrate, who were defendants, as well as several terms of two years or less upon other defendants.

As a result of this case, two obstruction of justice indictments have been returned and other allegations of misconduct wtih respect to the government's witnesses are under investigation.

Staff: United States Attorney N. Welsh Morrisette, Jr.; Assistant United States Attorneys Irvin F. Belser, Jr., Arthur G. Howe and Thomas P. Simpson (E.D. S.C.)

NARCOTIC CONTROL ACT OF 1956

Government's Right to Appeal from Orders Granting Motions for Suppression and Return of Evidence. The attention of the United States Attorneys is called to the fact that, under Section 201 of the newly enacted Narcotic Control Act of 1956 (18 U.S.C. 1404), the Government now has the right to appeal from an order granting a motion for the suppression of evidence and return of property made before the trial of a person charged with violation of the narcotics laws. The granting of such motions by the court should therefore be reported to the Criminal Division in order that the question of whether an appeal may be taken may be submitted to the Solicitor General for determination. The statute provides that such appeals must be taken within 30 days after entry of the order; prompt notification is therefore essential.

The United States Attorneys Manual is being revised to delete paragraph (g) of page 19, Title 2 thereof which heretofore authorized the United States Attorneys to dismiss without prior authorization from the Department those cases in which the crucial evidence was inadmissible because obtained by an unlawful search and seizure.

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CIVIL DIVISION

Assistant Attorney General George Cochran Doub

COURT OF APPEALS

BONDS

Alien Appearance - Forfeiture of Bond Given to Secure Presence of Alien for Deportation Not Affected by Subsequent Administrative Reversal of Exclusion Order. United States v. James P. Sanderson (C.A. 9, Oct. 3, 1956). A Board of Special Inquiry of the Immigration and Naturalization Service, after a hearing, found an alien ineligible for admission to the United States. Pending an administrative appeal, his attorney posted a bond to secure the alien's release from custody, the bond being conditioned upon the alien's surrender for deportation in case he was found to be unlawfully in this country. Subsequent administrative appeals were unsuccessful. The alien failed to surrender on demand and was later apprehended. The bond was declared forfeited. Following habeas corpus proceedings, however, where a determination was made that the original hearing had not been fairly conducted, a new administrative hearing was held which resulted in reversal of the former exclusion decision and ultimate admission of the alien. The bondsman sued to recover the proceeds of the forfeited bond and secured judgment in the District Court. The Court of Appeals (Judge Healy, dissenting), reversed. The Court held that the alien's failure to surrender on demand was a breach of the bond and its proceeds were rightly forfeited. Breach of the condition of the bond was unaffected by the subsequent determination that the admission hearing was invalid and the alien's ultimate admission to the United States.

Staff: John G. Laughlin and Richard M. Markus (Civil Division)

Bail Bond - Induction of Principal into Army Does Not, Ipso Facto, Discharge Surety. United States v. Carolina Casualty Insurance Co. (C.A. 7, Oct. 11, 1956). Appellant executed a bail bond in the sum of $5,000 as surety, payable to the United States, which provided that the principal, who was under criminal indictment, would appear in accordance with all orders and directions of the Court. One day before the case was called for trial, the accused was inducted into the Army, and the case was held on the call to proceed to trial when reached. Subsequently, the accused received an undesirable discharge from the Army by reason of his indictment for another crime. Approximately four months later, the case was called for trial and defendant was absent. On motion of the Government, the bail bond was declared forfeited and judgment was entered against the surety. The Court of Appeals for the Seventh Circuit affirmed, rejecting the surety's contention that the bond became void upon the principal's induction into the Army. While recognizing that a bond will not be forfeited if performance is rendered impossible by reason of the principal's induction into the Army, the Court noted that this was not the case here since the principal had been discharged nearly four months prior to default and forfeiture and had been physically present in his home city since that time. Therefore, his failure to appear was not due to military service or because of any other control exercised over him by

the Government. The Court also noted that the surety company had failed to apply for discharge of the bond at the time of the principal's induction as it might have done under 50 U.S.C. App. 513(3).

Staff: United States Attorney Robert Tieken (N.D. Ill.)

FALSE CLAIMS ACT

Furnishing of Item Other Than That Called for by Contract - Mislabelling. United States v. National Wholesalers, et al (C.A. 9, September 18, 1956). Defendants received an invitation to bid on a contract for the furnishing of 6,600 generator regulators to the Army. The invitation specifically referred to a certain regulator model manufactured by the Delco-Remy Division of General Motors, but went on to stipulate that the bidder could offer to supply a substitute "or equal" item providing that he indicated such an intent in his bid and complied with certain other conditions. Defendants submitted a bid in which they represented that they proposed to furnish the Delco-Remy model itself. Despite this fact, following the acceptance of their bid, they delivered in installments over 4,000 regulators of their own manufacture with surreptitiously obtained Delco-Remy name plates affixed to each. The Army, which accepted them relying on the name plates, then discovered the true state of affairs. Determining, however, that the mislabeled regulators were "equal" to the genuine Delco-Remy product, and the Korean conflict being in progress, the contracting officer elected to take the balance of the regulators called for by the contract on an "or equal" basis. In this suit, the Government invoked the False Claims Act, 31 U.S.C. 231-233, to recover the prescribed $2,000 statutory forfeiture on each of the seventeen invoices submitted by defendants for payment prior to the time the Army discovered that the supply of regulators were not genuine Delco-Remys. The District Court dismissed the complaint on the ground that the contract permitted the delivery of "or equals" and that the Government was prohibited, by reason of its acceptance of the balance of the regulators, from demonstrating that the regulators delivered as Delco-Remys were inferior. The Court of Appeals reversed. It held that the contract by its express terms called for the delivery of genuine Delco-Remy regulators and that, in view of "the crude and deliberate mislabelling" by defendants, the only reasonable conclusion was that, in palming off their own regulators, they intended to defraud the Government. The case was remanded with instructions to enter judgment for the Government in the amount of $2,000 on each of eight vouchers submitted by the defendants with the invoices. A petition for rehearing has been filed by defendant.

Staff: Geo. Stephen Leonard and Alan S. Rosenthal (Civil Division)

FEDERAL CREDIT UNION ACT

Suspension of Charter - District Court Has Jurisdiction over Suit against Secretary of Health, Education, and Welfare to Enjoin Suspension of Charter - Charging Fee for Check Cashing Is Ground for Suspension. State Department Federal Credit Union v. Folsom (C.A. D.C., Oct. 25, 1956) - Certain Federal Credit Unions engaged extensively in cashing checks for fees of 10 or

15 cents for persons "within the field of membership." The Secretary of Health, Education and Welfare, who is charged with administration and enforcement of the Federal Credit Union Act, requested that the practice of charging a fee be discontinued on the ground it was not authorized by the Act. When the Credit Unions refused to comply, they were served with notice to show cause why their charters should not be suspended, and this suit against the Secretary for declaratory and injunctive relief followed.

The District Court dismissed the complaint on the ground that it was an unconsented suit against the United States. The Court also found that if the complaint were not dismissed, defendant's motion for summary judgment should be granted on the merits. In a per curiam decision, the Court of Appeals held that the District Court had jurisdiction, citing Agnew v. Board of Governors, 153 F. 2d 785 (C.A. D.C.), rev'd on other grounds, 329 U.S. 441, but that the Secretary's motion for summary judgment should be granted since his finding that the Credit Unions had no authority to cash checks for a fee was reasonable.

Staff: Assistant United States Attorneys Frank H. Strickler and Lewis Carroll (D. D.C.)

GOVERNMENT OFFICIALS

Salary as Incident of Office. United States v. Robert Grant and Fidelity and Deposit Company of Maryland (C.A. 7, October 15, 1956). The Government sued a former United States Marshal and the surety upon his faithful performance bond for damages incurred when he absented himself from his post and failed to perform the duties of United States Marshal for a period of some 20 months, during which time he continued to receive salary totalling $11,500. The Government sought only recovery of this amount and waived any claim "for nominal damages, or any damages other than the salary." The District Court dismissed the Government's complaint, and on appeal the Seventh Circuit affirmed. The Court of Appeals held that since United States Marshals were appointed by the President with the advice and consent of the Senate, they fell within the class of government officials whose salaries were incidents of their offices and not predicated upon the amount of service rendered. The Court recognized that the 1953 amendments to the Annual and Sick Leave Act, passed subsequent to the time of Grant's misconduct, placed United States Marshals within the coverage of the Act and declared their salaries not to be incidents of their offices, but held that these amendments constituted a change in the then existing law. The Court concluded that Grant was therefore entitled to his salary as a matter of law during the period of his absence and neglect of duty, and that since the Government's complaint sought recovery only of this salary, it was entitled to no other damages from Grant or his surety arising from this misconduct.

Staff: Robert S. Green and Richard M. Markus (Civil Division)

TORT CLAIMS ACT

Scope of Employment - United States Marshal Executing Writ of Municipal Court of District of Columbia Held Not "Within the Scope of his Office or Employment" by the Government. Spencer D. Gardner v. United States (C.A. D.C., Oct. 25, 1956). Plaintiff sued to recover damages under the Tort Claims Act

for the alleged negligence of a Deputy United States Marshal for the District of Columbia in executing a writ of restitution issued by the Municipal Court. The Government moved to dismiss the action, or in the alternative for an order granting summary judgment, and the District Court dismissed for lack of jurisdiction over the subject matter. The complaint alleged that plaintiff's personal property, supplies, and store fixtures were ejected from his dry cleaning business premises in the District of Columbia by the Marshal effecting an eviction pursuant to the Municipal Court writ. The negligence alleged was the failure of the Marshal to provide 48 hours notice to the plaintiff to evacuate the premises, in accordance with the customary procedure, which would have enabled him to pay the amount owed his landlord in time.

In a per curiam decision, the Court of Appeals affirmed the dismissal on the ground that a United States Marshal executing a writ of the Municipal Court is not acting within the scope of his federal employment so as to subject the United States to tort liability for his actions. Alternatively, the Court held that the United States was entitled to summary judgment since the complaint and affidavits showed that the Marshal lawfully evicted the plaintiff after proper notice.

Staff: Marcus A. Rowden and Richard M. Markus (Civil Division)

VETERANS ADMINISTRATION

NSLI - Regulation Providing for Payment of Benefits to Contingent Beneficiary, Rather Than Estate of Principal Beneficiary, Where Principal Beneficiary Survives Insured But Dies Prior to Commencement of Payments, Held Valid. United States v. Margaret D. Short (C.A. 9, Oct. 12, 1956). The insured designated his mother as principal beneficiary, and his brother and a charitable institution as contingent beneficiaries, under a National Service Life Insurance policy. At no time did he elect between a lump-sum or an installment method of payment. After his death in an Army hospital in Japan, his mother filed a claim with the Veterans Administration, but delays occurred in securing an official report of death. Before the report was received, the mother died; she received nothing from the policy during her lifetime. The Veterans Administration, pursuant to Section 8.91(b) of its Regulations (38 C.F.R. 8.91(b)), informed the mother's attorneys that it had no choice but to pay the proceeds of the policy, including installments accruing after the insured's death and prior to her death, to the designated contingent beneficiaries, rather than to her estate. This ruling was affirmed by the Board of Veterans Appeals. In a suit instituted by the executrix of her estate for declaratory relief, the District Court ruled that benefits accruing prior to the death of the principal beneficiary were payable to her estate and only the benefits accruing since that time were payable to the contingent beneficiaries. Insofar as the Veterans Administration Regulations required a different result, they were held invalid as not supported by the National Service Life Insurance Act.

The United States appealed the decision, and although only a stakeholder in this action, was deemed to have a sufficient interest "in supporting lawfully promulgated regulations and in carrying out the will of Congress." The

Court of Appeals for the Ninth Circuit (one judge dissenting) reversed the District Court with instructions to distribute the proceeds of the policy equally between the contingent beneficiaries. The Court held that Section 8.91(b) of the Regulations was consistent with the statute, which requires payment to the estate of the insured only when all beneficiaries (contingent as well as principal) die before receiving all the benefits payable, and where, as here, the beneficiaries are not entitled to a lump-sum settlement. Furthermore, under the statute the benefits of the policy go to the estate of the principal beneficiary only when he is entitled to lump-sum payment but elects a different method. The principal beneficiary here was never so entitled. Therefore, the Regulation awarding the benefits to the contingent beneficiaries in the circumstances of this case was necessary and appropriate to carry out the purposes of the statute and was in accord with the general policy of preferring living beneficiaries.

Staff: Julian H. Singman (Civil Division)

DISTRICT COURT

TORT CLAIMS ACT

Duty of Custom Officers and Food and Drug Inspectors to Use Due Care in Inspecting Foreign Shipment of Food. Holt v. United States (S.D. Fla.). Plaintiffs, importers of foreign fish, brought suit against the Government for alleged negligence of Custom officers in drawing an inadequate sample of a foreign shipment for inspection by Food and Drug inspectors, and the alleged negligence of the Food and Drug inspectors in approving a sample of the food which was subsequently condemned on further inspection by the Food and Drug Administration. Plaintiff's reliance on the initial approval caused him to pay the seller in full for the shipment. The Government defended on the ground that its agents owed no duty to the plaintiff importers, but inspected the food for the benefit of ultimate consumers, and if this were considered a suit under the Tort Claims Act, there was no liability under the "discretionary function" and "misrepresentation" exceptions. The District Court, without opinion, dismissed the complaint on the authority of a similar decision in the Southern District of New York, Anglo-American & Overseas Corporation v. United States, which is now pending on appeal.

Staff: Assistant United States Attorney E. Coleman Madsen (S.D. Florida); Isidor Lazarus (Civil Division)

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TAX DIVISION

Assistant Attorney General Charles K. Rice

District Court Decisions

Income Taxes - Alleged Unconstitutional Appropriations and Expenditures Not Grounds for Restraining Collection of Income Taxes - Fyke Farmer v. Rountree, et al. (M.D. Tenn.). This action was brought to restrain the collection of income tax for 1949 upon the allegations that the tax, if collected, would be used largely in the prosecution of an unlawful war of aggression—i.e., the intervention in Korea—in violation of the Constitution and in the preparation for wars of aggression in violation of international law and various treaties. Plaintiff further claimed that payment of this tax by him would make him a guilty party and subject to punishment under the Nuremberg Charter.

The District Court granted judgment on the pleadings, dismissing the action following the rule laid down in Massachusetts v. Mellon, 262 U.S. 447, that the District Court was without jurisdiction because such an action did not present a claim or controversy cognizable by the District Court and that the impact of the tax was not such an injury of which an individual could complain.

The plaintiff's contention was similar to that of the plaintiff in Whetstone v. United States, 82 F. Supp. 478 (N.D. Ill.), certiorari denied, 337 U.S. 941, which was dismissed upon the same grounds.

The case was troublesome because the plaintiff attempted to take the depositions of everybody concerned with the Government at the time of our entry into and participation in the Korean conflict.

Staff: United States Attorney Fred Elledge, Jr. (M.D. Tenn.); Frederic G. Rita (Tax Division).

Income Tax - Distribution of Pre-1913 Accumulation in Complete Liquidation of Corporation Held Not Tax-Free. James G. Schaefer v. Russell A. Welch, Director (S.D. Ohio). On October 10, 1956, the Court held that Section 115(b) of the Internal Revenue Code of 1939, which provides for tax-exempt distribution of pre-1913 accumulations, does not apply where such accumulations are distributed in complete liquidation pursuant to Section 115(c) of that Code.

The Court held that upon such a distribution the taxpayer, after recovering the basis of his stock, must treat the excess over the basis upon the liquidation as long-term capital gain. This is a case of first impression on the interpretation of Section 115(b) of the 1939 Code.

The Court also held that where part of the liquidating distribution was a non-interest bearing note of the liquidating corporation promising payment to the taxpayer of $750 in five (5) equal annual installments, such part was taxable in the full face amount of $750 in the year received.

Staff: Assistant United States Attorney Richard H. Pennington (S.D. Ohio); George T. Rita (Tax Division).

CRIMINAL TAX MATTERS
Appellate Decisions

Section 3616(a) - Conflict with an Effect upon Validity of Felony Provisions of 1939 Code. There are now four petitions for certiorari pending in the Supreme Court which raise problems resulting from the overlap between Sections 145(b) and 3616(a) of the Internal Revenue Code of 1939 (see Bulletin, September 28, 1956, pp. 656-657 and other Bulletin discussions cited there). These cases are Louis Smith v. United States (C.A. 8), Doyle v. United States (C.A.7), Achilli v. United States (C.A.7) and Moran v. United States (C.A. 2). The opinions of the Courts of Appeals in the Moran, Achilli and Smith cases are discussed on pages 609-610 of the August 31, 1956 issue of the Bulletin.

The Government has filed briefs in opposition to certiorari in the Doyle, Achilli and Moran cases (all of which raise the question of the legality of the sentence) on the ground that the question was not raised in the district court. There was no challenge to the legality of the sentence in the Smith case. There the petitioner challenged the validity of the indictment under 145(b) by an appropriate pretrial motion, contending that prosecution was barred by the three-year statute of limitations because the indictment, while purporting to charge an offense under 145(b), actually charged only a violation of Section 3616(a). The Government opposes certiorari in that case on the merits, relying on the clear language of Section 3748(a)(2).

In view of the number of pending petitions which raise questions relating to Section 3616(a) and the confusion throughout the federal courts resulting from the majority and minority opinions in Berra v. United States, 351 U.S. 131, it is quite possible that the Supreme Court will grant certiorari in one or more of these cases. If it does not, present indications are that the problem will be squarely presented by a petition for certiorari expected to be filed during November in the case of United States v. H.J.K. Theatre Corp., Jeanne Ansell and Irving Rosenblum (see Bulletin, September 28, 1956, pp. 656-657). The Government will probably acquiesce in a limited grant of certiorari in order to have the Supreme Court clear up some of the doubts created by the opinions in the Berra case.

Net Worth—Instructions to Jury Relating to Nature of Method and Permissible Inferences. United States v. Raymond O'Connor (C.A. 2, decided October 1, 1956.) Appellant, indicted on four counts of income tax evasion, was convicted on all counts after seven weeks of trial. The Government's case was based on the net worth method and the proof was unusually voluminous and complex. Appellant, a certified public accountant, took sharp issue with the Government's computations at the trial. He testified at length, charging the Treasury agents with having committed one hundred four errors, in omissions from his opening net worth, improper inclusion in his closing net worth, and the treatment of non-deductible expenditures, capital transactions, gifts and other items. The net impact of the appellant's evidence, if believed, would have been to destroy entirely the alleged unreported income. The trial judge gave a long series of instructions to the jury during which he undertook to explain the net worth method and to apply it to the facts of this case. In this respect the charge was erroneous, confused and patently inadequate.

The Court of Appeals held that the trial court's "grossly inadequate" instructions to the jury required a reversal in the light of the Supreme Court's warning in Holland v. United States, 348 U.S. 121, 129, that charges in this type of case should be "especially clear." Although the instant case was tried about a year before the Holland opinion came down, the Second Circuit held that the standards there laid down have retroactive application. (Compare with United States v. Bardin, 224 F.2d 255 (C.A. 7), holding that such standards were intended to apply only to future trials.)

The Tax Division and the Solicitor General are in agreement that no petition for certiorari should be filed because the jury charge cannot possibly be successfully defended in the Supreme Court.

The reversal in this case highlights the necessity of a charge, in every net worth case, similar to that set forth on Pages 21-26 of the "Suggested Special Instructions for Use in Criminal Tax Cases" sent to all United States Attorneys in March, 1955. Unfortunately, these instructions were not in existence at the time the instant case was tried.

Staff: United States Attorney John O. Henderson and Assistant United States Attorney Alexander C. Cordes (W.D. N.Y.)

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ANTITRUST DIVISION

Assistant Attorney General Victor R. Hansen

SHERMAN ACT

Price Stabilization Conspiracy. United States v. Memphis Retail Appliance Dealers Association. (W.D. Tenn.) A civil antitrust suit was filed on November 1, 1956, charging a trade association and seven of its members with a violation of Section 1 of the Sherman Act in the sale and distribution of electric and gas appliances.

The complaint alleged that defendants have conspired to maintain manufacturers' retail list prices on appliances; to adhere to maximum limitations on trade-in allowances for used appliances; to prevent distributors from selling appliances directly to consumers; to eliminate the competition of discount houses with retailers; and to adhere to restrictive practices in advertising the selling prices of appliances.

According to the complaint, the conduct of defendants since 1948 has eliminated competition among retailers of appliances in the Memphis area, has suppressed competition from discount houses and from distributors, and has stabilized the prices for appliances sold in that area. Members of the defendant association sell approximately $10,000,000 worth of appliances annually.

Relief sought in the complaint includes injunctions against a continuation or revival of any of these practices. The Court is also requested to order the defendant association to require as a condition of membership that no retailer or distributor member will engage in any of the practices alleged in the complaint.

Staff: Philip L. Roache, Jr., Robert O. Aders and Stanley R. Mills, Jr. (Antitrust Division)

Restraint of Trade. United States v. Minnesota Mining & Manufacturing Company. (D. N.J.) A civil antitrust suit was filed on October 29, 1956, charging Minnesota Mining & Manufacturing Company of St. Paul, Minnesota, with a violation of Section 1 of the Sherman Act in the manufacture and sale of reflex reflective sheeting.

This sheeting is widely used throughout the country to make outdoor signs, particularly road signs, brilliant and reflective when contacted at night by beams of light from motor vehicle headlights. Defendant manufactures and sells such sheeting under the name "Scotchlite", and its sales in 1955 of Scotchlite and products made therefrom amounted to more than $10,000,000.

The complaint alleged that defendant has prevented its dealers and sign makers from reselling Scotchlite or products made therefrom to the United States Government, various state agencies, railroads and other purchasers in competition with defendant; that it prevented sign makers from selling to the

Government signs made reflex reflective by means other than the use of Scotchlite; that it allocated customers and territories among itself, its dealers and converters; and that it imposed various restrictions on dealers and converters in their use and resale of Scotchlite purchased from defendant.

The complaint seeks injunctive relief against the continuance of these practices, as well as a court order requiring defendant to notify its dealers and converters that Scotchlite purchased from defendant may be used and resold without restrictions. In addition, the Court is requested to grant relief with respect to defendant's patents on Scotchlite to restore competition to this industry.

Staff: John D. Swartz, John V. Leddy and John H. Clark, III (Antitrust Division)

Guilty Plea in Price Fixing Case. United States v. Standard Ultramarine and Color Co., et al. (S.D. N.Y.) An indictment was returned on June 29, 1955 charging six manufacturers with a price fixing conspiracy on dry colors. Following a decision by Judge Weinfeld on December 16, 1955 denying motions of defendants to enter pleas of nolo contendere, five of the six defendants entered pleas of guilty and were fined $5,000 each.

Trial against the remaining defendant, Holland Color & Chemical Company, was set for November 7, 1956. At a pre-trial conference on October 26, 1956 this defendant again sought to enter a plea of nolo contendere, but Judge Weinfeld refused to accept this plea. Defendant then entered a plea of guilty and was fined $5,000.

Staff: Philip L. Roache, Jr., Robert O. Aders and Stanley R. Mills, Jr. (Antitrust Division)

Nolo Contendere Pleas Accepted. United States v. Lyman Gun Sight Corp., et al. (Dist. Col.) On October 19, 1956 District Judge F. Dickinson Letts granted motions by all defendants to withdraw their pleas of not guilty and to enter pleas of nolo contendere.

The indictment was returned on November 15, 1955 and charged defendants with conspiring to exclude from the rifle scopes industry those dealers who sell at less than the manufacturers' list prices, and to boycott such dealers so that their advertisements would be rejected by outdoors magazines.

The Government opposed entry of pleas of nolo contendere. The Government argued that routine acceptance of such pleas in antitrust cases avoids the sanctions of criminal prosecution and lessens the effectiveness of treble damage actions, which were contemplated by Congress as deterrents to assist in antitrust enforcement. The Government noted that a nolo plea, unlike a guilty plea or a conviction, cannot be used as prima facie evidence in subsequent treble damage actions. The pendency of a companion civil

action, it was argued, did not detract from this position since defendants in civil cases can settle the litigation prior to the taking of testimony, while the entry of nolo pleas requires court approval.

The Court, in granting the motions for change of plea, merely stated that this case was an appropriate one for nolo pleas.

The Court referred the matter to the Probation Office for a pre-sentencing report, and invited counsel for the Government and the defendants to submit written memoranda relating to the penalties to be imposed.

Staff: James L. Minicus, William H. Crabtree, Forrest A. Ford, and Josef Futoran (Antitrust Division)

Merger Does Not Abate Criminal Proceedings as to Corporation. United States v. Maryland and Virginia Milk Producers Association, Inc., et al., (Dist. Col.) On October 16, 1956, defendant Chestnut Farms-Chevy Chase Dairy Company moved to dismiss the indictment as to it on the ground that the criminal proceeding had abated as to it because of its merger into its parent, National Dairy Products Corporation, on October 1, 1956. The Court took the motion under advisement following argument. It denied the motion on October 30, 1956, stating, "Obviously it would be intolerable and contrary to public policy to permit a corporation to evade civil liability or to escape criminal penalties by voluntarily terminating its existence." Inasmuch as Delaware was the state of incorporation, the Court interpreted the applicable Delaware law, which provides that any "proceeding" pending against any corporation consolidated or merged may be prosecuted as if such consolidation or merger had not taken place, to include criminal proceedings.

Staff: Joseph J. Saunders, Edna Lingreen and J. E. Waters (Antitrust Division)

INTERSTATE COMMERCE COMMISSION

I.C.C. Orders Declared Invalid. Consolidated Truck Service, Inc., et al. v. United States, Interstate Commerce Commission, et al. (D. N.J.) On September 28, 1956, a special three-judge statutory court consisting of Circuit Judge Biggs, and District Judges Modarelli and Hartshorne, issued a unanimous opinion in which it held that raw shelled nuts are "agricultural commodities" and not "manufactured products thereof," within the meaning of Section 203(b)(6) of the Interstate Commerce Act, and are therefore exempt from the coverage of said Act.

This was an action instituted against the United States and the Interstate Commerce Commission by Consolidated Truck Service, Inc., a motor carrier of raw shelled nuts, to set aside an order of the Commission entered in a proceeding entitled Determination of Exempted Agricultural Commodities.

The United States confessed error in this case and joined with the Department of Agriculture, an intervening plaintiff, in supporting Consolidated's contention that raw shelled nuts are not "manufactured" products.

The Court relied heavily on East Texas Motor Freight Lines, Inc. v. Frozen Food Express, 351 U.S. 49, in reaching the conclusion that raw shelled nuts fall within the exemption. One of the chief contentions of the Commission was that once the nut was shelled it had lost its "identity" as an agricultural product. In the East Texas case the Supreme Court stated: "At some point processing and manufacturing will merge. But where the commodity retains a continuing substantial identity through the processing stage we cannot say that it has been "manufactured" within the meaning of Section 203(b)(6).

In the case at bar, the Court held: "Seemingly it /the shelled nut/ suffers no substantial change by the divestiture of its natural outer covering, essential for its growth but, insofar as mankind is concerned, serving no other purpose."

The Commission and the intervening defendants objected to the intervention of the Secretary of Agriculture as a party plaintiff, and also to the fact that the United States, a statutory defendant, "strongly" supported Consolidated's position. The Court held that the intervention of the Secretary of Agriculture as a party plaintiff was authorized by statute, and that support for the position of the United States if found in Frozen Food Express v. United States, 351 U.S. 40, and East Texas Motor Freight Lines, Inc. v. Frozen Food Express, supra. The Court also added: "We can perceive no reason why a Department or a Cabinet Officer, charged with duties of decision by Congress, may not express views in accordance with judgment and conscience. The writ of Mark, iii, 25 1/ does not run in this case."

Staff: Norah C. Taranto (Antitrust Division)

Interstate Commerce Act - Construction of Section 410 - Freight-Forwarders. Acme Fast Freight, Inc., et al. v. United States, et al. (D. Del.) On September 28, 1956, a special statutory District Court, consisting of Circuit Judge Biggs and District Judges Leahy and Rodney, dismissed this complaint to set aside an order of the Interstate Commerce Commission, which granted a revised permit to an applicant authorizing it to extend throughout the major part of the United States its operations as a freight-forwarder in the transportation of general commodities.

The Court held that the Commission had correctly construed Section 410 /49 U.S.C. §1010/, which governs the issuance of permits, and that the findings of the Commission were supported by substantial evidence. In sustaining the Commission's view that the possible effect of new operations on existing competition was not a factor to be considered in deciding applications for permits to operate as a freight-forwarder, the Court stated that under the statute "there was to be no protection 'against useless and wasteful duplication.' There was to be afforded to existing services, no 'virtually monopolistic rights.' As to 'prior operations' they were to be afforded no

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1/ "And if a house be divided against itself that house cannot stand."

advantage which would place them 'in any more favorable position than any new shipper.' Permits were to be issued 'without regard to whether the applicant would compete with existing facilities.' In fact, § 410(d) was designed to insure that permits would not be denied 'on the ground that the existing forwarder service was adequate.' The basic thesis of Congress was the 'greatest opportunity should be given to persons to go into the business.' This is the unmistakable intent of § 410(d)."

Staff: John H. D. Wigger (Antitrust Division)

Abandonment Ordered by I.C.C. Upheld. Pratt, et al. v. United States, et al. (N.D. Iowa) This action was brought to set aside an order of the Interstate Commerce Commission granting a certificate of abandonment to the Chicago and North Western Railway Company. The certificate permitted the abandonment of 19 miles of a branch line extending between Sargeant Bluff and Sacton, Iowa. The case was heard by a three-judge district court at Sioux City, Iowa on March 19, 1956. Plaintiffs in the case were the Iowa Commerce Commission and certain individuals and commercial organizations who contended that they and the public would be adversely affected by the abandonment.

The Interstate Commerce Commission's examiner recommended that the application for permission to abandon be denied. The Interstate Commerce Commission's Division 4 overruled the examiner and the full Commission agreed with Division 4.

One of the points raised was that, since the Interstate Commerce Commission did not agree with its examiner, it had erred in not giving the examiner's findings weight similar to that given the report of a special master. Overruling this point the Court said: ". . . This argument was specifically rejected in Universal Camera Company v. N.L.R.B., 340 U.S. 474, 492. In the last cited case the court also held that the substantial evidence standard is not modified in any way when the Commission and the examiner disagree, and the court further stated that the significance of the examiner's report depends largely upon the importance of credibility in the particular case.

In our present case the diverse conclusions are not based, at least to any substantial extent, upon conflicting conclusions as to the credibility of witnesses."

Other contentions, rejected by the Court, have to do with:

(a) The Interstate Commerce Commission's failure to consider the entire branch as to earnings and public convenience and necessity;

(b) The Interstate Commerce Commission's application of so-called overhead or bridge traffic formulae and principles;

(c) The Interstate Commerce Commission's disregard of cost of extension industry switching at certain points and industries now performed by the branch line crew and engine and charged to the line;

(d) The Interstate Commerce Commission's statement that two stations on the line are located on hard surfaced roads and that adequate motor service is available;

(e) The Interstate Commerce Commission's consideration of computations by the applicant based on "shortest alternate routes" while the applicant's own witnesses admitted that such routes are not open to traffic and it is not known when it will be if ever;

(f) The Interstate Commerce Commission's conclusion based on a finding that any reasonable method of assigning revenues and expenses to the line would show a deficit since 1950;

(g) The Interstate Commerce Commission's conclusion that available routes would provide adequate service and that public convenience and necessity did not require operation of the line;

(h) The Interstate Commerce Commission's ultimate conclusions.

The Court said it had some doubt about the wisdom of the decision but it could not substitute its judgment for that of the Commission.

Staff: Charles R. Esherick (Antitrust Division)

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LANDS DIVISION

Assistant Attorney General Perry W. Morton

CONDEMNATION

Severance Damages - Use of Before and After Valuation of Entire Farm Does not Depend on Whether Owner Claims Severance Damages - Preservation of Error and Harmless Error. United States v. Lonnie Mills (C.A. 8, October 24, 1955). A farm fronting on the Arkansas River had been bisected by a levee but use as a unit continued. Later the Government imposed an easement on the riverward portion in connection with a river improvement and bank stabilization project. The owners' valuation evidence was limited to the part of the farm riverward of the levee. The Court excluded evidence offered by the Government as to the before and after value of the entire farm.

The Court of Appeals, while affirming the judgment, held that the exclusion of evidence was erroneous. It held that there was sufficient evidence to submit to the jury the question whether these lands constituted two tracts or a single tract and, if it were a single tract, compensation should be based upon the before and after value of the entire tract. This decision sub silentio rejects the notion that had been expressed in the case that the owners had an option either to value the particular land affected or, if they claimed severance damages, to value the entire tract. The judgment was affirmed on the ground that the error was not prejudicial on the record in this case.

Staff: Roger P. Marquis (Lands Division)

OUTER CONTINENTAL SHELF LANDS ACT

Maintenance of State-Issued Leases as Federal Leases - Unrenewed Leases Ineligible. Stanolind Oil and Gas Co. v. Seaton (C.A. D.C.). The judgment in Stanolind Oil and Gas Co. v. McKay (3 U.S. Attys Bul., No. 23, p. 25) was affirmed on the grounds that when a nonproducing State lease was allowed to lapse by nonpayment of rent before December 11, 1950, the lease had no "term remaining unexpired" on that date and the lessee was not a person "holding" a lease on August 7, 1953 (the date of the Act), and therefore Section 6(b) of the Act did not permit maintenance of the lease as a federal lease.

Staff: George S. Swarth (Lands Division)

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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. 22 Vol. 4 of October 26, 1956.

MEMOS	DATED	DISTRIBUTION	SUBJECT
116 Supp. 3	10-23-56	All Employees	Leave for Voting
124 Supp. 4	10-22-56	U.S. Attys.	Revision of Docket and Reporting Manual
ORDER	**DATED**	**DISTRIBUTION**	**SUBJECT**
94-55 Supp. 2	10-17-56	U.S. Attys. & Marshals	Subsistence for Travel

MAILING ADDRESS

Unless directed otherwise, mail is usually sent to the official headquarters of United States Attorneys. It has been brought to our attention that delays may be avoided if in special circumstances mail is sent directly to other places in the district.

Recently an emergency situation arose where a file was needed at other than the United States Attorney's headquarters. The request for the file did not contain notice to the Department of where to direct the file with the result that the consequent delay almost became fatal.

To avoid further trouble, it is suggested that, in those instances where mail is to be directed to places other than the regular mail address, the Department be affirmatively and specifically notified to that effect.

REVISED S.F. 61 (APPOINTMENT AFFIDAVIT)

Because the necessary supplies of Standard Form 61 (Appointment Affidavit) can not be made available for field distribution by the General Services Administration, an extension for the use of the old stock forms has been granted by the United States Civil Service Commission to January 1, 1957. The new edition may, however, be used before that date whenever supplies are available.

Remaining stocks of the earlier edition of Standard Form 61 will be obsolete and should not be used after January 1, 1957.

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Ineligibility to Citizenship - Claim of Military Exemption - Res Judicata - Estoppel. Mannerfrid v. Brownell (C.A. D.C., October 18, 1956). Appeal from decision refusing to invalidate a deportation order. Affirmed. (See Bulletin, Volume 4, No. 4, page 132).

This alien entered the United States temporarily in 1941 and in 1948 he presented to the Attorney General an application for preexamination as a result of which it was found that he was not ineligible for citizenship or for admission for permanent residence. He thereafter went to Canada and returned in 1949 with a visa as a permanent resident. In 1951, he applied for naturalization which was denied in the courts because he had applied for exemption from military service in 1943. This action barred him from becoming a citizen by reason of the provisions of section 3(a) of the Selective Training and Service Act of 1940. Under the Immigration Act of 1924, which was in effect when the alien was admitted for permanent residence, he was inadmissible to this country because of his ineligibility to citizenship. Deportation proceedings against him were founded upon that inadmissibility.

The alien argued in substance that the finding of the Attorney General in the preexamination case and of the courts in his naturalization case constituted a binding adjudication of the legality of his entry in 1949 and that the government is estopped on equitable principles from deporting him.

The appellate court rejected his contentions, stating it agreed with the decision in the District Court. In that decision it was pointed out that the question of lawful admission was not actually litigated in the naturalization proceedings and was not res judicata. It was further held in the lower court that if the plaintiff was not entitled to be admitted legally in 1949, no law of the case or estoppel can be asserted as a defense against the sovereignty of the United States.

Staff: Assistant United States Attorney John W. Kern III, (United States Attorney Oliver Gasch, Assistant United States Attorneys Lewis Carroll and Joseph M. F. Ryan, Jr. (Dist. Col.), and Lorraine Wall Hurney, Attorney, Office of General Counsel, Immigration and Naturalization Service, on the brief).

Evidence - Inferences from Refusal to Testify - Communist Party Membership. Ocon v. Del Guercio (C.A. 9, September 26, 1956). Appeal from decision refusing to invalidate deportation order. Affirmed.

The alien was ordered deported on the ground that he had been a member of the Communist Party after entry. Two witnesses testified for the government as to his membership. Upon advice of counsel, the alien refused to be sworn and refused to answer all questions except two questions relating to counsel by whom he was represented. The alien's counsel cross-examined the government's witnesses but the alien offered no evidence or witnesses on his own behalf. The alien did not claim the privilege of self-incrimination as a ground for his refusal to answer questions. The Special Inquiry Officer ordered his deportation and the Board of Immigration Appeals dismissed his appeal.

The alien argued that the deportation order was invalid because the Special Inquiry Officer was not appointed and otherwise qualified pursuant to the Administrative Procedure Act. The appellate court held this contention to be without merit. It likewise held that the Immigration and Nationality Act was not unconstitutional as violating due process or freedom of speech and association or because it was a bill of attainder or an ex post facto law. The Court also held that there was reasonable, substantial and probative evidence of the alien's membership in the Communist Party in the form of the testimony of the two witnesses. Finally, the Court rejected the argument that it was error to draw an inference from the alien's silence at the deportation hearing. Also rejected was the contention that because substantial evidence is required under the act the alien can wait to hear all the government's evidence and if he believes that substantial evidence has not been presented then he is under no duty to speak and thus, if he does not, no inference can be drawn.

Entry of Philippine Citizen - Philippines Regarded as Foreign Territory. Baez v. Boyd (C.A. 9, September 26, 1956). Appeal from denial of habeas corpus to review deportation order. Affirmed.

Appellant, a native of the Philippine Islands, entered the United States as a stowaway in 1939 and again entered in 1946 upon presentation of a Philippine document of identity. He was ordered deported by the Special Inquiry Officer on the ground that he did not have a proper visa at the time of his 1946 entry. The warrant of deportation issued in his case was, however, based upon his 1939 entry, although on the same charge. The alien contended that as an American national at the time of his entry he did not need a visa. He also argued that his 1939 arrival was not an "entry" because he was an American national traveling from an insular possession to the mainland. The appellate court rejected both contentions, pointing out that under the provisions of the Philippine Independence Act of 1934, Philippine citizens were regarded as aliens for the purposes of the immigration laws and that the Philippine Islands were regarded as "foreign" territory for such purposes. The Court also upheld the decision of the Board of Immigration Appeals that the alien was deportable on the basis of either his 1939 or 1946 entry.

Arrest without Warrant - Proof of Validity - Summary Judgment. Valerio v. Mulle (E.D. Pa., October 22, 1956). Declaratory judgment

proceedings to review deportation order. Defendant filed motion for summary judgment.

The alien was arrested by immigration officers without a warrant of arrest. The Court observed that there was authority for such an arrest if the officers had reason to believe that the alien was in the United States in violation of the immigration laws and if it reasonably appeared to them that he might escape before a warrant could be obtained. However, the Court said the evidence in respect to why the officers arrested without a warrant was not clear. No hearing was held in the Court on the point and no affidavits were submitted. The arresting officers did not appear at the hearing before the Special Inquiry Officer.

The Court said that under these circumstances it would be unwise to grant defendant's motion for summary judgment without ordering a hearing in the case at least to look into the question as to why the arresting officers made the arrest a day before they obtained the warrant. The motion was therefore denied.

EXCLUSION

Use of Blood Tests in Determining Claims of Citizenship - Racial Discrimination. Lee Kum Hoy et al. v. Shaughnessy (C.A. 2, September 25, 1956). Appeal by respondent Shaughnessy, District Director of the Service, from decision sustaining writ of habeas corpus and adjudging that Chinese relators be admitted to the United States as citizens. (133 F. Supp. 850). Cross-appeal by relators predicating error on interlocutory ruling by the lower court (123 F. Supp. 674). On respondent's appeal, reversed and remanded with direction to discharge writ; on relators' cross appeal, affirmed.

This case has been the subject of considerable previous litigation (see Bulletin Volume 3, No. 18, page 26). The present action involved the validity of the use of blood test evidence in determining the citizenship of the Chinese applicants, which the lower court held had been properly received if the tests had been taken without undue discrimination because of the race of the relators. From the decision that such evidence might properly be used, the relators appealed. However, the lower court subsequently ruled that the blood tests in question were administered to all Chinese and to no whites and held this to be illegal discrimination. From this decision the respondent appealed.

The appellate court reviewed the history of the development and use of blood tests in citizenship cases, which had originated in the State Department, and held that on the entire administrative record, the finding in the lower court that the testing of these relators was actuated by racial discrimination was not warranted. There was no evidence that in any particular case officers of the Service were actuated by racial prejudice either in requesting blood tests or in processing the case without blood tests. Even if occasional prejudice on the part of individual officers of the Service were deemed proved by inference arising from the preponderance of Chinese cases among those blood tested, it does not follow

that the officers responsible for the policies of the Service had consciously adopted a discriminatory policy. The Court therefore reversed the decision admitting the relators as citizens of the United States.

The Court adhered to its previous holdings in other cases that blood tests, if not taken because of discrimination on racial grounds, are competent evidence on the issue of paternity, at least in federal courts sitting in the State of New York. The relators' contention, raised by their cross-appeal, that evidence of the blood tests was improperly received because of lack of administrative authority to make use of blood tests, was therefore overruled. The Court said that, even in the absence of express authority embodied in official rules or directives, responsible official personnel had authority to utilize any non-discriminatory, investigatory technique reasonably appropriate.

Staff: Assistant United States Attorney Harold J. Raby (United States Attorney Paul W. Williams and Assistant United States Attorney Maurice N. Nessen (S.D. N.Y.) on the brief).

REFUGEE RELIEF ACT

Adjustment of Status - Use of Confidential Information - Proof of Physical Persecution. Petition of Cha'o Li Chi (S.D. N.Y., October 23, 1956). Action to review denial of adjustment of status under section 6 of Refugee Relief Act of 1953.

The Attorney General denied adjustment of status in this case on the ground that the alien had failed to establish that he would be subject to persecution if returned to China. In a previous proceeding before a different judge of this Court, it was held that the alien had been denied due process because the decision in his case was based on confidential information (see Bulletin, Vol. 3, No. 22, page 26). At the administrative rehearing the alien was informed of the broad, general nature of the information used against him. After being informed of the nature of the evidence against him the alien denied its purport. The Attorney General again denied his application. In this action the alien conceded that he had the burden of establishing that he has reasonable ground to fear persecution because of his political beliefs if returned to China, but he argued that he had sustained the burden and that the administrative determination against him lacked sufficient support in the evidence to justify it.

The Court rejected his contention. It was pointed out that the Attorney General has wide discretion in certain immigration matters and the scope of judicial review in such matters is clearly circumscribed. The case also involves political issues into which the courts should not intrude. While the Attorney General may not capriciously disregard the evidence consisting of the petitioner's denials or draw irrational inferences from such evidence, he is not obliged to accept those denials at full value when they conflict with other evidence. Questions of weight

and credibility were for the Attorney General, not the Court, to pass on. On this record it cannot be said that he acted capriciously, arbitrarily or unfairly in concluding that the petitioner had failed to sustain his burden of establishing reasonable grounds for his asserted fear of persecution if returned to China.

Adjustment of Status - Fear of Persecution - Interpretation of Statute. Cheng Lee King v. Carnahan (N.D. Calif., October 5, 1956). Action to review order denying adjustment of status under section 6 of Refugee Relief Act of 1953.

The statute in question provides for adjustment of status of certain non-immigrant aliens if it is shown that an applicant is "unable to return to the country of his birth, or nationality, or last residence because of persecution or fear of persecution on account of race, religion, or political opinion". In this case, it was not disputed that fear of persecution barred the alien's return to China, the country of both his birth and nationality. However, the alien last resided in Singapore for some fifteen years and it was not shown that he was unable to return there because of persecution or fear of persecution, but because he could not obtain a visa to do so. The alien contended that the statute was satisfied if an applicant is unable to return to one of the alternate countries because of fear of persecution, or at all events, if he is unable to return to any of the three alternate countries and his inability to return to one of them is because of fear of persecution.

The Court rejected these contentions stating that although section 6 of the Act refers to the country of birth, nationality, or last residence in the alternative it is clear that Congress intended that, if these countries are different, an applicant must be unable to return to any of the three. The section quite plainly states that the inability to return to the specified countries must be because of persecution or fear of persecution. There is nothing in its legislative history to suggest that Congress intended that an alien who could not return to one of the specified countries because of fear of persecution would be eligible for relief if, for different reasons, his return to the alternate countries was also barred.

Staff: United States Attorney Lloyd H. Burke and
Assistant United States Attorney Charles Elmer Collett
(N.D. Calif.).

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I N D E X