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BULLETIN

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DISTRICTS IN CURRENT STATUS

As of February 28, 1959, the total number of districts meeting the standards of currency were:

CASES				MATTERS			
Criminal		Civil		Criminal		Civil	
	Change from 1/31/59		Change from 1/31/59		Change from 1/31/59		Change from 1/31/59
79	-	60	-	61	∕ 3	71	- 3
84.0%	-	63.8%	-	64.8	∕ 3.1%	75.5%	- 3.2%

MONTHLY TOTALS

During February, the total number of cases and matters pending rose for the second straight month after having decreased for the three-month period, October-December, 1958. The increase from 52,084 to 52,249, or 165 items, was not as substantial, however, as during January when 957 items were added to the workload. Criminal cases pending rose from 7,105 to 7,722 during February, or 617 cases, for the largest percentage of increase in any of the categories.

Aggregate collections are continuing at a higher level than in the previous fiscal year. During February, a total of $2,483,089 was collected, bringing total collections for the first eight months of fiscal 1959 to $21,804,015. This total represents an increase of $3,005,406, or 16.0 percent over the $18,798,609 collected during the similar period of fiscal 1958.

Set out below is a comparison of the workload pending at the end of the past fiscal year and on February 28, 1959:

	June 30, 1958	February 28, 1959	
Triable Criminal	5,721	7,722	∕ 2,001
Civil Cases Inc. Civil Tax Less Tax Lien & Cond.	14,108	14,586	∕ 478
Total	19,829	22,308	∕ 2,479
All Criminal	7,577	9,495	∕ 1,918
Civil Cases Inc. Civil Tax & Cond. Less Tax Lien	16,621	17,097	∕ 476
Criminal Matters	10,736	11,742	∕ 1,006
Civil Matters	14,428	13,915	- 513
Total Cases & Matters	49,362	52,249	∕ 2,887

Cases pending in United States Attorneys' offices amounted to 28,869 as of February 28, 1959. Compared to February 28, 1958 this is an increase of 1,351 or 4.9 per cent. Following is a table giving a comparison of the number of cases filed, terminated and pending during the first eight months of fiscal years 1958 and 1959.

	1st 8 Months F. Y. 1958	1st 8 Months F. Y. 1959	% of Increase or Decrease
Filed			
Criminal	19,953	20,326	+ 1.87
Civil	15,835	15,583	- 1.59
Total	35,788	35,909	+ .34
Terminated			
Criminal	18,466	18,464	- .01
Civil	14,329	14,910	+ 4.05
Total	32,795	33,374	+ 1.77
Pending			
Criminal	8,505	9,156	+ 7.65
Civil	19,013	19,713	+ 3.68
Total	27,518	28,869	+ 4.91

* * *

JOB WELL DONE

A member of the March Grand Jury, in commenting on the very thorough and careful preparation and superb presentation by the Assistant United States Attorneys in the Southern District of New York who appeared before the Grand Jury, made particular mention of the fine work done by Assistant United States Attorneys Leonard R. Glass and John D. Roeder.

The General Counsel, Securities and Exchange Commission, has commended Assistant United States Attorney Silvio Mollo, Eastern District of New York on the patience and restraint he showed in the argument in a recent criminal case, on his fine manner of handling a very difficult matter, and on the splendid cooperation he has given the Commission in this and other matters.

In expressing appreciation for the assistance rendered by United States Attorney Theodore F. Bowes and his staff, Northern District of New York, in obtaining testimony vital to the denaturalization of a gangster, the Assistant District Director of Investigations, Immigration and Naturalization Service, especially commended Assistant United States Attorney Kenneth Ray for the promptness and vigor with which he instituted court action and for his forceful presentation of the government's position which did much to elicit the desired information.

The Acting District Chief, Food and Drug Administration, has commended Assistant United States Attorney Norman Black, Southern District of Texas, for his excellent handling of a recent case.

In commenting on the work of Assistant United States Attorney Ronald A. Rosen, Southern District of California, in handling the arraignment, plea and sentence calendar, the presiding judge wrote that Mr. Rosen gave the government such impeccable representation that in his many years of association with that calendar, both as judge and as United States Attorney, he could not recall anyone who had done better and very few who had done as well.

The FBI Special Agent in Charge has commended Assistant United States Attorney Morton Schlossberg on his complete and thorough understanding as well as his clear presentation of a recent old case whose complexity required considerable study and effort to properly present the facts to the jury.

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ANTITRUST DIVISION

Assistant Attorney General Victor R. Hansen

SHERMAN ACT - CLAYTON ACT

Complaint Filed Under Section 7 of Clayton Act and Section 1 of Sherman Act. United States v. Firstamerica Corporation (N.D. Calif.). A civil antitrust suit was filed on March 30, 1959 in San Francisco against Firstamerica Corporation (successor to the Transamerica banking interest) charging violations of Section 7 of the Clayton Act and Section 1 of the Sherman Act.

According to the complaint, Firstamerica, the largest bank holding company in the United States, has announced plans to merge and consolidate its California subsidiary, First Western Bank & Trust Company of San Francisco, with the California Bank of Los Angeles, pursuant to an agreement between Firstamerica and California Bank whereby Firstamerica will acquire over 80 percent of the stock of the California Bank. The complaint alleges that the effect of carrying out this acquisition of stock and the merger and consolidation may be substantially to lessen competition, tend to create a monopoly and unreasonably restrain trade and commerce in banking in the metropolitan Los Angeles area, the State of California, and in an eleven state area.

This is the first action the Department has instituted against banks under Section 7. It is alleged that the merger and consolidation of California Bank and First Western Bank & Trust Company will give the resulting Firstamerica subsidiary bank about 91 banking offices or 16 percent of all the banking offices in the metropolitan Los Angeles area which will account for deposits of over $1.2 billion or 15 percent of the area's total deposits. Statewide, the consolidated bank will have about 165 or 11 percent of the State of California's banking offices which will account for about $2 billion or 9 percent of total banking deposits in that State. Within an eleven-state area where Firstamerica operates 23 banks, the Firstamerica bank system will account for about 387 banking offices or 13 percent of all banking offices, and about $4 billion in deposits.

On January 14, 1959, Firstamerica's application to acquire California Bank stock received majority approval from the Board of Governors of the Federal Reserve System pursuant to provisions contained in the Bank Holding Company Act of 1956 - an act which also provides that any act or action taken pursuant thereto, shall not serve as a bar or defense to the institution of an antitrust proceeding. At the time of filing the complaint, Firstamerica's counsel stipulated not to proceed with its merger plans without Department approval during the next 30 days; and further, that Firstamerica will not proceed thereafter with the merger pendente lite except upon court approval after notice to the Department.

Staff: Larry L. Williams, Lyle L. Jones, Edward G. Gruis, Clement A. Parker, and John M. O'Donnell. (Antitrust Division)

SHERMAN ACT

Automobile Dealers named in Section 1 Cases in New York Area. United States v. Greater New York Chrysler Corporation Automobile Dealers, Inc., et al., (S.D. N.Y.); United States v. Nassau-Suffolk De Soto Dealers Group., et al., (E.D. N.Y.). On March 25, 1959, four indictments were filed in the Southern District of New York and four informations were filed in the Eastern District of New York, charging associations of Buick, Chrysler, Oldsmobile, Dodge, De Soto and Plymouth automobile dealers, which operate in the New York metropolitan area, with violation of Section 1 of the Sherman Antitrust Act in connection with the sale and distribution of new automobiles.

One of the indictments named as defendants Greater New York Chrysler Corporation Automobile Dealers, Inc.; Nassau-Suffolk Dodge Dealers Group Inc.; Nassau-Suffolk De Soto Dealers Group; Nassau-Suffolk Chrysler Dealers Association, and Brooklyn & Queens Dodge Dealer Group. It charges that these dealer associations have participated in a combination and conspiracy, the terms of which were that the member dealers would refrain from making any retail sales of new automobiles at prices that would yield less than a certain agreed upon gross profit; that, for the purpose of determining whether the minimum gross profit had been realized, the trade-in value of a used car accepted in trade would be that set forth in an agreed upon publication; that the dealers would refrain from price advertising; and that periodic meetings of the respective associations would be held for the purpose of policing the combination and conspiracy.

Defendants named in the other three indictments are M. & B. Dodge Dealers Group; Metropolitan Buick Dealers Association, Inc.; and Automobile Merchants Association of New York, Inc.

Defendants named in the informations are Nassau-Suffolk Chrysler Dealers Association; Nassau-Suffolk Dodge Dealers Group, Inc.; Brooklyn & Queens Dodge Dealer Group, and Nassau-Suffolk De Soto Dealers Group. These were arraigned on April 2, 1959, at which time they entered pleas of nolo contendere, which were accepted by the Court over the objections of the government. Upon the government's recommendation, the Court levied the following fines upon the defendants:

United States v. Nassau-Suffolk Chrysler Dealers Ass'n.	$7,500
United States v. Nassau-Suffolk Dodge Dealers Group	$7,500
United States v. Nassau-Suffolk De Soto Dealers Group	$5,000
United States v. Brooklyn & Queens Dodge Dealer Group	$5,000

for total fines of $25,000.

It is expected that the remaining defendants will be arraigned in the Southern District of New York on April 14, 1959.

Each of these other three indictments and the four informations charges that, for several years past, the dealer association named in the particular indictment or information has participated in a combination and

conspiracy to adopt, print or procure uniform retail list prices for the sale of new automobiles and accessories by member dealers and to distribute such lists to member dealers to be used by them in connection with the retail sale of automobiles and accessories.

Staff: John D. Swartz, William J. Elkins, Joseph T. Maioriello, Edward F. Corcoran and Agnes T. Leen (Antitrust Division).

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CIVIL DIVISION

Assistant Attorney General George Cochran Doub

COURTS OF APPEAL

CIVIL PROCEDURE

Notice of Appeal Filed Before Judgment Is Final Does Not Confer Jurisdiction on Court of Appeals After Judgment Becomes Final. Carmen M. Lohr v. United States (C.A. 5, March 20, 1959). Plaintiff, the widow of a commercial airline pilot killed in the crash of a C-46 commercial cargo plane, filed this action against the United States, the Civil Aeronautics Administration, Sandy & Company, Hector Alexander, and the owner of the airplane, Riddle Airlines, Inc. The theory of her complaint was that the aircraft was not airworthy. Neither Sandy & Company nor Hector Alexander were served. On August 12, 1958, the district court held that the complaint did not state a cause of action as against the United States and the Civil Aeronautics Administration. On August 25, 1958, while the case was still pending against the remaining defendants, plaintiff noted an appeal from the order dismissing as to the United States. On November 12, 1958, the district court granted summary judgment for Riddle Airlines. Since the case was still pending against Sandy & Company and Hector Alexander, who could still be served in the action, the United States moved to dismiss the appeal as interlocutory. Reagan v. Traders & General Insurance Co., 255 F. 2d 845, 847 (C.A. 5); Hardy v. Bankers Life and Casualty Co., 222 F. 2d 827, 828 (C.A. 7). Upon receiving the government's motion to dismiss the appeal, plaintiff took a voluntary nonsuit as to the remaining defendants. The effect of this was to make the order dismissing as to the United States a final order, since the case had now been disposed of as to all defendants. However, plaintiff did not file a new notice of appeal. The Court of Appeals held that the premature notice of appeal did not confer jurisdiction upon it since it was from an order which was "neither a final nor an interlocutory decision of the kind which will support an appeal to this Court".

In the event that a premature notice of appeal is filed, a second, timely notice should always be filed when the order appealed from becomes final. United States v. Crescent Amusement Co., 323 U.S. 173, 177.

Staff: Howard E. Shapiro (Civil Division)

CIVIL SERVICE RETIREMENT ACT

Retirement Under Section 1(d) of Civil Service Retirement Act Can Be Obtained Only With Recommendation of Retiring Employee's Department Head, Who May Withhold It at His Complete Discretion. United States v. Oren E. Cummins (C.A. 9, March 2, 1959). Plaintiff, an Internal Revenue Service investigator, applied for retirement under former Section 1(d) of the Civil Service Retirement Act (5 U.S.C. 691(d)) which provides for a higher annuity

than the ordinary retirement program. In order to qualify, the statute requires inter alia that the applicant has performed the hazardous duties of investigating, apprehending or detaining persons suspected or convicted of offenses against the criminal laws of the United States for at least twenty years and that the head of his department recommends him for retirement under Section 1(d). The Secretary of the Treasury refused to recommend plaintiff because he had previously determined that persons in plaintiff's classification were not to be approved for inclusion under Section 1(d). Consequently, upon plaintiff's retirement, he received the smaller retirement benefits of Section 4(a) of the Act. He brought this action to recover the difference between those two provisions (i.e., $76.00 per month).

The district court awarded plaintiff $760.00, basing its decision on the ground that the Secretary was obligated to consider the individual merits of each applicant and not just make a determination, as was done here, for a whole class. On appeal, the Ninth Circuit reversed. The Court held that under the statute the department head was given the unrestricted right to either recommend or refuse to recommend an employee, and the applicant could not qualify for such retirement without this recommendation. The Court further held that the Secretary's decision in this matter was wholly within his discretion and the lower court erred in attempting to place restrictive standards on his judgment. The Court noted that the district court's decision would frustrate the purpose of the Act--viz., to permit available younger men to take over hazardous jobs by encouraging the older men to retire early. The department head's recommendation must take into consideration how many men of a certain age group in a particular job capacity is desirable. Consequently the judgment below was reversed with instructions that judgment be entered for the government.

Staff: Robert S. Green (Civil Division)

DISTRICT COURTS

ADMIRALTY

Personal Injury; Warranty of Seaworthiness Does Not Extend to Longshoreman Unloading Storage Cargo from Dead Deactivated Vessel. William J. Roper v. United States (E.D. Va., February 26, 1959). Libelant, a longshoreman foreman, instituted this action in admiralty against the United States for injuries sustained while he was engaged in discharging cargo from a dead and deactivated vessel, owned by the United States, which was being used solely for the storage of surplus grain. The Court found that there was no negligence on the part of the government and that the vessel was not in navigation, even though it was occasionally moved from its moorings to a grain pier in order to unload its grain. The Court held inter alia that the warranty of seaworthiness does not apply to a vessel which has been removed from navigation, and accordingly dismissed the libel with costs.

Staff: Alan Raywid (Civil Division)

TORTS

CAA Tower Control Operator Not Required to Give All His Attention to One Aircraft. New York Airways, Inc. v. United States, et al. (E.D. N.Y., January 15, 1959). Plaintiff brought this action to recover for damage to one of its helicopters resulting from a collision of that craft, while landing, with an Eastern Air Lines truck which was on the runway. The basic contentions against the United States were that its CAA tower control operator was negligent (1) in failing to keep the aircraft under constant surveillance, and (2) in failing to observe the truck and warn the pilot.

At the time in question, the pilot of the helicopter requested landing information. He was advised that a DC-3 was preparing to land, and was instructed to remain outside the field. The pilot informed the control tower that he had ample time to cross in front of the DC-3 which he was then given permission to do. The control tower operator alternated his attention between the helicopter and the approaching DC-3, and therefore failed to observe the truck. However, the pilot failed to take any precautionary measures to observe if there were any obstructions beneath him. The Court held that while the tower operator had a duty to call traffic which was known to the tower to the pilot's attention, this did not diminish the pilot's responsibility to determine if the landing area was clear. The Court further held that the control tower operator was not required to give all of his attention to one aircraft, but to the contrary had a duty to "maintain a continuous watch on all visible flight operations in the control zone," and that between the pilot and the tower operator, the pilot had the primary responsibility of avoiding collision. Consequently, the complaint was dismissed because of the plaintiff's failure to establish its freedom from contributory negligence.

Staff: United States Attorney Cornelius W. Wickersham, Jr.; Assistant United States Attorney James M. FitzSimons (E.D. N.Y.), and John J. Finn (Civil Division)

Government as Joint Tortfeasor Not Subject to Contribution Where Immune from Suit by Injured Party. George H. Drumgoole, et al. v. Virginia Electric and Power Company v. United States (E.D. Va., March 5, 1959). Two Army reservists, while on two weeks active duty training in Virginia, were injured by a high-voltage transmission line belonging to the Virginia Electric and Power Company. They filed suit for negligence against the utility company which then impleaded the United States as a third-party defendant, seeking full indemnification for any amounts which might be recovered by the plaintiffs. The Court granted the government's motion to dismiss the third-party complaint. It held that reservists, in training, are in the same status as other servicemen, and therefore that the government is not liable to them under the Federal Tort Claims Act for injuries sustained in the course of their service. See Feres v. United States, 340 U.S. 135. The Court further held that the Company's claim against the government must fail because, while the Virginia Code, Section 8-627, permits contribution between joint tortfeasors, it does not allow any indemnification where the joint offender could not have been held answerable to the injured party in the first instance.

Staff: United States Attorney John M. Hollis; Assistant United States Attorney A. Andrew Giangreco (E.D. Va.)

COUNTERCLAIMS

Government Contract; Judgment Granted Government on Counterclaim Based Upon Plaintiff's Tortious Conduct. Tennessee Mechanical Institute, Inc. v. United States (C. Cls., March 4, 1959). Claimant school sued for amounts allegedly due it for the training of veterans under the GI Bill pursuant to contracts with the Veterans Administration. The government counterclaimed for overpayments arising from claimant's fraudulent misrepresentations of its expenses which had resulted in its being paid a higher monthly rate of tuition per student than it was entitled to receive. In addition, the government counterclaimed for subsistence payments made to veterans who were on plaintiff's roll of students, but who did not have sufficient class attendance to entitle them to such payments. In making these payments, the Veterans Administration had relied upon plaintiff's records and reports which had fraudulently stated that those veterans had been in attendance the requisite number of days. The Court dismissed the petition and granted judgment for the government on its counterclaims for approximately $500,000. With regard to the counterclaim for subsistence payments, which sounded in tort, the Court held that while it did not have jurisdiction over tort claims against the government, it did have jurisdiction over all counterclaims by the government, including those based on a plaintiff's tortious conduct. The Court cited Cherry Cotton Mills v. United States, 327 U.S. 536, 539; and Erie Basin Products, Inc., et al. v. United States, 123 C. Cls. 433, 436-437.

Staff: M. Morton Weinstein (Civil Division)

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CIVIL RIGHTS DIVISION

Assistant Attorney General W. Wilson White

Voting; Refusal to Register Applicants on Account of Race or Color. United States v. State of Alabama, et al. (M.D., Ala.) On February 5, 1959, the United States filed an action under the Civil Rights Act of 1957 against the registration board and registrars of Macon County, Alabama, for the purpose of preventing discriminatory acts and practices which have deprived Negro citizens of their right to vote. The registrars of that County had purported to resign their office during a recent controversy with the Federal Commission on Civil Rights.

In connection with this action the United States filed a motion for production pursuant to Rule 34 of the Federal Rules of Civil Procedure. At that time the Alabama legislature was considering a bill, which was subsequently enacted, which would permit the destruction of certain voting records of unsuccessful applicants for registration. These records were vitally material to the government's case. Accordingly, the District Court issued a temporary restraining order enjoining any destruction of such records.

Subsequently the United States amended its complaint to include the State of Alabama as a party defendant. The temporary restraining order and motion to produce were also amended to include the State of Alabama.

Defendants filed a motion to dismiss which was granted by the District Court. That Court held that the registrars had effectively resigned and suit could not be brought against them. It further held that neither the registration board nor the State of Alabama could be sued under the Civil Rights Act of 1957, inasmuch as the Court felt the Act allowed suit only against individual persons.

An appeal has been taken to the Fifth Circuit. That Court denied the government's motion for an injunction for the preservation of the Macon County voting records on the assurance by the Attorney General of Alabama that such records would not be destroyed. The argument is set for May 1, 1959.

Staff: United States Attorney Hartwell Davis (M.D. Ga.) First Assistant Joseph M. F. Ryan, Jr. and D. Robert Owen, Attorney (Civil Rights Division)

Police Brutality; Conspiracy to Commit Offense Against United States. United States v. Payne et al. (N.D. Ga.) Herbert C. Payne, a police officer employed by the Town of Lyerly, Georgia, incited a mob to go to the house of the victim for the purpose of "teaching him a lesson" and running him out of town. The victim was a ne'er-do-well who had a reputation for drunkenness and beating his children. When the mob arrived at the victim's house, he fled into the woods where he was caught and beaten. The following night, substantially the same group, again led by Payne, went to the victim's house and again beat him after telling him to leave town.

A federal grand jury returned a two-count indictment against Payne and one other member of the mob. They were both charged with (1) a violation of section 242 of title 18, United States Code (one of the so-called "civil-rights" statutes), and (2) a violation of section 371 of title 18, United States Code (conspiracy to violate section 242).

Both of the defendants were tried before a jury which found Payne guilty of the charge involving conspiracy to violate section 242. Trial was commenced on March 23, 1959. Payne was sentenced to imprisonment for 12 months and fined $1,000. Imprisonment was, however, suspended and he was placed on probation for three years.

Staff: United States Attorney Charles D. Read, Jr., Assistant United States Attorney E. Ralph Ivey (N.D. Ga.)

Summary Punishment; Denial of Equal Protection of Laws. United States v. Willie Alvin Barber and James Grady Hancock (M.D. Ga.). On March 19, 1959, defendants were tried at Valdosta, Georgia, on a two count indictment charging them, under the civil rights statute, (18 U.S.C. 242) with having inflicted summary punishment upon one John Lester Teal and charging Hancock with having denied Teal the equal protection of the laws. The jury convicted defendant Barber of having beaten Teal for the purpose of inflicting summary punishment upon him. Hancock was acquitted of both charges. The evidence indicated that Teal, manager of a jewelry store at Valdosta, went to Nashville, Georgia, on August 21, 1958, to repossess a ring in possession of defendant Barber's daughter. During the day, Barber, while off duty and in plain clothes, accosted Teal on a city street and, after accusing him of insulting Barber's daughter, beat him with a blackjack. During the course of the beating, defendant Hancock arrived in full uniform but allegedly did nothing for several minutes to stop the beating. He finally took both defendant Barber and Teal to the police station. Upon arrival, he seized and held Teal while Barber administered the second beating.

The Court imposed a six months' suspended sentence, five years' probation and a fine of $1,000.

Staff: United States Attorney Frank O. Evans, Assistant United States Attorney W. Howard Fowler (M.D. Ga.)

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CRIMINAL DIVISION

Assistant Attorney General Malcolm R. Wilkey

CONTEMPT

Summary Conviction; Imposition of 15 months' Sentence; Immunity Granted Coextensive With Privilege Against Self-Incrimination. Emanuel Brown v. United States (Sup. Ct., March 9, 1959). Summary conviction and sentence of petitioner for contempt of court sustained.

Petitioner had been subpoenaed to appear before a grand jury in the Southern District of New York investigating possible violations of the Motor Carrier Act. This was part of a larger investigation of general racketeering and of gangsters suspected of complicity in the Victor Reisel acid-throwing incident. Petitioner refused to answer six relevant questions on the ground of possible self-incrimination. After consulting with his lawyer in an ante-room, he persisted in his refusal to answer, even though he was advised by the United States Attorney that under the immunity provision of the Motor Carrier Act he was afforded full immunity and therefore could not claim the privilege. The grand jury then sought the aid of the District Court which then heard extensive argument on the issue of the scope of the immunity provision. Following a weekend recess, the Court ruled that petitioner was fully protected by the immunity provision and directed him to return to the grand jury room and answer the questions.

Later the same day, the grand jury returned to the court room "to request the aid and assistance of the court" in the face of petitioner's further refusal to answer. The Court then addressed the same questions to petitioner in open court in the grand jury's presence and directed him to answer, and in each instance he refused, relying on the privilege. After petitioner said he would persist in his refusal if he were returned to the grand jury room, and after further argument by counsel, the Court adjudged him guilty of contempt in the presence of the Court and imposed sentence.

The Supreme Court, in an opinion by Mr. Justice Stewart, was unanimous in holding that the immunity provision was intended to apply to grand jury as well as Interstate Commerce Commission investigations, and that the immunity granted is coextensive with the privilege against self-incrimination, with the result that petitioner was under an unqualified duty to answer.

The Court split 5-4, however, on the procedural issue whether the District Court was obliged to treat petitioner's contempt as having been completed before the grand jury and, therefore, as one which could be prosecuted only on notice and hearing as provided in Rule 42(b) of the Federal Rules of Criminal Procedure. The majority pointed out that while the district judge might have adopted this procedure, he was not required to do so. He had the power, on the application of the grand jury and in aid of its investigation, again to question petitioner in the presence of the jury (thus affording him a locus penitentiae) and then to treat the third refusal as a contempt committed in the presence of the Court and therefore punishable summarily under Rule 42(a), F. R. Crim. P. The

majority opinion concluded that this procedure had been at least implicitly approved in federal precedents, and that such procedure stemmed from the usages of the common law incorporated into Rule 42. The majority likewise concluded that the sentence of 15 months' imprisonment was not an abuse of the District Court's discretion.

In his dissenting opinion, the Chief Justice, joined by Black, Douglas, and Brennan, JJ., expressed the view that when petitioner, on his second appearance before the grand jury, refused to answer the questions, his contempt was completed and could not "be reproduced in a command performance before the court to justify summary disposition" under Rule 42(a). The dissent observed that, in the circumstances of this case, the District Court might have summarily committed petitioner to jail for civil contempt until he answered the questions, or might have given notice of a criminal contempt proceeding to be commenced under the procedures set forth in Rule 42(b). The latter course, the dissent observed, would have permitted petitioner "to present evidence in extenuation [as to the sentence] and to show what other courts had done in similar circumstances."

Staff: Argued by John F. Davis (Solicitor General's Office); Carl H. Imlay (Criminal Division) on the brief.

NARCOTICS

Consecutive Sentences for Offenses Arising Out of Single Transaction. Nathaniel Harris v. United States (Sup. Ct., March 9, 1959). This is another in a series of cases involving consecutive sentences for offenses arising out of a single transaction. Petitioner was caught in the act of filling capsules with heroin. On the basis of the statutory presumptions arising from possession, he was convicted of purchasing narcotics not in or from an original stamped package and of receiving and concealing the same drug, knowing that it had been imported unlawfully.

In affirming these convictions, the Court (per Clark, J.) held that the case was controlled by its 5-4 decision at the last term in Gore v. United States, 357 U.S. 386, where, on the basis of proof of a single act of sale, the Court sustained three consecutive sentences for the two offenses involved here, plus the offense of selling narcotics not pursuant to a written order form. In answer to petitioner's contention that each of the offenses requires proof of only the single fact of possession, the Court pointed out that the question of identity of offenses must be determined by looking at the statutory elements as defined by Congress. Since the elements are different there is no identity. The fact that the prosecution is aided by the statutory presumptions in establishing the ultimate facts of the violations does not bring about a merger of the offenses.

The Chief Justice concurred in the result and Black and Douglas, JJ., dissented without opinion.

Staff: Argued by John L. Murphy (Criminal Division).

NATIONAL MOTOR VEHICLE THEFT ACT

Validity of Consecutive Sentences Imposed for Interstate Transportation of Stolen Car and Receipt and Concealment of Same Car. Billy G. Woody v. United States (Sup. Ct., March 23, 1959). The issue in this case was whether consecutive five-year sentences could validly be imposed upon a car thief for the interstate transportation of the car, in violation of 18 U.S.C. 2312, and the receipt and concealment of the same car, in violation of 18 U.S.C. 2313. Although the issue arose on a collateral attack under 28 U.S.C. 2255 to set aside the second sentence, the record of the original trial was available and it showed affirmative separate acts of wrongdoing prohibited by Section 2313, such as changing the motor number, executing a false bill of sale, and painting the car. The government contended that the offenses are not only distinct in law, but in this case there was positive proof of separate acts of concealment motivated by separate criminal impulses. The case was argued on January 14, but it was not until March 23 that the Court announced an affirmance of the judgment below by an equally divided Court. Mr. Justice Stewart did not participate. This result imports no decision on the merits of the question involved in the case.

Staff: Argued by Beatrice Rosenberg (Criminal Division).

IMMIGRATION

Illegal Transportation of Aliens; Cumulative Sentences. George Vega-Murrillo v. United States (C.A. 9, March 6, 1959). Appellant appealed from a denial of a motion to correct an allegedly illegal sentence. This was his second appeal before the same Court on an identical claim.

Appellant was convicted in 1955 of transporting three Mexican aliens from Indio, California, to Fresno, California, in violation of Section 274(a) of the Immigration and Naturalization Act (8 U.S.C. 1324). That section specifically provides that the penalty provisions shall apply "for each alien in respect to whom any violation of this subsection occurs", and appellant was given a separate sentence for each of the three aliens transported. Appellant argued that since the aliens were transported at the same time and in the same conveyance between identical points, only one sentence was permissible.

In rejecting appellant's argument that only one sentence was permissible, the Court affirmed its prior ruling that the punishment for federal offenses is a matter for the discretion of Congress provided no constitutional limitation is violated and that Congress in the exercise of its discretion had provided cumulative punishment for each person transported.

Staff: United States Attorney Laughlin E. Waters (S.D. Calif.).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

NATURALIZATION

Statutory Construction; Special Law Applicable to Veterans of Korean Hostilities; Lawful Entry Necessary Preceding Physical Presence in United States. Tak Shan Fong v. United States (U. S. Supreme Court, March 23, 1959). Certiorari to review decision of Second Circuit Court of Appeals in naturalization proceeding. Affirmed.

This petitioner for naturalization entered the United States lawfully as a seaman on August 24, 1951 at Honolulu and later departed with his ship. On January 27, 1952, he again entered the United States, this time unlawfully. Deportation proceedings against him were halted when it was determined that he had been inducted into the United States Army in 1953. He served honorably until May 3, 1955 and thereafter filed his petition under the Act of June 30, 1953 (67 Stat. 108). The lower court granted his petition but the Court of Appeals reversed (254 F. 2d 4).

The statute under which the petition was filed was designed to facilitate the naturalization of aliens who served in the Armed Forces during the general period of the Korean hostilities. Included were those, otherwise eligible, who "having been lawfully admitted to the United States, and having been physically present within the United States for a single period of at least one year at the time of entering the Armed Forces....."

Petitioner argued that under the statute one year's presence in the United States at the time of induction entitled him to naturalization if at any time theretofore he had been lawfully admitted to this country. He relied upon his lawful admittance and brief stay at Honolulu in 1951 as compliance with the statutory requirement. The government contended, however, that the lawful admittance must have been the means whereby the alien commenced his year's presence in the country, and that accordingly the lawful Honolulu entry was irrelevant.

The Supreme Court agreed with the government's view, saying that while perhaps a verbal construction of the statute could be made as not implying any connection between the required lawful admittance and the required year's presence, the Court thought the only fair and natural construction of the words was that such connection was implied. The Court felt that it would not be a meaningful requirement to attribute to Congress if it could have been satisfied by a lawful entry, followed by departure, before and unconnected with the commencement of the year's presence. Congress must have been referring to the last entry before the year's presence--the entry into the country which provided the occasion for that presence. While the statute does not demand that the alien's continuing status in the country be lawful, it does make that requirement of the entry which gives rise to the alien's presence. The legislative history bears out that construction.

The Court observed that while it must be receptive to the purpose implicit in legislation of this sort--to express the gratitude of the country toward aliens who render service in its defense--that does not warrant rationalizing to an ambiguity where fairly considered none exists, or extending the generosity of the legislation past the limits to which Congress was willing to go.

Staff: John F. Davis (Office of the Solicitor General) argued this case.

DEPORTATION

Possible Physical Persecution; Fair Hearing; Review of Attorney General's Discretionary Action by Courts; Application of Administrative Procedure Act; Frivolous Appeal. Cakmar, et al. v. Hoy (C.A. 9, March 23, 1959). Appeal from decision upholding validity of deportation order and and denying discretionary relief under section 243(h) of Immigration and Nationality Act (8 U.S.C. 1253(h)). Affirmed.

The alien in this case, together with his alien wife and three alien children, all entered the United States as temporary visitors for thirty days on July 7, 1954. They admittedly had the intent of "losing themselves" in the United States and delaying their deportation as long as possible. They were first ordered deported on June 9, 1955. On February 20, 1956, they filed a complaint for judicial review of the deportation order, which the district court decided against them. Their appeal was dismissed on May 20, 1957 upon agreement between them and the Service that they would leave the United States by July 1, 1957. Several extensions of this period were granted administratively upon the claim by the wife that she was too ill to travel. Subsequently, the aliens petitioned for a stay of deportation on the ground that they might be physically persecuted if deported to Turkey, alleging a fear that if Russia took over Turkey, Russian soldiers or Armenians might persecute the family. The Court said that no such persecution has taken place during their lifetime, and none is feared from the Turkish government. To find such a possibility as ground to establish a present existing danger of persecution would render the deportation statutes a complete nullity.

In the lower court urged without avail that the order of deportation was invalid because the alien could not understand the questions asked of him, and it was therefore the duty of the hearing officer to continue the case and obtain the services of a competent interpreter. The appellate court affirmed the decision below on this point, holding that there was no evidence to show that the alien did not completely understand the questions he was asked and the answers he gave. Further, there was positive evidence in the record, and none to the contrary, that he spoke and understood the English language well enough to proceed with the examination. The finding by the lower court was supported by substantial and uncontradicted evidence and was the only finding that could be made on the evidence before the trial court. Any different finding would have been error.

The Court of Appeals observed that the alien's counsel obtained extensions of time to file the transcript of trial testimony and over three months after it was filed he also filed a five page brief on appeal, citing only one case, which the appellate court said was inapposite to the instant action.

As to the application for discretionary relief on the ground of possible physical persecution, the government contended that an order denying such relief is a nonreviewable order under the Administrative Procedure Act and the Declaratory Judgment Act. It argued that the Attorney General's action in that matter was an absolute exercise of grace that was not reviewable, either in the district court or the appellate court. Subsequently, however, the government conceded that under certain circumstances jurisdiction may exist in the courts to inquire into the Attorney General's actions in such matters, where that officer had refused to act at all; or where his actions are completely capricious; or where he acts under fraudulent circumstances; or where his actions are completely beyond his authority.

The lower court first refused, on motion, to dismiss the complaint for lack of jurisdiction, but after trial found that it had no jurisdiction to review the exercise of the discretion of the Attorney General under section 243(h). After considering cases cited by appellants, the Court of Appeals concluded that they were not entitled as a matter of right to a hearing in such cases before the Attorney General, who can act, or not, as he likes. Section 5 of the Administrative Procedure Act (5 U.S.C. 1004) is not controlling. Section 243(h) of the Immigration and Nationality Act is a statute coming within the terms of section 10 of the Administrative Procedure Act (5 U.S.C. 1009), rather than section 5 of that act.

The Court ruled, however, that if the Attorney General purports to act, then the court has jurisdiction to determine if procedural due process has been rendered the alien. That is his right. Here he received it, as well as a fair consideration of his application. He has no right to complain, and none to protect.

The Court observed that the appeal in this case appeared to closely approach the frivolous and vexatious; furthermore, that the Court completely agreed with the comment of the Special Inquiry Officer who heard the administrative proceedings that "This case is a classical example of the circumvention, through dilatory tactics, of the prompt execution of the immigration laws of this country."

CITIZENSHIP

Burden of Proof in Actions Under Section 360 of Immigration and Nationality Act; Effect of Issuance of Administrative Certificates of Citizenship to Children of Alleged Citizen. Martinez Reyes v. Neelly, (C.A. 5, March 10, 1959). Appeal from decision upholding deportation order and ruling that appellant is not citizen of United States. Affirmed.

Appellant was found deportable by the Service on the ground that he was an alien who entered the United States without the required immigrant visa. Suit was thereafter instituted under section 360 of the Immigration and Nationality Act (8 U.S.C. 1503) for a judgment declaring him a citizen of the United States. Upon consideration of the conflicting evidence at the trial of the case, as well as in the administrative deportation proceedings, the district court found that appellant was born in Mexico, is not a citizen of the United States, and that such findings in the administrative proceedings were supported by substantial evidence. The record indicated that the Service had issued certificates of citizenship to six of appellant's children founded upon his citizenship status, although appellant himself had not been issued such a certificate.

The Court observed that this was another of the many cases filed under section 360, in which opportunity is given for an independent suit with a trial and decision de novo. In such cases, as in other civil cases, the burden of establishing in the trial court the truth of the facts alleged is on the plaintiff. And in an appeal in such cases, the burden is upon appellant to show that the findings of the district judge are clearly erroneous.

Appellant did not claim here that the district court did not give him a hearing. He stood almost entirely on the proposition that the certificates of citizenship issued by the Service in effect conferred upon him citizenship, which gave rise to the presumption that he was a citizen and placed upon the government a burden of proof equivalent to that imposed in a denaturalization proceeding.

The Court observed that while the decision of the Court of Appeals for the Third Circuit in Delmore v. Brownell, 236 F. 2d 598, does seem to lend some support to appellant's contentions, that opinion itself recognized that it was contrary to the opinion of the Court of Appeals for the Ninth Circuit in Mah Toi v. Brownell, 219 F. 2d 642. The Court said that it had cited the latter with approval in DeVargas v. Brownell, 251 F. 2d 870, and that it wholly agreed with the Mah Toi decision.

The Court said that when the evidence as a whole is considered in this case, it is seen that the certificates of citizenship issued by the Service were based upon evidence furnished by the appellant and that the certificates could have no greater standing or force than that evidence on which the determination to issue them was based. The Court therefore felt it clear that any force which the certificates had has been completely dissipated by the evidence in this case; and that, with the finding of the district judge that the fact of appellant's birth in the United States, on which the certificates purportedly were based does not exist, the proof failed, and the certificates of citizenship failed with it.

Since no ground appeared for holding that the district judge's findings were clearly erroneous, the judgment was affirmed. Circuit Judge Rives strongly dissented.

(NOTE: The majority opinion in this case referred to the issuance of an administrative certificate of citizenship to the appellant himself. However, the dissenting opinion stated that the administrative certificates involved had been issued to six of the appellant's children and not to him personally.)

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INTERNAL SECURITY DIVISION

Acting Assistant Attorney General J. Walter Yeagley

Foreign Agents Registration Act of 1938, as Amended. United States v. Arnaldo Goenaga Barron (D.C.) Defendant, an American citizen of Cuban extraction, became an agent for the Cuban revolutionary movement of July 26 in October of 1955. His activities included soliciting funds for the movement, holding mass meetings, distributing propaganda and attempting to supply the Cuban revolutionary forces with arms and ammunition. Although he was requested on two occasions to file a registration statement, he failed to do so and on November 17, 1958, he was indicted for a wilful violation of the Foreign Agents Registration Act of 1938, as amended. He originally filed a plea of not guilty, but on March 16, 1959, after having filed a registration statement on March 6, 1959, he withdrew his plea and entered a plea of nolo contendere which was accepted by the Court.

Staff: Thomas B. DeWolf, James L. Weldon, Jr.
(Internal Security Division)

Communist Control Act of 1954; Communist-infiltrated Organizations. Rogers v. United Electrical, Radio and Machine Workers of America. The petition requesting that the respondent be determined a Communist-infiltrated organization under the Communist Control Act of 1954 was filed with the Subversive Activities Control Board on December 20, 1955. Following numerous motions attacking the petition and the constitutionality of the statute, an answer was filed on February 13, 1957. Hearings for taking of testimony began May 13, 1957. The Board on its own motion, stayed further action until remand proceedings in the Communist Party case had been completed. Several locals instituted an action in the district court to be declared indispensable parties and for injunctive relief restraining all further proceedings. This action was dismissed and such dismissal was affirmed on appeal. On March 20, 1959, the Attorney General filed a motion to dismiss the petition stating, "A comprehensive analysis of the entire case at this time reflects that certain key witnesses who are essential to establish the allegations of the petition are now unavailable to testify. This has been occasioned by death, physical incapacity and by additional factors affecting availability which were unforeseeable at the time the petition was filed. It is pertinent to note that a number of those individuals whose membership in the union occasioned the filing of this petition have since withdrawn from the union. Such withdrawal may well have been caused by the institution of these proceedings." Respondent consented to the motion to dismiss and on March 30, 1959, the Board granted the motion and dismissed the petition.

Staff: F. Kirk Maddrix, Herbert E. Bates and Anthony F. Cafferky (Internal Security Division)

Suits Against the Government. Waldo Frank v. John Foster Dulles (C.A. D.C.) The complaint filed on November 12, 1958 asserted that plaintiff was in possession of a passport invalid for travel to Communist China

and prayed, inter alia, for a decree directing defendant to afford plaintiff a passport permitting travel to Communist China. Plaintiff's motion for summary judgment alleged he had a constitutional right to unlimited travel citing Kent, Briehl v. Dulles, 357 U.S. 116 (1958). The Court in denying plaintiff's motion stated that "Within the reasonable and proper exercise of foreign relations, the President of the United States may properly restrict the travel of certain citizens to certain designated geographical areas of the world when necessitated by foreign policy considerations" (citing Worthy v. Dulles, Civil Action No. 916-58 October 2, 1958), and issued an order dated March 23, 1959 granting defendant's oral cross-motion for summary judgment.

Staff: Samuel L. Strother, F. Kirk Maddrix and Anthony F. Cafferky (Internal Security Division)

* * *

LANDS DIVISION

Assistant Attorney General Perry W. Morton

Indian Allotments; Validity of Condemnation Under State Law. Nicodemus v. Washington Water Power Co. (C.A. 9, February 25, 1959). The power company brought proceedings in the federal district court for Idaho to condemn an easement for an electric transmission line over the allotment of Julia Nicodemus, a Coeur d'Alene Indian. The United States appeared to see that adequate compensation was paid and compensation was fixed in the amount estimated by an Indian Agency appraiser. Objections to the taking having been overruled, the Indian owner appealed.

The Court of Appeals affirmed. The Indians had argued that the treaty with the Tribe guaranteeing designated land for them was not subject to abrogation by general acts of Congress. The Court held that the treaty dealt with tribal land not, as here, allotted land. In any event, Congress has plenary power over Indian property and the question whether it has been exercised "is the manifest intention of Congress, and not whether the statute be general or special." The Court then held that 25 U.S.C. sec. 357 clearly and unambiguously authorized the taking.

Staff: The Government submitted on brief.

Navigable Streams; Obstructions; Discharge of Industrial Waste; Availability of Injunctive Remedy. United States v. Republic Steel Corporation (C.A. 7): The Republic Steel Corporation, International Harvester Company and Interlake Iron Corporation have plants located on the Calumet River south of Chicago. That river, which is actually more like a canal, is a busy waterway used by lake and foreign ships as large as 600 feet in length and up to 21 feet in draft. The companies use vast quantities of water from the river totaling more than six billion gallons a month. When they return the water to the river industrial solids, composed of fiber dust, etc., in fine particles, are discharged. These are deposited on the river bottom, causing shoaling which interfered with navigation. The district court, after a lengthy trial, sustained the claim of the United States that the companies were responsible for interference with navigation and that the United States was entitled to an injunction compelling removal of the obstruction and enjoining creation of future obstructions.

The Court of Appeals reversed with directions to dismiss. It held that the discharge of industrial solids by the companies was not a violation of the Rivers and Harbors Act of 1899 as claimed by the government, placing great emphasis on the fact that because of the great quantity of water involved, the particles of solids were microscopic. Alternatively, "as a matter of precaution", because this conclusion "might be erroneous" it held that the court could not grant injunctive relief and, therefore, the complaint shouldbe dismissed. The government will file a petition for certiorari.

Staff: United States Attorney Robert Tieken,
Assistant United States Attorney John Peter Lulinski
(N.D. Ill.)

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TAX DIVISION

Assistant Attorney General Charles K. Rice

CIVIL TAX MATTERS
Appellate Decisions

Tax Lien; Levy on Accrued Salaries of State Employees; Personal Liability of State Auditor for Failure to Honor Levy. Edgar B. Sims v. United States, (Supreme Court, March 23, 1959.) Three employees of the State of West Virginia were delinquent in federal income taxes. The District Director issued notices of levy directed to the State of West Virginia and served upon the State Auditor, Sims, seizing the accrued salaries of the taxpayers pursuant to Section 6331, 1954 Code. Sims refused to honor the levies and instead paid the accrued salaries, aggregating $519.71, over to the taxpayers. The government thereupon brought suit against Sims under Section 6332 to recover the $519.71 from him personally. The Supreme Court, in a unanimous opinion, affirmed the decision of the Court of Appeals for the Fourth Circuit, upholding the district court judgment for the government.

The Court first noted that nothing in the Constitution requires that salaries of state employees be treated any differently, for federal tax purposes, than the salaries of others; and that accrued salaries are property and rights to property subject to levy under Section 6331.

The Court then answered Sims' contention that, since the definition of "person" in Section 6332 does not mention states, they are to be excluded. The Court held that the definitions were not exclusive, and that whether the term "person" as used in a revenue statute, includes a state, depends upon "its legislative environment." The Court found that there was no evidence of any Congressional intent to exclude states, and that "the all-inclusive terms of Section 6332 of general application" included a state.

The Court next considered Sims' contention that salaries of state employees were exempt from levy under Section 6331, since that Section expressly provides for levy upon accrued salaries of federal employees, without any similar mention of salaries of state employees. The Court pointed out that, prior to the enactment of this provision, it had been held that accrued federal salaries were not subject to levy for unpaid federal taxes, and therefore specific provisions were necessary in order to subject federal employees to the levy procedures applicable to all other taxpayers, including state employees.

The Court then answered Sims' final contention that he was not personally liable since he was not a "person obligated with respect to" the accrued salaries of state employees, within the meaning of Section 6332, imposing personal liability on any such person for failure to honor a levy. The Court held that under West Virginia law, Sims had complete control over the payment of accrued salaries of state employees. Moreover, the Court noted that the four judges below, who had also so held,

were familiar with West Virginia law, being constantly required to pass upon it.

Staff: John F. Davis, Assistant to the Solicitor General
Melva M. Graney and Joseph Kovner (Tax Division).

Priority of Claims in Bankruptcy: Federal Tax Liens Versus Employer Contributions to Union Welfare fund. United States v. Embassy Restaurant (S. Ct., March 9, 1959.) The sole issue involved in this case was whether contributions by an employer to a union welfare fund which were required by a collective bargaining agreement constituted "wages * * * due to workmen" within the meaning of Section 64a(2) of the Bankruptcy Act so as to prime federal tax liens in the payment of the bankrupt's debts. The employer, Embassy Restaurant, Inc., had entered into collective bargaining agreements with certain unions under which it was required to pay to the trustees of welfare funds maintained to provide insurance and sick benefits for union members the sum of $8 a month per union employee. After the employer was adjudged a bankrupt, the trustees of the welfare funds, seeking the status of priority wage claimants, filed claims for unpaid, accrued contributions to the welfare fund for the prior 3-month period in amounts totaling less than $600. Resolving a conflict between the Third Circuit in the instant case (254 F. 2d 475) and the Second Circuit in Local 140 Security Fund v. Hack (242 F. 2d 375), the Supreme Court sustained the government's contention and held (three judges dissenting) that such contributions were not entitled to priority as "wages * * * due to workmen" under the Bankruptcy Act. The Court pointed out that the legislative history of the wage priority provision showed that Congress did not regard all types of obligations due employees from their employers as being within the concept of wages, even though having some relation to employment. It then stated that the contributions here involved did not possess the customary attributes of wages for they were without relation to the workman's hours, wages or productivity, and that they were due to the trustees, rather than to workmen who actually had no legal interest in the contributions.

Staff: John F. Davis, Assistant to the Solicitor General
Melva Graney, George F. Lynch, (Tax Division).

District Court Decisions

Summons; Enforcement of Administrative Summons for Re-examination of Books and Records; When Tax Assessment Is Barred by Ordinary Statute of Limitations But Is Not Barred if There Was Fraud, Court Need Only be Satisfied That Commissioner Has Reasonable Grounds to Suspect Fraud. Nighosian, Revenue Agent v. Lash (D. Mass., March 9, 1959). The Internal Revenue agent filed a petition under Section 7604 of the Internal Revenue Code of 1954 to enforce a summons requiring the taxpayer to produce corporate books and records, and to testify as to its income tax liability.

Some of the tax years involved were barred by the ordinary three year statute of limitations, but assessments could be made for these years if

there had been fraud. Under such circumstances, it has been held that a re-examination would be barred by Section 7605(b) of the '54 Code as "unnecessary" unless "a reasonable basis exists for suspicion of fraud."

Taxpayer contended that the District Court must be satisfied and make its own finding that a reasonable basis exists for suspicion of fraud, based on evidence received at the hearing to enforce the summons. The Court held, however, that the District Court is only required to find that the Commissioner had reasonable grounds to suspect fraud, and that there should not be a hearing de novo on whether there are reasonable grounds to suspect fraud.

Taxpayer also contended that the purpose of the re-examination was to determine whether there had been malfeasance on the part of the revenue agents who originally examined the taxpayer's return. The Court held that, although this was one purpose of the re-examination, that alone does not make the re-examination improper, and the government need only show that at least one purpose of the re-examination was to determine a tax liability, and that the re-examination had the possibility of leading to this result.

This decision is significant in its holding that the District Judge must only find that the Commissioner had reasonable grounds to suspect fraud and that the District Judge is not to determine whether he himself feels there is reasonable grounds to suspect fraud. This decision should be of assistance to United States Attorneys and their staffs when they are called upon to enforce a summons issued by the Internal Revenue Service.

Staff: United States Attorney Anthony Julian and Assistant United States Attorney Charles F. Barrett (D. Mass.) Richard M. Roberts, Lloyd J. Keno (Tax Division)

Liens; Tax Liens Not Discharged or Released Under Provisions of Reorganization Plan in Absence of Express Provisions Concerning Release or Discharge of Tax Liens. In the Matter of Merchants Distilling Corporation, Debtor (S.D. Ind., March 2, 1959.) Merchant's Distilling Corporation filed a petition for reorganization under Chapter X, Bankruptcy Act as amended. The United States filed a claim against the debtor for excess profits taxes of $479,253.84. The amended plan of reorganization as accepted by the Secretary of the Treasury provided that these taxes were to be paid out of tax savings which might result from carry over or carry forward of net operating losses for years prior to the date of the confirmation of the plan. Under the plan, Schenley Industries, Inc., paid in to the reorganized company approximately $1,000,000 capital and thereby became the owners of its stock. The plan contained no express provisions regarding the release of the tax liens securing the excess profits taxes above mentioned, but there was attached to the plan a copy of a letter from Schenley to the trustee approved by the trustee stating that the reorganized debtor had good title in fee to the real and personal property reserved under the reorganization, subject to no liens or encumbrances with the exception of some real and personal property taxes assessed in Vigo and

Knox Counties, Indiana, for the year 1957. Another paragraph in the letter, however, stated that the property of the debtor was free and clear of all liens, encumbrances, etc., except certain enumerated liens which included those of the United States, it being specified that these liens would be dealt with according to the plan. The plan contained no express provisions relative to the release or discharge of the federal liens. The trustee contended that the acceptance of this arrangement contemplated that the United States would release its liens in exchange for the contractual liability. The trustee filed a petition to clarify the provisions of the plan to state that the liens of the government would be released and for the Court to decree that the government had no lien for its taxes. The case was referred to a Special Master who dismissed the trustee's petition. Exceptions were filed by the trustee to the report. The District Court overruled these exceptions and dismissed the trustee's petition holding that since there was no express agreement or understanding between the debtor or trustee and the Secretary of the Treasury whereby the liens of the United States should be released or that the United States should rely solely upon the contractual liability to make payment in the future by reason of the carry-forward losses, without the protection of the liens, there was no merit in the trustee's motion.

Staff: United States Attorney Don A. Tabbett and Assistant United States Attorney John C. Vandivier, Jr. (S.D. Ind.) Homer R. Miller (Tax Division)

Liens; Enforcement Against Personal Property; Necessity and Effect of Taking Possession of Personalty. United States v. Samuel Caruso, et al., (W.D. Pa.). This was a federal tax lien foreclosure proceeding against personal property of the taxpayer. The other claimants were a landlord, a holder of a chattel mortgage and the State of Pennsylvania. It was conceded by all parties that the chattel mortgage was prior to all other claimants.

Before reaching the merits, the Court held that where a dispute arises over the priority between a tax lien of the United States and a lien under state law there exists a federal question giving the Court jurisdiction. The Court cited United States v. London Globe Ins. Co., Ltd., et al., 348 U.S. 215, and United States v. Acri, 348 U.S. 211.

On December 17, 1957, all of the personal property was purportedly sold by a constable upon a landlord's warrant. The purchaser at the constable's sale was the holder of a judgment note against the taxpayer which had been recorded on May 28, 1956. The constable had not taken and retained possession of the personal property and did not have possession of said property on the date of sale. On the following day, December 18, 1957, the Internal Revenue Service seized the personal property of the taxpayer under Section 6331 of the Internal Revenue Code of 1954 and served notice of levies upon the constable, the bank, the landlord and the alleged purchaser. No money was recovered, however, and it was subsequently determined that no money was ever paid by the alleged purchaser.

On January 17, 1958, the present proceeding was commenced. As a result of this proceeding and based upon stipulation of counsel, the Court directed the Marshal to proceed with the sale, which he did on March 26, 1958, realizing an amount in excess of the prior chattel mortgage.

In holding that the government was entitled to first priority in the surplus monies, the Court held that the constable's levy under the landlord's warrant and the subsequent sale appeared to be a nullity as the constable had not taken and retained possession of the personal property. The Internal Revenue Service had actually seized the property of the taxpayer, had located the premises and remained in possession until the Marshal's sale.

The Court allowed the owner of the premises reasonable rental for the period that the personal property was stored under lock and key on the premises by the government.

Staff: United States Attorney Hubert I. Tietelbaum, Assistant United States Attorney John F. Potter (W.D. Pa.); F. A. Michels (Tax Division).

CRIMINAL TAX MATTERS

District Court Decision

Evidence: Motion to Suppress Denied When Defendant Could Not Show Misrepresentation; Records Held Voluntarily Produced. United States v. duPont (D. Mass. January 19, 1959, P-H Federal Tax Service Par. 590458). Defendant under indictment on 62 counts of aiding and assisting in the preparation of false and fraudulent income tax returns for others for the years 1953, 1954 and 1955 (Sec. 3793(b)(1), Internal Revenue Code of 1939, and Sec. 7206(2), Internal Revenue Code of 1954), moved to suppress certain evidence he had made available to the investigating government agents. The questioned evidence consisted of file copies of his clients' income tax returns with defendant's fees noted thereon. Both the revenue agent and special agent at first stated to defendant that they were engaged in an investigation of his personal income tax liability. They explained their respective functions, and defendant acknowledged to them that through his experience in preparing returns he was familiar with the significance of a special agent in a case. In the course of examining defendant's file copies of his clients' returns the special agent found insufficient evidence to warrant prosecuting defendant for evasion of his personal taxes but found abundant evidence to support a prosecution under the charges for which he was subsequently indicted.

In support of his motion to suppress, defendant advanced the theory that from the inception of the investigation, the special agent's real intention had been to determine whether defendant had prepared false returns for others. This being so, he contended that the agents' statement that the investigation was directed toward his personal tax liability was a misrepresentation vitiating his consent to examine his records and amounting to an unlawful search and seizure.

I N D E X