

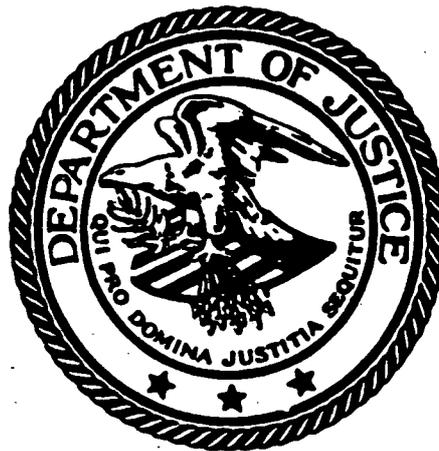
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May 8, 1959

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DEPARTMENT OF JUSTICE

Vol. 7

No. 10



UNITED STATES ATTORNEYS
BULLETIN

257

UNITED STATES ATTORNEYS BULLETIN

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DISTRICTS IN CURRENT STATUS

As of March 31, 1959, the following districts were in a current status:

CASES

Criminal

Ala., M.	Del.	Iowa, S.	Mont.	N.D.	Vt.
Ala., S.	Dist. of Col.	Kan.	Neb.	Ohio, N.	Va., W.
Alaska #1	Fla., N.	Ky., E.	Nev.	Ohio, S.	Wash., E.
Alaska #2	Ga., N.	La., E.	N.H.	Okla., N.	Wash., W.
Alaska #3	Ga., M.	La., W.	N.J.	Okla., E.	W.Va., N.
Alaska #4	Ga., S.	Me.	N.M.	Oregon	W.Va., S.
Ariz.	Hawaii	Md.	N.Y., N.	Pa., M.	Wis., E.
Ark., E.	Idaho	Mass.	N.Y., E.	Pa., W.	Wis., W.
Ark., W.	Ill., E.	Mich., W.	N.Y., W.	P.R.	Wyo.
Calif., N.	Ill., N.	Miss., N.	N.C., E.	R.I.	Guam
Calif., S.	Ind., S.	Mo., E.	N.C., M.	S.D.	V.I.
Colo.	Iowa, N.	Mo., W.	N.C., W.	Tex., E.	

Civil

Ala., N.	Hawaii	Mich., W.	N.D.	S.D.	Wash., W.
Ala., M.	Idaho	Minn.	Ohio, N.	Tenn., W.	W.Va., N.
Ala., S.	Ind., N.	Miss., N.	Ohio, S.	Tex., N.	W.Va., S.
Alaska #2	Kan.	Mo., E.	Okla., N.	Tex., E.	Wis., E.
Ariz.	Ky., W.	Mont.	Okla., E.	Tex., W.	Wis., W.
Ark., E.	Me.	Neb.	Okla., W.	Utah	Wyo.
Calif., N.	Md.	N.Y., N.	Ore.	Vt.	C.Z.
Dist. of Col.	Mass.	N.Y., S.	Pa., W.	Va., E.	Guam
Ga., N.	Mich., E.	N.C., M.	P.R.	Wash., E.	V.I.

MATTERS

Ala., N.	Conn.	Ky., W.	N.J.	Pa., E.	Wash., E.
Ala., M.	Del.	La., W.	N.Y., E.	Pa., W.	Wash., W.
Ala., S.	Fla., N.	Me.	N.C., E.	R.I.	W.Va., N.
Alaska #1	Ga., M.	Md.	N.C., M.	S.D.	W.Va., S.
Alaska #3	Ga., S.	Mich., E.	N.C., W.	Tenn., E.	Wis., E.
Alaska #4	Ill., S.	Mich., W.	N.D.	Tenn., W.	Wyo.
Ariz.	Ind., N.	Miss., N.	Ohio, N.	Tex., E.	C.Z.
Ark., E.	Ind., S.	Miss., S.	Ohio, S.	Tex., W.	Guam
Ark., W.	Iowa, N.	Mo., E.	Okla., N.	Utah	V.I.
Calif., N.	Iowa, S.	Mont.	Okla., E.	Vt.	
Colo.	Iowa, E.	Neb.	Okla., W.	Va., W.	

Civil

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

As of March 31, the number of districts current increased in two categories and decreased in two. The total current with regard to criminal cases dropped from 79 to 71, or 75.5%; in civil cases the number dropped from 60 to 54, or 57.4%; the number current in criminal matters rose from 61 to 64, or 68.0%; and the districts current with regard to civil matters pending rose from 71 to 73, or 77.6% of all districts.

MONTHLY TOTALS

The reductions achieved during March in six of the eight categories of work are encouraging and it is hoped they indicate a trend which will continue to the end of the fiscal year. As a result of an increase in condemnation cases, the total of all civil cases, excluding tax lien, increased slightly during the month, and civil matters pending rose also.

Collections during March totaled \$3,752,241 or \$1,269,152 more than for the preceding month. A very substantial recovery in an admiralty case helped to make the total for March unusually high. Aggregate collections for the first nine months of the fiscal year are far ahead of those for the similar period of fiscal 1958. The total of \$25,556,256 collected so far is \$4,189,341 or 19.6% more than was collected in the first nine months of the preceding year.

Set out below is a comparison of the workload pending at the end of the past fiscal year and on March 31, 1959, the three-quarter mark in the present fiscal year:

	<u>June 30, 1958</u>	<u>March 31, 1959</u>	
Triable Criminal	5,721	7,628	/ 1,907
Civil Cases Inc. Civil Tax Less Tax Lien & Cond.	14,108	14,578	/ 470
Total	19,829	22,206	/ 2,377
All Criminal	7,577	9,371	/ 1,794
Civil Cases Inc. Civil Tax & Cond. Less Tax Lien	16,621	17,115	/ 494
Criminal Matters	10,736	11,669	/ 933
Civil Matters	14,428	14,089	- 339
Total Cases & Matters	49,362	52,244	/ 2,882

PENDING WORKLOAD

The charts, exhibited at the recent United States Attorneys Conference, showing the workload pending in each district on March 1, 1958 and March 1, 1959, aroused so much interest that it has been decided to reproduce them for the benefit of all of the staff in each United States Attorney's office. On each chart the March 1, 1959 figures are expressed in terms of the percentage of the March 1, 1958 figures which equal 100%. The chart on pages 261 to 263 shows the criminal complaints and civil matters pending; the chart on pages 264 to 266 shows the land tracts pending; and the chart shown on pages 267 to 269 shows the triable criminal and civil cases less tax lien and land condemnation pending.

JOB WELL DONE

Assistant United States Attorney Horace R. Jackson, District of South Dakota, has been commended by the Acting Assistant General Counsel, Bureau of Public Roads, Department of Commerce, for his work in connection with recent land condemnation trials. The letter stated that Mr. Jackson's cases were comprehensively prepared and most ably tried.

The Postal Inspector in Charge has commended Assistant United States Attorneys Silvio J. Mollo and Otis P. Pearsall, Southern District of New York, for the excellent way in which they handled a recent case involving three of the largest dealers in pornography in the United States. The effective action taken was the result of weeks of investigation by the Postal Service, and the full cooperation of the United States Attorney's office.

Assistant United States Attorney James Montgomery, Northern District of Illinois, has been commended for the fine and efficient manner in which he handled a recent National Firearms Act case, which resulted in a successful conviction.

In expressing appreciation for the assistance rendered by United States Attorney Chester A. Weidenburner and his staff, District of New Jersey, in obtaining successful prosecution for violations of the Securities Act of 1933, the Associate Regional Administrator, Securities and Exchange Commission, especially commended Assistant United States Attorney Jerome D. Schwitzer for his courage, legal ability and stamina shown in the face of formidable opposition.

The General Counsel, Securities and Exchange Commission has commended Assistant United States Attorney Robert Hornbaker, Southern District of California, for the successful prosecution of a recent case involving violations of the Securities Act of 1933 and the Mail Fraud Statute.

The General Counsel, Securities and Exchange Commission, has expressed appreciation for the capable and expeditious manner in which United States Attorney Laughlin E. Waters and his staff, handled a recent case. Assistant United States Attorney Thomas R. Sheridan was specifically commended for his excellent work on the case.

Assistant United States Attorneys Philip C. Lovrien and William R. Crary, Northern District of Iowa, have been commended by the Regional Director, Federal Housing Administration, and by the FBI Special Agent in Charge for their conscientious efforts and meticulous preparation of a recent FHA case. Their presentation of the case won a conviction on both counts of the indictment.

Assistant Attorney General W. Wilson White, Civil Rights Division, has commended Assistant United States Attorney Donald Hawkins and his secretary Miriam W. Leslie, Southern District of Ohio, on the courtesy and generous and cheerful cooperation they extended to Civil Rights attorneys who were engaged in presenting certain civil rights matters to the grand jury in Dayton, Ohio.

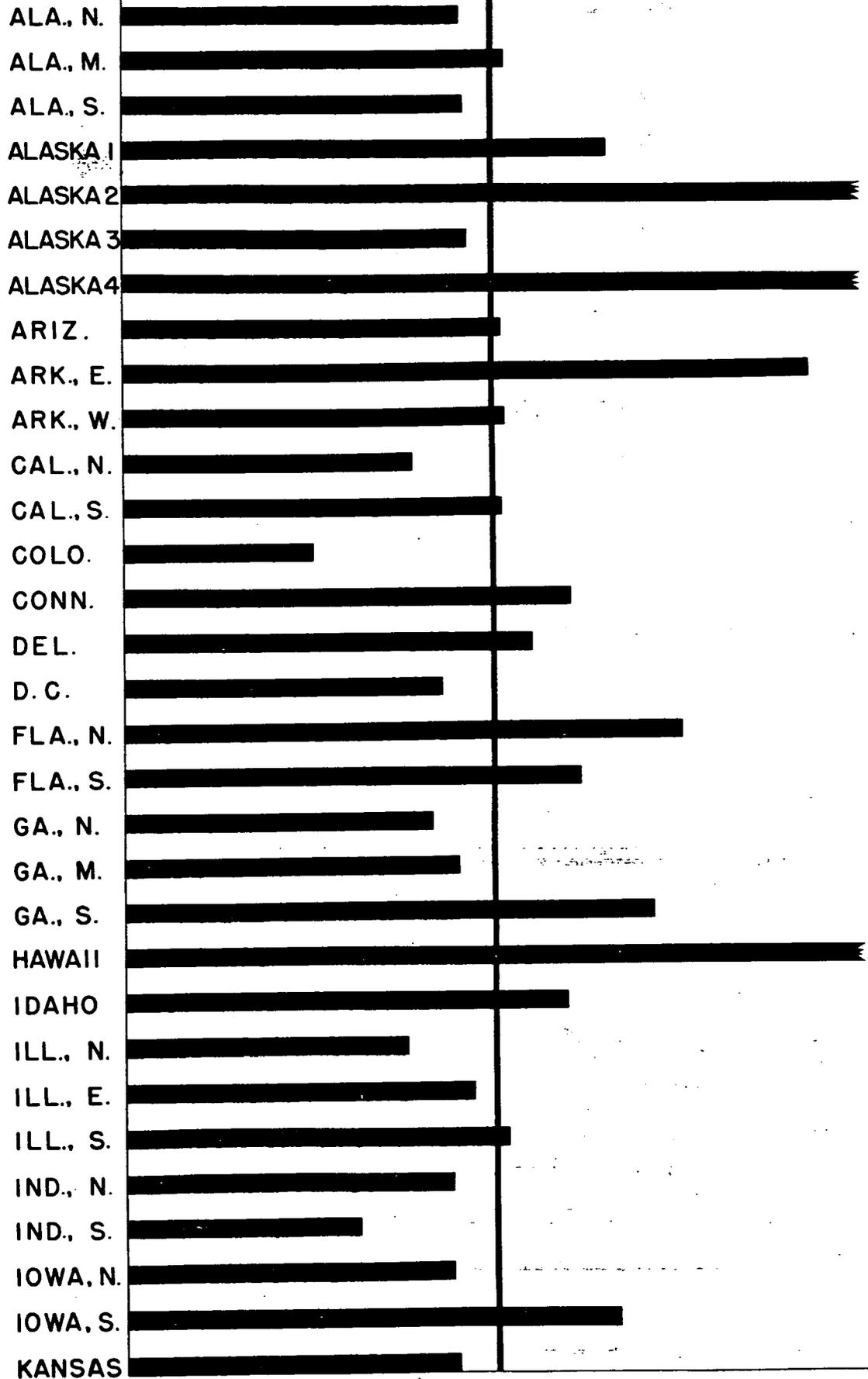
The General Counsel, Securities and Exchange Commission, has expressed to United States Attorney William C. Spire, District of Nebraska, appreciation for the splendid manner in which Mr. Spire has handled Commission cases which have been referred to his office.

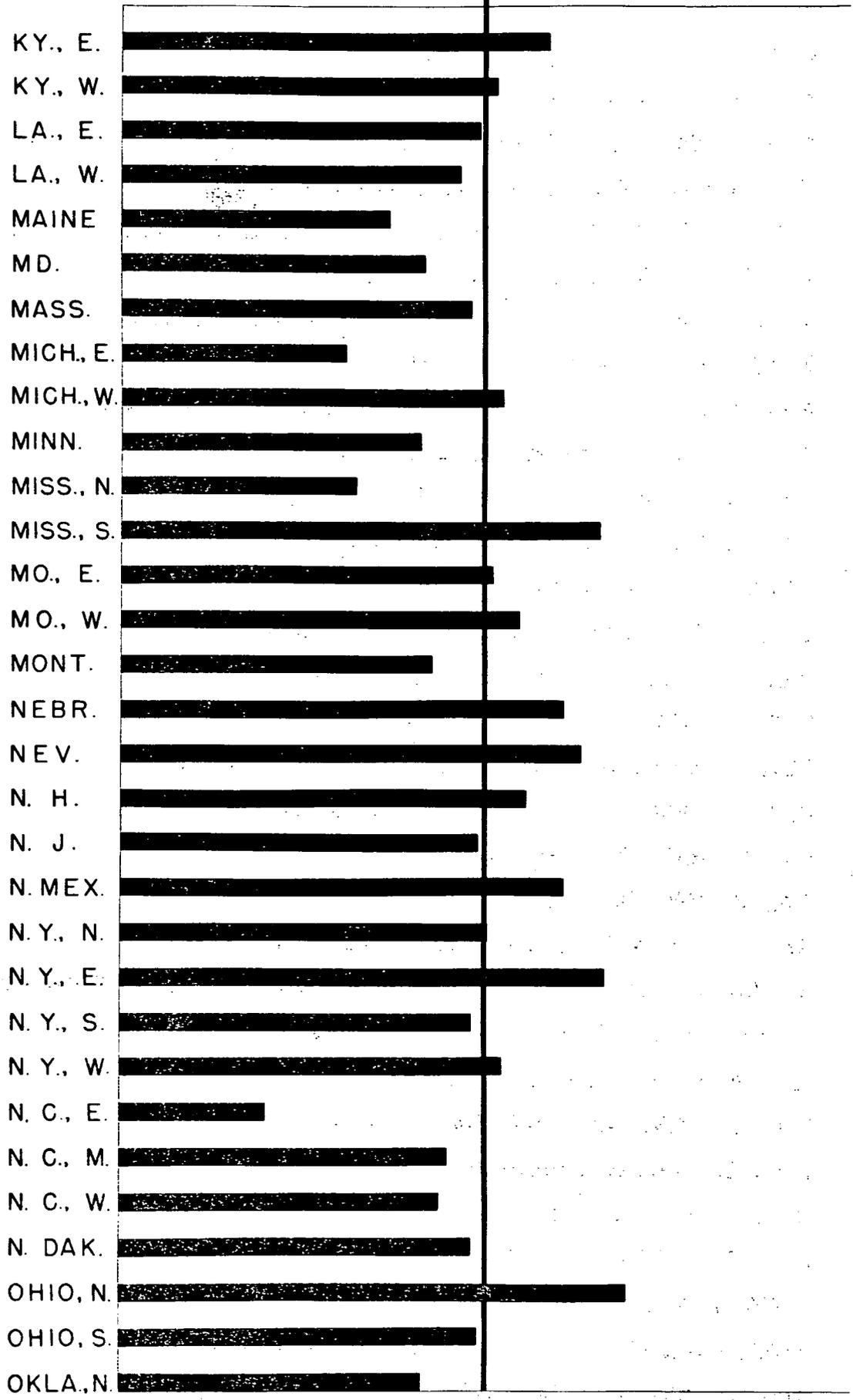
The Regional Chief Attorney, Veterans Administration, has commended Assistant United States Attorney Frederick J. Woelflen, Northern District of California, for the splendid manner in which he represented the United States in a recent case. The letter stated that the manner in which Mr. Woelflen examined the witnesses, introduced other evidence and presented the case clearly demonstrated his ability as a trial attorney and reflected the amount of careful preparation and research he gave to the case.

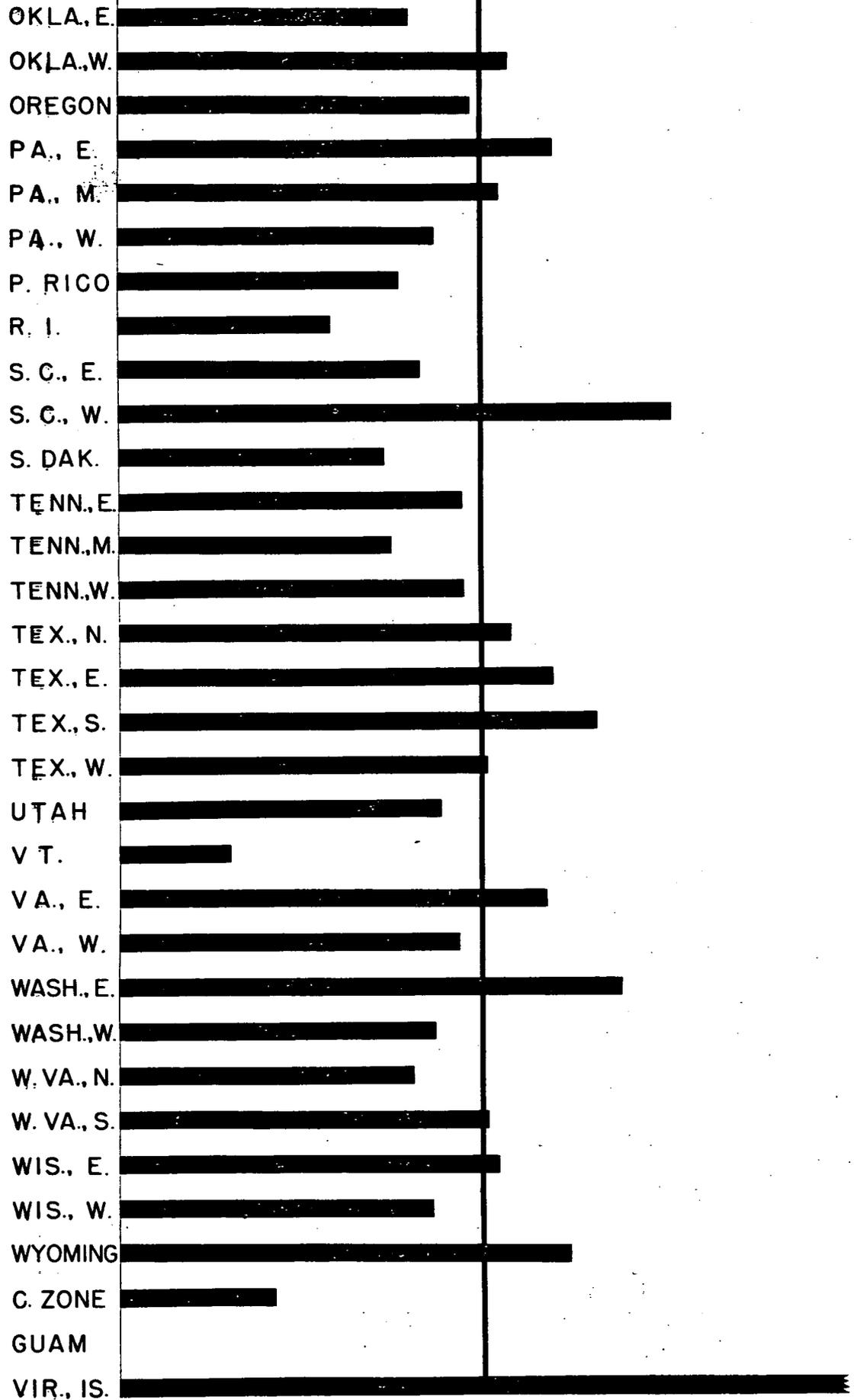
Assistant United States Attorney Norman A. Hubley, District of Massachusetts, has been commended by the General Counsel, General Accounting Office, for his resourceful handling of a recent case which was complicated by technical transportation data and law. The letter observed that the large number of suits filed by the plaintiff, the manner of pleading, and the unwillingness of its counsel to carry the burden of proof in accordance with the Supreme Court mandate all combined to place a considerable burden upon the Government, but that Mr. Hubley's conduct of the trial was such as to foreclose plaintiff's counsel from certain moves he admittedly contemplated and may well result in some mitigation of the Government's burden.

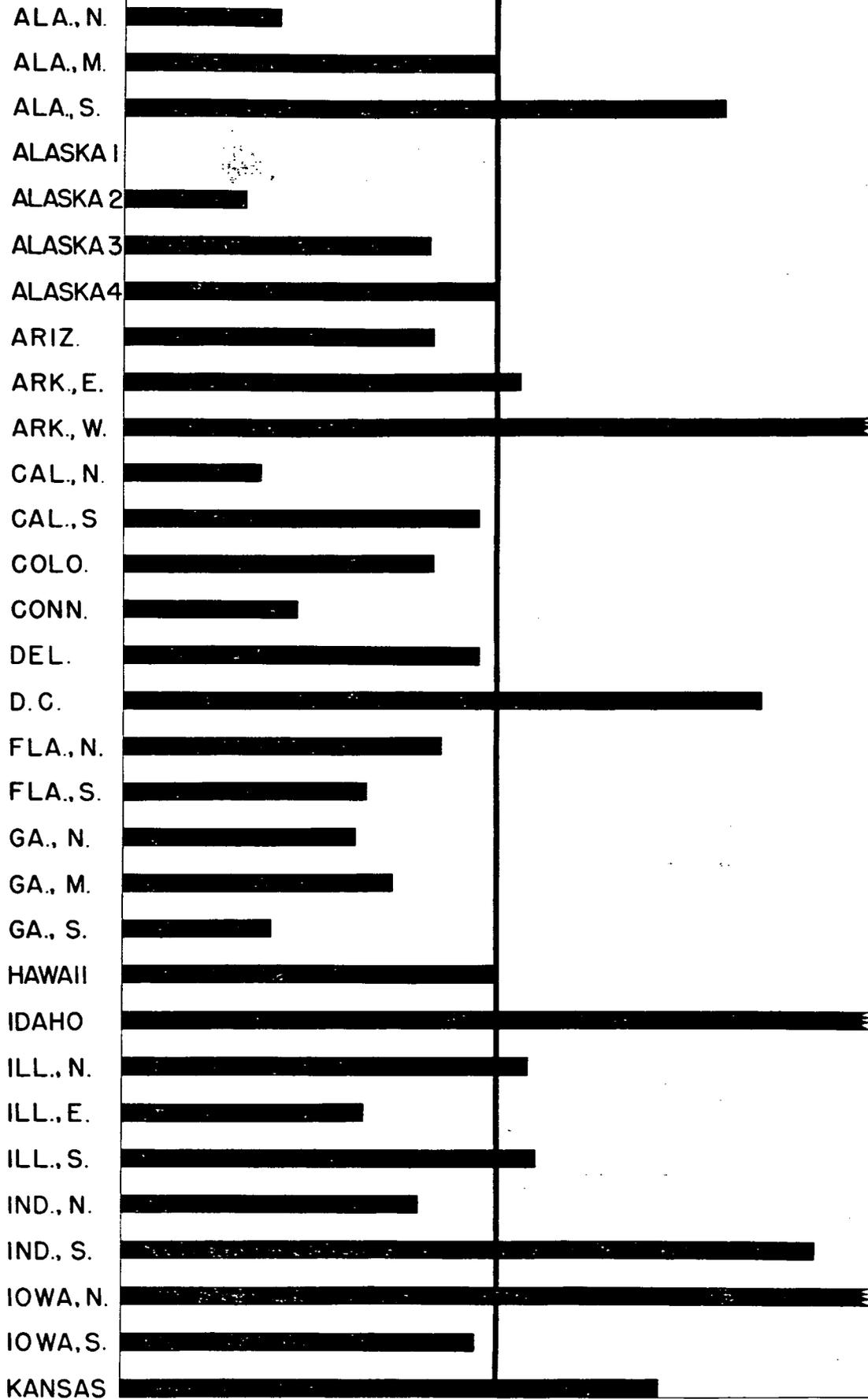
The Bureau of Public Roads has expressed to the Department its appreciation for the comprehensive preparation and able trial by Assistant United States Attorney Horace R. Jackson, District of South Dakota of condemnation cases in connection with land acquisition for an Interstate Highway Project.

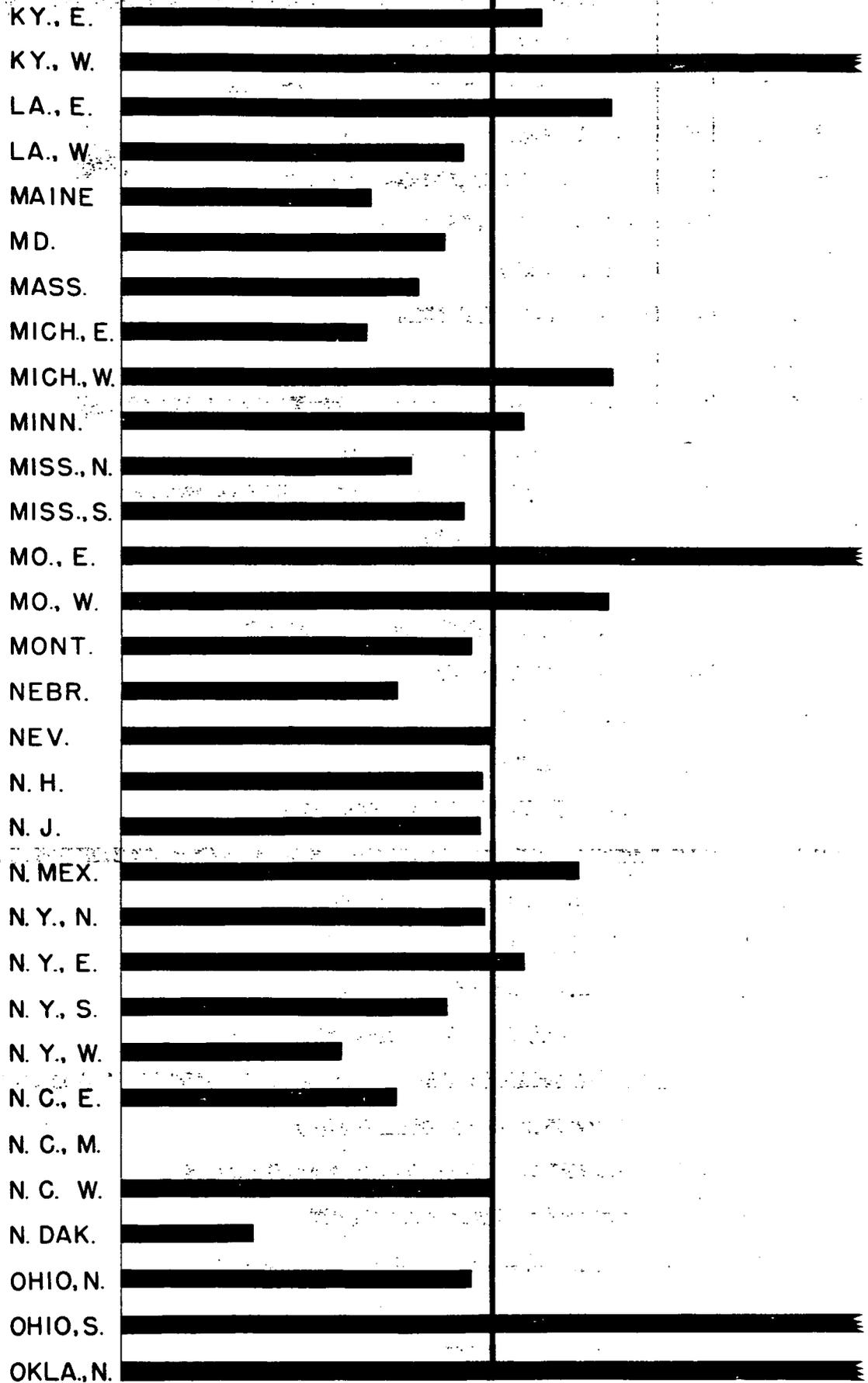
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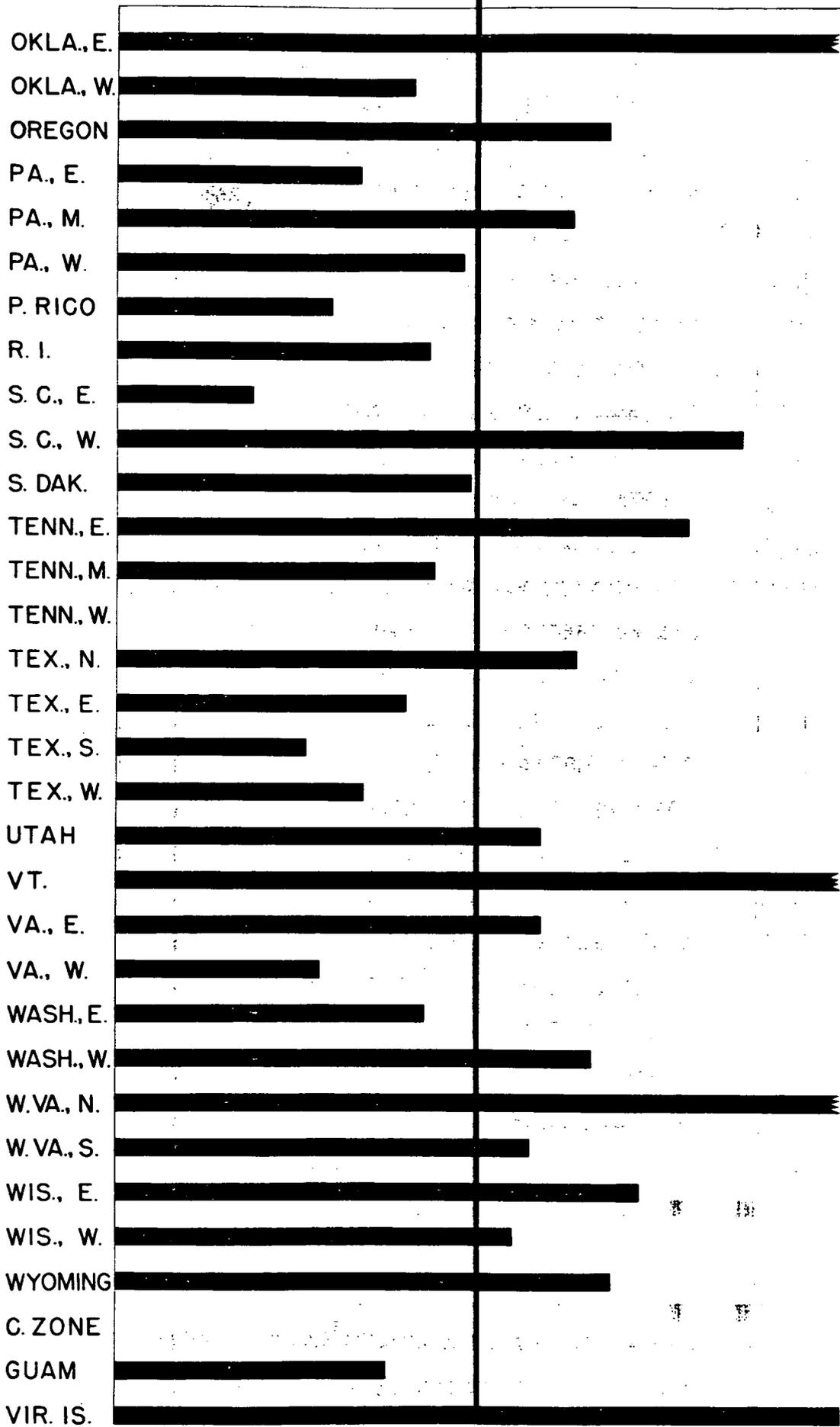


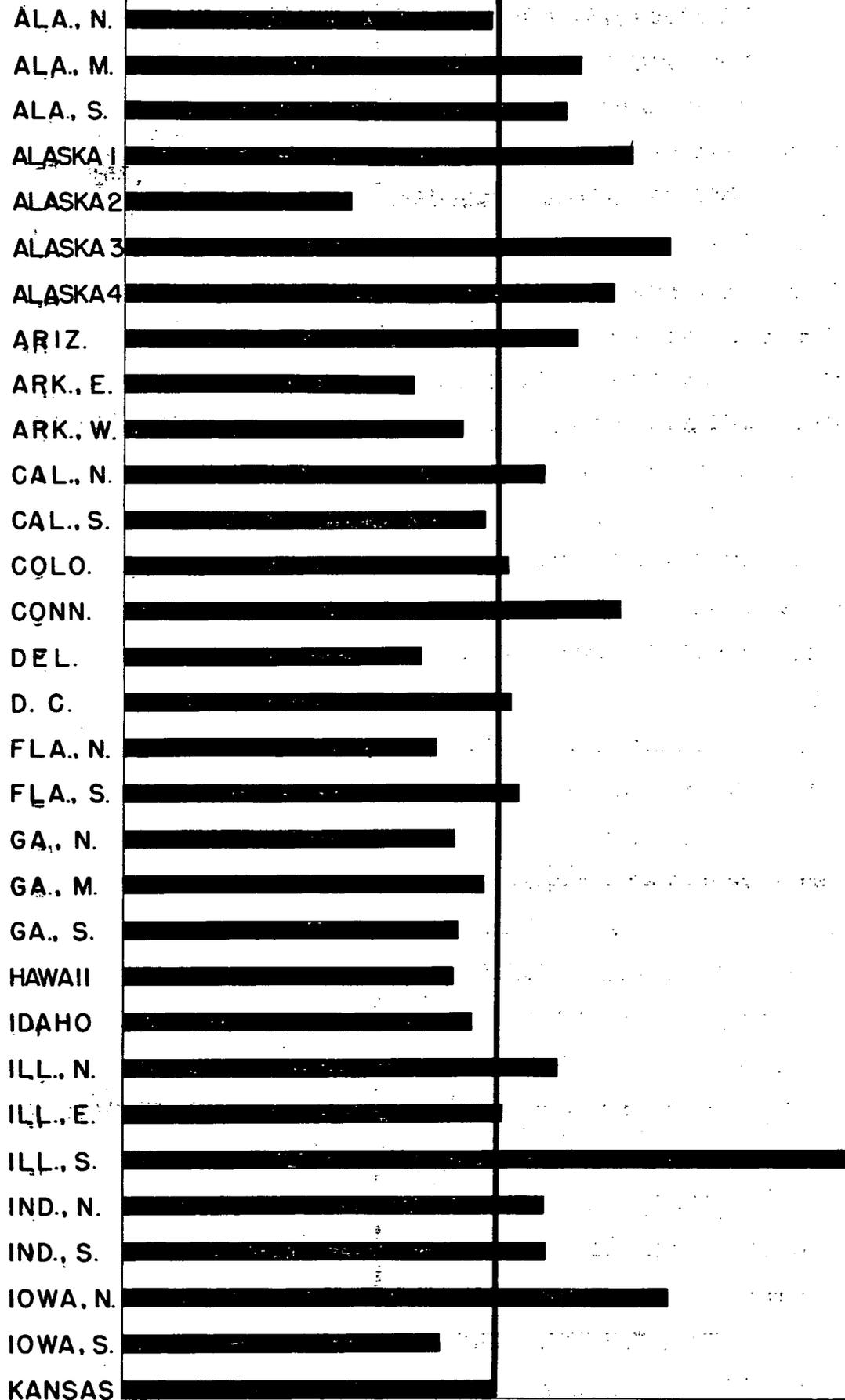


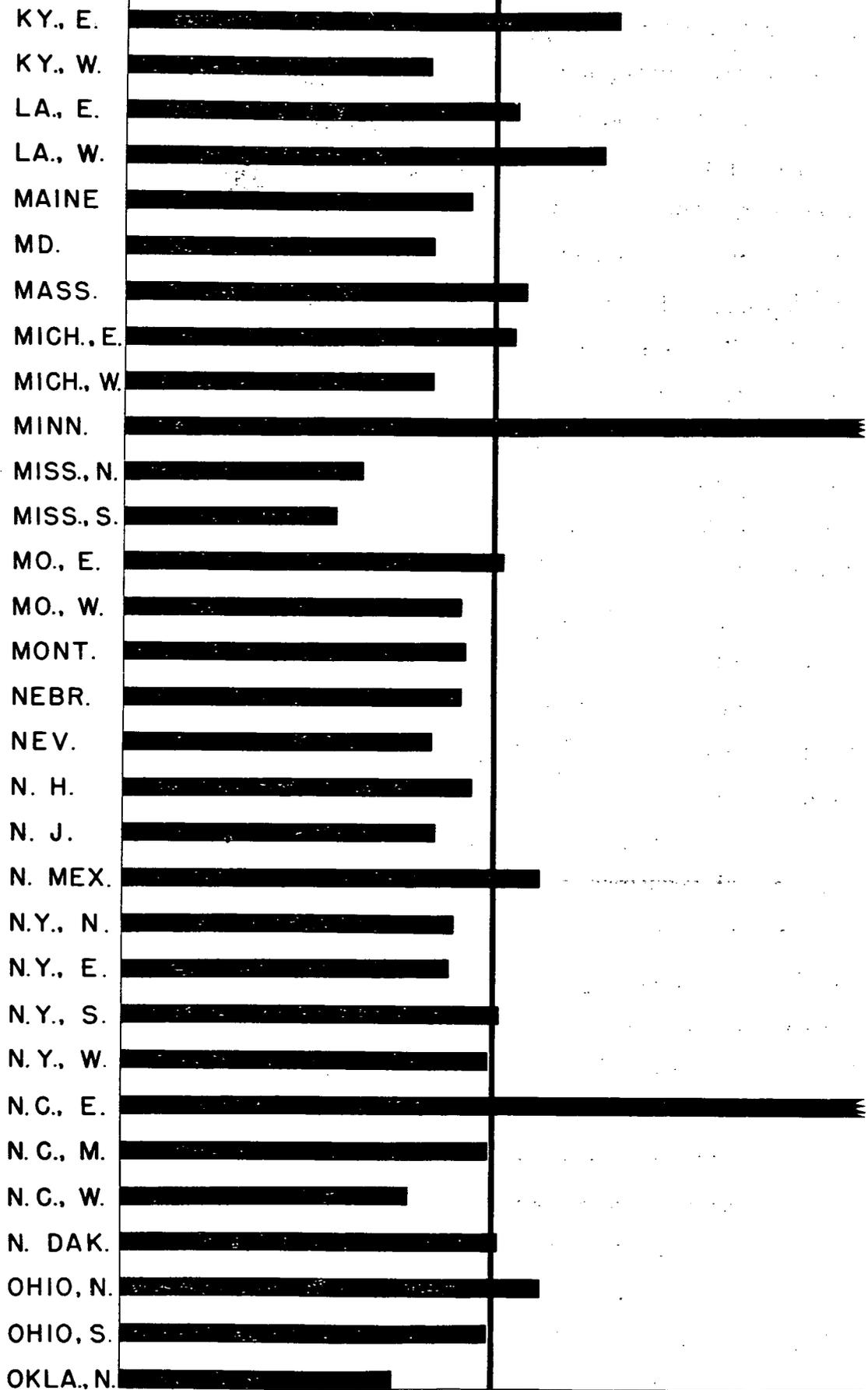


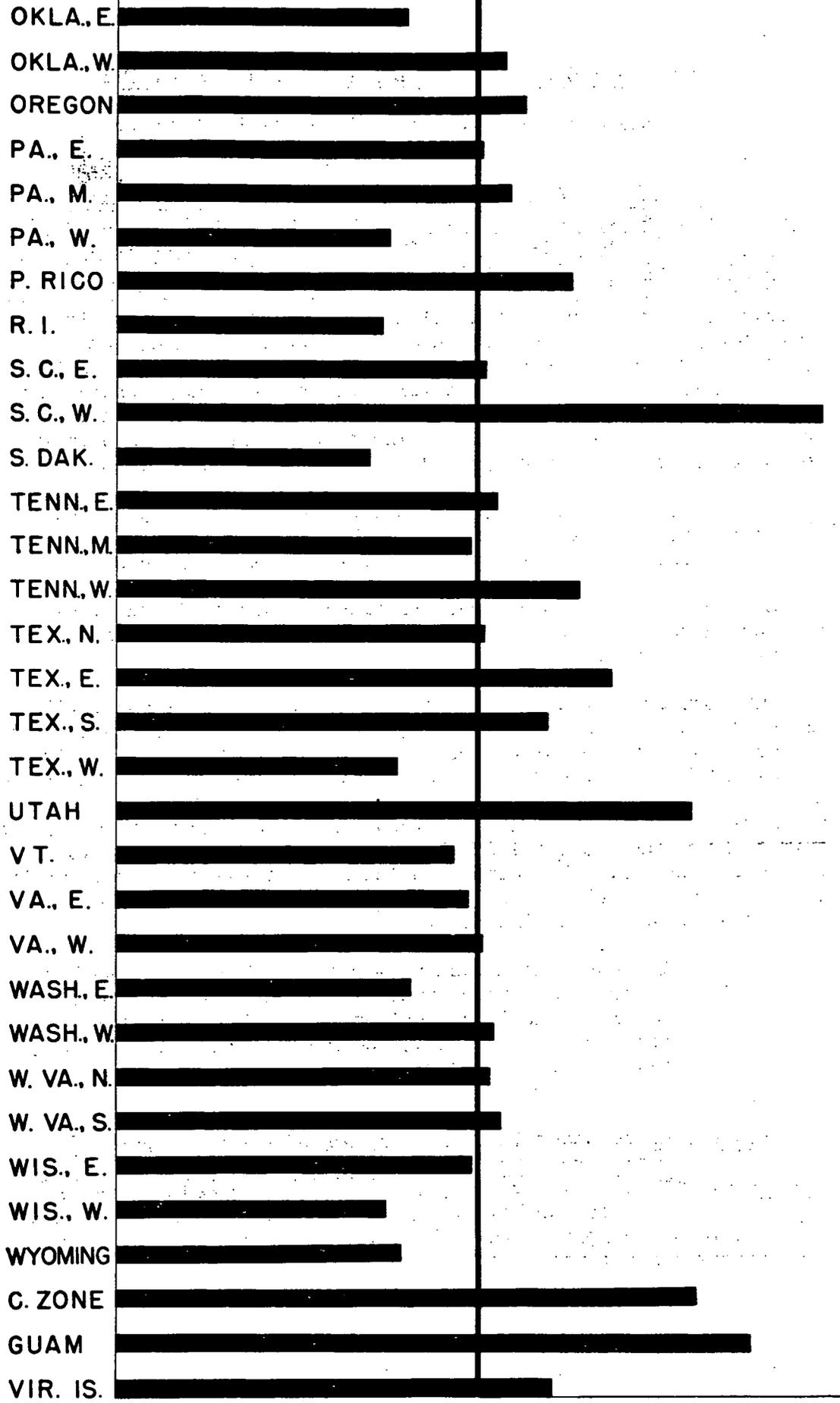












OFFICE OF ALIEN PROPERTY

Assistant Attorney General Dallas S. Townsend

Under Wisconsin Statute Attorney General Who Vested All Beneficial Trust Interests May Terminate Trust, Notwithstanding That Life Beneficiary Is Still Living. Trust under the will of Marcelle Solbrig, deceased; Rogers v. Raimy et al. (Wis. Sup. Ct., April 7, 1959). This action was brought by the Attorney General to obtain termination of a testamentary trust and distribution to him of the trust assets. The trust provides for payment of income to Martha for life, and, upon her death, for distribution of the corpus to Oskar and Werner. After vesting the interests of these beneficiaries, the Attorney General demanded payment of all trust assets. The trustee refused to pay on the ground the life tenant was still alive. The Attorney General then petitioned for termination under Sec. 231.23 Wis. Stats. which provides:

"Trustees' estate, termination of. When the purposes for which an express trust shall have been created shall have ceased the estate of the trustee shall also cease."

The County Court held that under the laws of Wisconsin the trust was a continuing one and could not be terminated before the death of the life tenant.

The Supreme Court (Dieterich, J.) reversed and remanded with directions to enter an order terminating the trust. The Court held that upon the decedent's death Martha, Oskar and Werner acquired the entire beneficial interest in the trust, Martha having a present life interest in the income, and Oskar and Werner having a vested future interest in the remainder. Accordingly, the Attorney General by his vesting order acquired the entire beneficial interest. Citing Sec. 231.23 Wis. Stats., the Court also held that after the issuance of the vesting order the trust purposes "could not be carried out and, therefore, there would be no object in continuing the trust."

Staff: The case was argued by Marbeth A. Miller. With her on the brief were United States Attorney Edward G. Minor and Assistant United States Attorney Howard W. Hilgendorf (E.D. Wis.); George B. Searls and Irwin A. Seibel (Alien Property).

Leave Granted Under Interlocutory Appeals Act to Appeal from Denial of Motion to Modify Reference of Action to Special Master. Rogers v. I.G. Chemie (C.A.D.C., April 16, 1959). This proceeding may be of general interest because here the government successfully utilized the new Interlocutory Appeals Act (28 U.S.C. 1292(b)) to obtain leave to appeal from a non-final order.

Shortly after the commencement of the action in October 1948 the government moved for designation of a special judge to supervise pre-trial proceedings. The motion was denied but thereafter the late Chief Judge Laws suggested the advisability of appointing a special master. In February 1950, after hearing and over plaintiff's objections, Judge Laws referred to a special master "the determination and findings of all issues of fact and law involved in said action." A year later, in February 1951, plaintiff moved to revoke the order on the ground that it was beyond the power of the Court to make the reference. Plaintiff's motion was opposed by defendants but was never expressly ruled upon.

Because of the pendency over the years of proceedings at all levels of the federal judiciary on the government's motion to dismiss the action for plaintiff's failure to comply with an order for production, the litigation never progressed beyond the early pretrial stage. In none of the proceedings, which were stayed in May 1953, as far as plaintiff was concerned, was the master called upon to make any rulings or findings going to the merits of the litigation. After the Supreme Court remanded the action to the District Court in June 1958, with instructions to reinstate the complaint (see U.S. Attorneys Bulletin, Vol. VI, No. 14, p. 439), the government moved to modify the reference by striking therefrom the reference to the special master of the "determination and findings of all issues of fact and law" and thereby limiting the scope of his authority to the conduct and supervision of discovery proceedings and depositions. In support of its motion, the government argued that the broad order of reference was contrary to the Supreme Court's decision in LaBuy v. Howes Leather Co., 352 U.S. 249, and also that circumstances have changed since the appointment of the master by reason of the suggestion in the Supreme Court's opinion in June 1958 (357 U.S. 197) that broad inferences unfavorable to plaintiff could be drawn at the trial of the action in the absence of complete disclosure of its records as to particular events. The government contended that this important judicial function should be exercised only by a judge and should not be entrusted to a special master.

The District Court denied the motion to modify the reference. Although the Court felt that the broad reference would be contrary to Federal Rule 53(b), if made over the objections of the parties, it held that the conduct of the parties over the years after the entry of the order constituted a waiver of the rule and consent to and acquiescence in the reference, and that there should be no change in the established order of procedure at this stage of the proceedings.

In its application for leave to appeal, the government contended that the denial of its motion was an abuse of discretion in view of LaBuy, supra, and in the circumstances of this case. The order appealed from contained the certificate required by the statute, namely that the "order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of the litigation involved in this civil action." Obviously, a ruling on the

propriety of the reference of the entire case would materially advance the ultimate termination of the litigation because if the District Court is held to have been in error for refusing to modify the reference, an appellate ruling now would obviate the possibility of a later remand, after a lengthy, costly and time-consuming trial before the special master, for a new trial before the District Court. The Court of Appeals granted leave to take the appeal.

Staff: George B. Searls, Irving Jaffe, and Paul E. McGraw
(Alien Property).

Statute of Limitations on Section 9(a) Suits; No Judicial Review of Section 32 action. Legerlotz v. Rogers (C.A.D.C., April 16, 1959). Plaintiff's rights in a patent license contract were vested in 1943. In 1947 he came to the United States. On December 16, 1946, he filed a claim under Section 32 for return of the property, alleging persecution by the Nazis. The claim was allowed and in December 1948 the Attorney General published a notice of intention to return the property and in March 1949 a "return order," providing for the return of approximately \$733,000, less some \$30,000 to be retained for taxes. Payments were made to plaintiff over the years, but in December 1955 the "return order" was amended to provide for the retention of an additional \$48,000 to be applied under the Blum-Byrnes Agreement ("reverse lend-lease"). Plaintiff sued in 1956 for the recovery of the \$78,000, alleging that he was entitled thereto under Section 9(a) and also that the retention of the \$78,000 under Section 32 was arbitrary, capricious, and contrary to law. The District Court granted summary judgment of dismissal on the ground that the action had not been brought by April 30, 1949, as required by Section 33 of the Trading with the Enemy Act. The Court of Appeals, in an opinion by Circuit Judge Washington, affirmed, holding that Section 33 must be applied as written, that its provisions must be followed even though plaintiff's claim had been allowed under Section 32, and that the courts did not have jurisdiction to review action of the Attorney General under Section 32.

Staff: The case was argued by George B. Searls. With him on the brief were Irwin A. Seibel, Paul J. Spielberg, and Sharon L. King (Alien Property).

* * *

ANTITRUST DIVISION

Acting Assistant Attorney General Robert A. Bicks

SHERMAN ACT

Supreme Court Holds That Under Maryland and Delaware Corporation Statutes Pending Criminal Proceedings Do Not Abate Upon Dissolution of Corporate Defendant. Melrose Distillers, Inc., et al. v. United States (Supreme Court). On April 20, 1959, the Supreme Court affirmed the court of appeals' judgment in the above case, which held that under the applicable Delaware and Maryland corporation statutes, pending criminal proceedings do not abate upon the dissolution of a corporate defendant. Unlike the court of appeals, the Supreme Court did not base its decision on whether the law of state of incorporation permits the continuance of a criminal prosecution after dissolution. It held that Section 8 of the Sherman Act, which defines "person" to include corporations "existing" under the laws of any state, requires reference to state law only to determine whether the corporation "exists" under that law. If state law does continue corporate existence after dissolution, irrespective of whether or not for purposes of state criminal prosecution, the dissolved corporation remains subject to federal criminal prosecution under the Sherman Act.

In the instant case, the Court found that the pertinent Delaware and Maryland corporation statutes, "no matter how the state court may construe [them]", bestow "enough vitality to make the corporation an 'existing' enterprise for the purposes of Section 8 of the Sherman Act." In so holding the Court pointed particularly to the fact that under the laws of both states "proceedings" against the corporation survived dissolution; it also pointed to the fact that under Maryland law the corporation continues "in existence for the purpose of paying, satisfying, and discharging any existing debts and obligations." The Court added that policy reasons supported its conclusion, since the dissolved corporations simply became divisions of a new corporation under the same ultimate ownership.

Since every state has laws continuing corporate existence after dissolution for specified periods and purposes, it would appear that the effect of this decision is that through "the interplay of federal and state law," corporations cannot escape criminal responsibility under the Sherman Act by some act of dissolution under the laws of any state despite the difference in language in the several dissolution statutes.

Staff: Richard A. Solomon and Henry Geller (Antitrust Division)

Consent Judgment Entered in Section I Case. United States v. Retail Floor Covering Association of Greater Philadelphia, et al., (E.D. Pa.). On April 20, 1959, a consent judgment was entered terminating civil antitrust proceedings against the Retail Floor Covering Association of Greater Philadelphia and its members.

The government's complaint, filed April 2, 1958, charged that the defendant Association and its members, in violation of Section 1 of the Sherman Act, had sought, by concerted action with certain manufacturers and wholesalers, to exclude non-members of the defendant Association as retail outlets for the sale of floor covering materials, and threatened to boycott, and did boycott, manufacturers of such materials who sold or distributed their products to other than approved wholesalers and retailers.

The final judgment contains appropriate injunctive provisions directed against the concerted action of the defendants alleged in the complaint; the channelization and restriction of the sale of floor covering materials in the Philadelphia area and the boycotting of manufacturers.

In addition, the final judgment enjoins individual action by the defendant members of the Association and prohibits them from coercing or inducing manufacturers and wholesalers of floor covering materials to restrict or limit their sale or distribution to any outlet or group or class of outlets.

Staff: William L. Maher, Donald G. Balthis, John J. Hughes
and Morton M. Fine (Antitrust Division)

* * *

C I V I L D I V I S I O N

Assistant Attorney General George Cochran Doub

S U P R E M E C O U R TS U R P L U S P R O P E R T Y A C T

Section 26(b)(1) of Surplus Property Act Is Compensatory and Therefore Not Subject to Five-Year Statute of Limitations Provided for Civil Penalties. Raymond Jerean Koller and Martin Silverbrook v. United States (Supreme Court, April 20, 1959). The United States instituted this action on May 12, 1955, pursuant to Section 26(b)(1) of the Surplus Property Act of 1944 (40 U.S.C. 489(b)), to recover double damages plus \$2,000 for each of three alleged violations of the Act. The gravamen of the complaint was that the defendants had served as front men to obtain surplus property for a non-veteran, who could not otherwise have obtained it. Specifically, the complaint charged that defendants had stated in their application for veteran's priority certificates their intention to purchase surplus property for their own use, while in fact they were acting at the instance and on behalf of a non-veteran. The fraudulent applications were filed--two by Koller and one by Silverbrook--in 1945 and 1946.

The sole defense was that the action was barred by the five-year statute of limitations provided in 28 U.S.C. 2562, applicable to "any civil fine, penalty, or forfeiture." The government argued that Section 26(b)(1) was compensatory in that it was an attempt by Congress to estimate in advance what damage the government would suffer and was therefore in the nature of liquidated damages. Congress provided for double damages plus \$2,000 in recognition of the fact that, in most cases, the amount of the government's loss is extremely difficult, if not impossible, to ascertain. The district court granted the government's motion for summary judgment and the Third Circuit unanimously affirmed (255 F. 2d 865), holding that the recovery permitted by Section 26(b)(1) is compensatory, not penal, and that therefore the five-year statute of limitations in 28 U.S.C. 2462 is inapplicable. The Supreme Court affirmed per curiam on the authority of Rex Trailer Co. v. United States, 350 U.S. 148.

Staff: Lionel Kestenbaum, Hershel Shanks, and Douglas A. Kahn
(Civil Division)

C O U R T S O F A P P E A LF A L S E C L A I M S A C T

False Claims Act Applies to Claims for Veterans Administration Home Loan Guaranties and Gratuities. United States v. Patrick DeWitt, et al. (C.A. 5, April 3, 1959). Prior to September 1953, when the VA guaranteed a loan, the proceeds of which were to be used by a veteran to purchase a home, it paid the lender 4% of the amount of the guaranty (not exceeding \$160), which was credited to the account of the veteran. 34 U.S.C. (1952 ed.) 694(c). It was not necessary to file a claim for this gratuity, as

it was automatically disbursed upon issuance of the guaranty. A prerequisite to obtaining the guaranty, however, was the prior certification of the lender (in connection with the loan guarantee application) that the veteran will occupy the home. This action was instituted against a real estate broker and its salesmen to recover double damages and forfeitures under the False Claims Act (31 U.S.C. 231-235) arising from 50 transactions in which the Veterans Administration had guaranteed mortgages on homes which were purportedly sold to qualified veterans. The complaint also prayed that the lender be ordered to repay the amount of the gratuity.

In each of these instances, after the veteran applied for the loan representing that he would occupy the house, and after the VA issued its Certificate of Commitment, but prior to the loan closing, the veteran informed the realtors that he could not or would not occupy the house. The realtor thereupon agreed to buy the house from the veteran for a specified sum. Subsequently, the loan was closed and the house deeded to the veteran, who simultaneously re-conveyed it to the realtor who re-sold it profitably. The mortgage lender, having no knowledge of the veteran's conveyance to the realtor, certified to the VA that the veteran would occupy the house as his home. The VA then guaranteed the loan and disbursed the gratuity. The foregoing facts were stipulated in 29 of the 50 causes of action. The District Court for the Western District of Texas entered a summary judgment on all 50 causes of action in favor of the defendants.

On appeal, the Fifth Circuit affirmed as to the mortgage lender and reversed and remanded as to the realtor and its salesmen. The Court ordered that judgment be entered in favor of the government on the 29 stipulated causes of action, and remanded the remaining 21 causes of action for trial. The Court held that the veteran must intend to occupy the house at the time of the loan closing as well as at the time of his initial application for a guarantee. The Court also ruled that the VA's Certificate of Commitment was not an "approval" of the claim, but merely an assurance that it would guarantee the loan if the sale were made as represented in the initial application. The instant action is distinguishable from United States v. McNinch, 356 U.S. 595, since that case involved applications solely for the credit of the United States, while here there was also a claim for money because of the automatically disbursed gratuity.

Staff: Maurice S. Meyer (Civil Division)

FEDERAL ALCOHOL ADMINISTRATION ACT

Director of Alcohol and Tobacco Tax Division of Internal Revenue Service Is Indispensable Party to Action for Declaratory Judgment That Federal Alcohol Administration Wine Regulations Are Not Applicable to Intra-Puerto Rican Transactions. James W. S. Davis, Supervisor of the Alcohol and Tobacco Tax Division in Puerto Rico v. Trigo Bros. Packing Corp. (C.A. 1, April 23, 1959). Plaintiff, a Puerto Rican corporation, bottled imitation raisin wines in Puerto Rico in bottles which did not

comply with the standard of fill provisions contained in the regulations promulgated by the Treasury Department under Section 5(e) of the Federal Alcohol Administration Act (FAAA). Plaintiff instituted this action in the district court in Puerto Rico, praying for a declaratory judgment that these regulations were not applicable to purely intra-Puerto Rican transactions. He also sought to enjoin the imposition of the sanctions set forth in Sections 4 and 7 of the Act (27 U.S.C. 204, 207). The complaint named as defendants: George Humphrey, then Secretary of the Treasury, Dwight Avis, Director of Alcohol and Tobacco Tax Division of the Internal Revenue Service, and Davis, the local supervisor. The action was dismissed as to the first two defendants because the Court lacked jurisdiction over them. The Court denied the government's motion to dismiss because of the absence of an indispensable party to the suit (viz., Avis, the Director of the Alcohol and Tobacco Tax Division) on the ground that Avis was not an essential party since the relief sought would not require him to take any affirmative action. The Court entered judgment for plaintiff declaring that the wine regulations in issue were inapplicable to local Puerto Rican transactions.

The First Circuit reversed. The Court noted that a bottler cannot sell wine without first obtaining either a certificate of approval or of exemption. Since the Director is the only person that is authorized to issue that certificate, he is an indispensable party to this action. The Court further held that the judicial review provided for under Section 5(e) of the Act, granting the district courts of the United States and its territories jurisdiction to review the Director's decisions with regard to issuing these certificates, related to jurisdiction over the subject matter and did not apply to jurisdiction over the person.

Staff: Morton Hollander; Herman Marcuse (Civil Division)

VETERANS PREFERENCE ACT

Government Employee's Acceptance of Employment With Government of Guam Terminated His Federal Status and Removed Him from Protection of Section 14 of Veterans' Preference Act. Norman A. Peltier v. Fred A. Seaton, Secretary of the Interior, et al. (C.A.D.C., April 16, 1959). In August 1950, Congress enacted the Organic Act of Guam (48 U.S.C. 1421 et seq.) which established Guam as an unincorporated territory with its own civil government, separate and distinct from the federal service. On September 25, 1950, knowing that this Act had become effective, appellant, who was then working on Guam as an employee of the Department of the Interior, entered into an employment agreement with the newly established government of Guam. Pursuant to the terms of this agreement, appellant went to the United States and brought his entire family back to Guam with him at the expense of the Guamanian government. Appellant was subsequently discharged, and, thereafter, brought this action seeking reinstatement on the ground that his dismissal was in violation of Section 14 of the Veterans' Preference Act (5 U.S.C. 863).

The district court granted the government's motion for judgment under F.R.C.P. 41(b) at the close of appellant's case. The Court of Appeals for the District of Columbia Circuit affirmed per curiam. It held that appellant had accepted employment with the Guamanian government on September 25, 1950, and consequently, on the date of his discharge, he was not working for the federal government. The Veterans' Preference Act was, therefore, inapplicable.

Staff: Doublas A. Kahn (Civil Division)

DISTRICT COURTS

ADMIRALTY

Exclusive Remedy for Employee of American Contractor Under Contract With United States to Build Public Works Outside Continental Limits Is Under Longshoremen's and Harbor Workers' Compensation Act. Raymond S. Berven v. The Fluor Corporation, Ltd., (S.D. N.Y., March 5, 1959). Plaintiff, an employee of the defendant, sued to recover damages for personal injuries alleged to have been sustained while he was working at an American airfield in Saudi Arabia. Defendant was under a contract with the United States to construct the airfield at Dahran. Under the provisions of this contract, the United States undertook to defend against plaintiff's claim.

Defendant moved for summary judgment on the ground that plaintiff's sole and exclusive remedy was under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901 et seq.) as amended and extended by the Defense Bases Act (42 U.S.C. 1651 et seq.). Plaintiff argued that the law of the place where the tort occurred controlled (i.e., Saudi Arabia); and, therefore, he had a right to enforce his claim for personal injury under Saudi Arabian law. In addition, plaintiff contended that the airfield was not a "public work," which is defined in the Defense Bases Act in terms of, inter alia, a building or project for the public use of the United States or its Allies. Plaintiff urged that the term "public use" has reference to the entire public and that, since the laws of Saudi Arabia exclude Jews from entering into that country, the airfield in question could not therefore be deemed a public work.

The Court ruled that it was the public policy of the United States to have the rights of the plaintiff and defendant determined by the Defense Bases Act and the Longshoremen's and Harbor Workers' Compensation Act. In addition, the Court ruled that the fact that Jews were excluded from the air base did not remove it from the definition of a "public work" since any facility constructed for a military purpose is for a public use. Defendant's motion for summary judgment was granted.

Staff: Robert D. Klages (Civil Division)

TORTS

Failure of Passenger in Air Force Jet to Eject Himself from Crippled Plane Did Not Establish Negligence on Part of Government. Alice Friedman, Admx. v. United States (E.D. N.Y., March 31, 1959). On June 15, 1951, William S. Friedman, a free-lance writer on aeronautical matters, was a passenger in a Lockheed F-94-B jet aircraft in a flight, conducted by the United States Air Force to demonstrate the planes capabilities. Friedman rode behind the pilot's seat and, prior to flight, was instructed as to bail out procedures. He signed a release exonerating the United States from liability in case of accident. The aircraft took off and during the flight the left wing broke off about four feet from the wing tip. Additionally, the gasoline tip tank and aileron on that wing were lost, and the right wing, about four feet from the tip, became bent. After determining that he could not control the aircraft sufficiently to make a safe landing, the pilot advised Friedman to bail out. He reviewed the bail out procedure with Friedman who indicated that he understood that the only thing necessary for him to do was to press a trigger which would catapult the seat from the airplane after the pilot opened the canopy. After the aircraft had descended to 3,000 feet the pilot bailed out, but Friedman never left the aircraft and was killed. The present suit was brought under the Tort Claims Act by the administratrix. The government's motion for summary judgment was denied on the ground that while the release which the decedent executed would bar an action to recover damages for ordinary negligence, it would not do so if the accident were a result of willful, wanton or gross negligence on the part of the government. "A provision absolving the Government from liability for such negligence would * * * be violative of public policy." 138 F. Supp. 530 at 534. Following trial on the merits, the Court found that plaintiff had not sustained the burden of proving negligence on the part of the government and, accordingly, entered judgment for the government.

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

TRADE AGREEMENTS EXTENSION ACT OF 1951

Tariff Commission Directed to Make "Escape Clause" Investigation of Barbed Wire. Atlantic Steel Company v. United States Tariff Commission, et al. (D.C., April 14, 1959). Plaintiff, a producer of barbed wire, filed applications for an "escape clause" investigation of the importation of barbed wire under Section 7 of the Trade Agreements Extension Act of 1951 (19 U.S.C.A. 1364). Section 7 states that "upon application of any interested party * * * the United States Tariff Commission shall promptly make an investigation and make a report thereon not later than six months after the application is made to determine whether any product upon which a concession has been granted under a trade agreement is * * * being imported into the United States in such increased quantities * * * as to cause or threaten serious injury to the domestic industry producing like or directly competitive products." The Commission dismissed the application on the ground that it

lacked jurisdiction in that, under an historic policy of Congress, barbed wire has been admitted free of import restrictions for the special and particular purpose of benefiting the American farmers, and that therefore the "escape clause" protective principle was inapplicable.

Plaintiff instituted this action seeking declaratory and mandatory relief against the Tariff Commission for its refusal to consider plaintiff's application. Upon the government's motion to dismiss on the ground that the Tariff Commission is not a suable entity, plaintiff added the individual members of the Tariff Commission as parties defendant. The District Court, without assigning reasons, denied the government's cross-motion for summary judgment and granted plaintiff's motion for summary judgment. A stay of the court's order pending appeal has been obtained.

Staff: United States Attorney Oliver Gasch and
former Assistant United States Attorney E. Riley Casey
(D. D.C.); Donald B. MacGuineas; Andrew P. Vance
(Civil Division)

* * *

C I V I L R I G H T S D I V I S I O N

Assistant Attorney General W. Wilson White

Fugitive Felon Act; Flight to Avoid Prosecution; Burglary (18 U.S.C. 1073). United States v. Harry R. Smith (E.D. Wis.) At the request of local authorities and in a spirit of cooperation, the United States Attorney for the Eastern District of Wisconsin twice issued fugitive warrants for the arrest of the subject, Harry R. Smith, who had fled the jurisdiction to avoid prosecution for burglary in Waukesha County. Smith was arrested in Chicago by the Federal Bureau of Investigation but efforts to have him returned to Wisconsin to stand trial on the burglary charge were repeatedly frustrated by a local judge who granted numerous continuances in the extradition hearing.

On March 6, 1959, a Federal grand jury returned an indictment against Smith charging him with a violation of the Fugitive Felon Act, 18 U.S.C. 1073. The United States Attorney plans to prosecute the defendant shortly on the Federal charge.

Staff: United States Attorney Edward G. Minor (E.D. Wis.)

* * *

CRIMINAL DIVISION

Assistant Attorney General Malcolm R. Wilkey

BRIBERY

Promise to Pay Money to Political Party for Use of Influence in Obtaining Appointive Office. In United States v. Shirey (Sup. Ct. 4-20-59), the Supreme Court held that an indictment alleging that defendant did "offer or promise to S. Walter Stauffer, a Member of Congress * * *, to donate \$1,000 a year to the Republican Party to be used as they see fit, in consideration of the use or the promise to use any influence to procure for him the appointive office * * * of Postmaster of York, Pennsylvania," charged an offense under 18 U.S.C. 214. This statute proscribes the paying, or offering or promising, "any money or thing of value, to any person, firm, or corporation in consideration of the use or promise to use any influence to procure any appointive office or place under the United States for any person." The majority (per Frankfurter, J.) held that the statute covers the acts charged under either of two alternative constructions: (1) that Stauffer is a "person" and that the offer alleged was "a promise to Stauffer of money," even though the Republican Party was to be the ultimate recipient; and (2) that, if the statute must be read as requiring that the recipient be a "person, firm or corporation," its content and manifest purpose confirm the construction that the word "person" is broad enough to include the Party. The majority found support for this conclusion in the legislative history of the statute, which showed that it was designed to reach contributions to party treasuries and to campaign funds, as well as direct payments to those in charge of patronage.

Mr. Justice Douglas wrote a concurring opinion in which he explained that he was influenced to join the majority because of his view that the legislative history shows that Congress intended to move against the twin evils of "payments to a political party" for the use of influence and payments to persons who are themselves to use such influence.

Mr. Justice Harlan, joined by Black, Whittaker and Stewart, JJ., dissented. They thought that since, in their view, the solicitation provision (18 U.S.C. 215) applies only where the payee's influence is promised and would therefore not cover a person who solicits, in consideration of a promise of his influence, a general political contribution to be paid directly to his party, it is unthinkable that Congress intended that Section 214 should apply to the person who offers such a contribution in return for the influence of the solicitor.

Staff: Argued by Former Assistant Attorney General Malcolm Anderson (Criminal Division)

LABOR MANAGEMENT RELATIONS ACT OF 1947

Trustees of Funds Sustained by Employer Contributions; Construction of "representatives of employees". Mechanical Contractors Association

of Philadelphia Inc. v. Local Union 420 (C.A. 3, February 3, 1959). The issue in this case was the legality of a jointly administered industrial fund in the light of 29 U.S.C. 186. The fund was sustained through employer contributions based on employee working hours. It was to be jointly administered by trustees equally representing management and labor.

The Association brought the action seeking a decree that joint administration of the Industry Fund is unlawful since the fund is not established in conformity with the provisions of 29 U.S.C. 186 and the contributions to it unenforceable. The appellant union did not contend that the fund complied with the requirement of this section; rather they contended that the union members of the joint board are not "representatives" within the meaning of the section, and that even if they are representatives, the contributions to this fund do not constitute payment or delivery of anything of value to them.

In affirming the District Court's determination that the joint administration of the fund was unlawful, the Court held that "No fund derived from employer contributions may be administered by persons designated by a union unless the fund meets the standards set forth in Section 302(c)(5). Any employee-designee administering such fund not meeting the requirements of Section 302(c)(5) is a 'representative' within the meaning of Subsections 302(a) and (b)." The Court also rejected appellant's alternative contention that the trustees were a mere conduit for the funds and thus were not receiving money or anything of value. It held that the veto power over the uses to which the funds may be put constitutes an effective control over the fund.

FEDERAL FOOD, DRUG, AND COSMETIC ACT

Prison Sentences Imposed for Violations of Food, Drug, and Cosmetic Act; Sales of "Bennies" from Truck Stop. United States v. Vernon T. Osborne and Edward P. Cogan (S.D. Ohio). On April 3, 1959, following pleas of guilty, defendants were sentenced to one year imprisonment under 21 U.S.C. 333(a) for violations of 21 U.S.C. 331(k). These violations resulted from the sales by the defendants of quantities of di-amphetamine sulfate tablets, known as "bennies", to truck drivers and others at a truck stop in Aberdeen, Ohio. Amphetamine compounds are dangerous habit-forming drugs, permitting the users thereof by their stimulating effects to engage in continued activity beyond the point of exhaustion, thus eliminating the protective effects produced by such symptoms as fatigue and drowsiness. They also produce a release from inhibitions which may lead to errors in judgment, which could be especially dangerous to automobile and truck drivers.

Staff: United States Attorney Hugh K. Martin; Assistant United States Attorney Thomas Steuve (S.D. Ohio)

AUTOMOBILE INFORMATION DISCLOSURE ACT

Removal of Manufacturer's Label of Price Information. United States v. Edward Lee Smith (E.D. Ill.). On January 15, 1959, Edward Lee Smith,

a used car dealer of Carbondale, Illinois, purchased a new station wagon from a franchised dealer. He drove it approximately nine miles, removed the manufacturer's label of price information, then offered the vehicle for sale as a used car. He was charged in an information with violation of the Automobile Information Disclosure Act and pleaded guilty. On February 6, 1959, the Court imposed a fine of \$250 and costs.

Staff: United States Attorney Clifford M. Raemer (E.D. Ill.)

Removal of Manufacturer's Label of Price Information. United States v. Brown Alexander Mangum, et al. (W.D. N.C.). Defendant Mangum operating Brown's Motor Company of Charlotte, Inc., was charged with selling new Volkswagens and Karmann Ghias from which the manufacturers' labels of price information had been removed. The case was tried before the Court, without a jury, during the course of which it was proved the defendant removed the price information labels from the new cars before sale. Conviction was obtained, the Court observing "The primary purpose of this law is to keep the public from being gypped." On April 9, 1959, Mangum and the company defendant were fined \$1,000 each.

Staff: United States Attorney James M. Baley, Jr.; Assistant United States Attorney William J. Waggoner (W.D. N.C.)

LIQUOR LAWS

Six-year Statute of Limitations; Production of Defendant's Statements. United States v. Samuel Thomas Stallings, et al. (S.D. N.Y., December 18, 1958). Defendants were charged in a five-count indictment, returned on June 12, 1958, with violations of the liquor revenue laws. The latest offense charged in the substantive counts occurred on July 28, 1953, and the date of the last overt act alleged in the conspiracy count was August 10, 1953. Defendants moved for dismissal of the indictment on the ground that the offenses were barred by the statute of limitations. Defendants also moved that the government be required to produce statements of the defendants in the possession of the government.

The Court held that the object of the offenses charged in this case involved an attempt to evade or defeat payment of federal taxes and denied the motion to dismiss on the basis of Braverman v. United States, 317 U.S. 49, and Putman v. United States, 162 F. 2d 903.

The motion for production was denied under Rule 17(c) on the ground that nothing more than discovery was intended and there was no suggestion that the trial would be expedited by inspection of the subpoenaed material before trial. The Court then held that whether the Court had the power to order discovery under Rule 16 was inappropriate for decision in this case.

Staff: United States Attorney Arthur H. Christy; Assistant United States Attorney John C. Lankenau (S.D. N.Y.)

WITNESSES

Privilege Against Self-incrimination; Testimony of Accused Before Grand Jury Which Indicts Him. United States v. Richard A. Cleary (C.A. 2, March 30, 1959). The Court of Appeals reversed an order of the District Court for the Southern District of New York, granting defendant's motion to dismiss an indictment based upon testimony given by the accused to the grand jury which indicted him. The case was remanded for reinstatement of the indictment.

In response to a subpoena, Cleary appeared before the grand jury and, after being warned of his rights, testified at length, incriminating himself. Largely as a result of this testimony, an indictment was returned against him. At the time he was subpoenaed, Cleary had already been arrested on the conspiracy charge for which he was later indicted. Upon defendant's motion to dismiss, the District Court held that, since charges were pending against Cleary when he appeared before the grand jury, his testimony was improperly received unless he had knowingly waived his privilege against self-incrimination under the Fifth Amendment. The District Court found that despite the warning Cleary received prior to testifying, he was nervous and did not understand his rights and, therefore, did not knowingly waive his privilege against self-incrimination by testifying before the grand jury. The District Court did not determine whether the mere calling of a person under charges to appear before a grand jury would invalidate a subsequent indictment.

The Court of Appeals held that the question was not whether Cleary knew his constitutional rights and consciously elected not to assert them, but "whether the testimony was freely given, all things considered," quoting from United States v. Block, 88 F. 2d 618, 621, certiorari denied 301 U.S. 690. It appeared to the Court that Cleary's testimony was completely voluntary, and that the District Court had imposed a subjective test depending upon the state of mind of the particular witness, a standard higher than is required.

In this connection it may be noted that the Second Circuit previously held, in United States v. Scully, 225 F. 2d 113, certiorari denied 350 U.S. 897, and in subsequent cases, that the mere possibility that a witness may later be indicted furnishes no basis for requiring that he be advised of his rights under the Fifth Amendment, when summoned to give testimony before a grand jury. As indicated in United States v. Cleary, Judge Frank, while concurring in the result in United States v. Scully, observed that the policy embodied in the privilege against self-incrimination had greater force when a person already indicted is called to testify before a grand jury (225 F. 2d 113, 116-120). Some other cases have stated that a witness need not be advised of his rights when he is not the primary subject or target of the grand jury's consideration. United States v. Klein (C.A. 2, 1957), 247 F. 2d 908, 920; United States v. Orta (C.A. 5, 1958), 253 F. 2d 312, 314. Other cases have intimated that an accused must be warned of his right against self-incrimination where he is already under charges or where he is the target of the grand jury investigation. United States v. Parker (C.A. 7, 1957), 244 F. 2d 943, 946; United States

v. Orta, supra. In Powell v. United States, 226 F. 2d 269, 274, the Court of Appeals for the District of Columbia, although not reaching the question, intimated that one may well be insulated from being called to testify before a grand jury which is seeking an indictment against him.

Staff: United States Attorney Arthur H. Christy; Assistant
United States Attorneys Donald H. Shaw and Mark F. Hughes,
Jr. (S.D. N.Y.)

COURT REPORTING

Necessity of Reporting Proceedings in Full. It appears that in a number of districts it is the practice of court reporters not to record the closing arguments of counsel to the jury in criminal cases unless they are specifically directed to do so. Recently, in briefing a case in the Supreme Court involving a question as to the propriety of certain remarks in the prosecutor's argument, it was found that, although defense counsel's summation had been recorded and transcribed in full, his argument had not been recorded. Failure to record the closing argument of counsel places the government at a serious disadvantage in meeting claims of alleged error on appeal, inasmuch as the government is unable to argue that the challenged remarks of the prosecutor were fair rebuttal, without a transcript of defense counsel's argument.

The practice of a court reporter in recording closing arguments only to the extent that he is directed to do so is not in conformance with the statutory requirement that the reporter "shall record verbatim by shorthand or by mechanical means; (1) all proceedings in criminal cases had in open court * * *" (28 U.S.C. 753(b)). The Department interprets the language of the statute to mean that every word in such proceedings should be recorded. It is suggested that in districts where it is the practice not to record the proceedings in full that United States Attorneys make application to the court to take such corrective measures as may be necessary to assure compliance with the statutory requirement.

DEPENDENTS ASSISTANCE ACT

Extension of Act to July 1, 1963. Public Law 86-4, 86th Congress, approved March 23, 1959, extending the provisions of the Universal Military Training and Service Act, as amended, to July 1, 1963, also extends the provisions of the Dependents Assistance Act to July 1, 1963. Thus, the criminal provision of the Dependents Assistance Act, 50 U.S.C. App. 2213a, is also extended by virtue of the new legislation.

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

ADMINISTRATIVE SUBPOENA

Authority to Issue; Scope and Content; Application to Subject of Investigation. Lee Tin Mew v. Jones, (C.A. 9, April 10, 1959). Appeal from order of district court denying motion to quash order directing appellant to appeal and give testimony before immigration officer. Reversed.

The district director of this Service in Honolulu issued an administrative subpoena in 1958 under the provisions of section 235 of the Immigration and Nationality Act, (8 U.S.C. 1225) directing appellant to appear and give testimony before an investigator of this Service. Before the oath was administered by the investigator, he warned appellant that any statements the latter might make must be voluntary and might be used by the government against him in any subsequent criminal or deportation proceedings. Appellant answered only a few questions concerning his names and thereafter refused to answer further inquiries. The investigator then obtained an order from the United States district court ordering the alien to appear and testify. The Court thereafter denied a motion to quash the order and the present appeal followed.

The appellate court stated that the questions in this appeal would have been defined with clarity if the alien had appeared before the investigator after the Court sustained the subpoena and then based refusal to answer specific questions on various grounds available to him. He did not pursue this course, however, and both parties to the action claim that the district court's order is appealable. It was so held in United States v. Vivian, 217 F. 2d 882. The Court of Appeals said that the government did not in any of the proceedings lay sufficient foundation to establish the authority of the investigator to question the alien under the administrative subpoena. The order of the lower court, which approved the propounding of the questions asked and apparently directed the alien to answer each and every one, was said by the Court of Appeals to be clearly erroneous.

The Court reviewed the provisions of section 235 of the Immigration and Nationality Act and the purpose for which it authorizes the sworn examination of an alien or other person. The subpoena issued by the district director did not recite that the inspection was being made of any alien seeking "admission or readmission to or the privilege of passing through the United States"; that the appellant is a "person coming into the United States", who may be required "to state under oath" certain matters specified by the statute; that its purpose was to take evidence "touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, pass through or reside in the United States"; that appellant was an alien or person he believed or suspected to be an alien; and it did not so much as intimate that he was the subject of investigation but questions were nevertheless directed at him regarding his citizenship.

The Court said that section 235 seems to be geared to the examination of the qualification of a person arriving at the border to enter the country and reside therein. There is a question whether the statute was intended to require a person in the country to give evidence as to his citizenship (see Minker v. United States, 350 U.S. 179).

After appellant was warned that his testimony must be voluntary and that anything he said might be used against him in a civil or criminal proceeding, he was interrogated over a wide field. He was asked his occupation; whether he engaged in gambling; whether he had organized a certain club; what his occupation had been during World War II and whether he registered for the draft in that war. The Court questioned whether a person claiming to be a citizen could be required "voluntarily" to answer such questions when warned that his answers may be used against him simply because the investigating officer believes or suspects him to be an alien. He was asked questions about alleged members of his family and other individuals. Many of those questions might have been pertinent to his status as a citizen or an alien. His examination as actually conducted, seemed to the appellate court to afford little ground for the immigration officer to apply to the district court for the enforcement of the subpoena.

In addition, the petition to the district court for enforcement was subject to all the defects above noted to the subpoena itself. The order of the court recites none of the foundation for its action. Although the order recited that testimony was introduced, no evidence appeared in the transcript which might serve as a basis for the court's findings. The court merely ordered that appellant appear before the immigration officer and testify concerning his privilege to reside in the United States and any matter which was material and relevant to the enforcement of the Immigration and Nationality Act. This the appellate court said was apparently a blanket affirmation of the right of the immigration officer to inquire into all the matters gone into in the previous examination without any affirmative proof of the jurisdictional foundation for the command. The order was held to be erroneous.

Circuit Judge Pope, in a concurring opinion, stated that in United States v. Minker, it was decided that in view of the consideration of policy therein mentioned, it must be held that Congress had carefully differentiated between a witness who is not the subject of an investigation and the person who is. Although the Minker decision dealt with denaturalization proceedings and the appellant here was not the subject of that kind of investigation, he was clearly the subject of a similar investigation, namely, one looking to deportation. Judge Pope believed that the policy which was the basis of the Minker decision is one which has to do with deportation as well as denaturalization and the rationale which led to that decision is equally controlling here.

DEPORTATION

Fraudulently Obtained Visa; Material Misrepresentation to Deny Arrest. Ganduxe y Marino v. Murff, (S.D. N.Y., March 28, 1959). Declaratory judgment action to review validity of deportation order.

The alien in this case was ordered deported on the ground that he was excludable at the time of his last admission to the United States on November 28, 1955 because he had obtained his immigrant visa by fraud or by wilfully misrepresenting a material fact.

While in the United States as a visitor in 1953, he was convicted in New York City of the offense of loitering for the purpose of inducing men to commit acts against nature or other lewdness. He was fined \$25 or, in default of payment, was committed to the City prison for not to exceed ten days. The Court pointed out that the alien was not deportable on the ground that he had been convicted prior to his last entry for a crime involving moral turpitude, although his offense did involve that element, because of the provisions of the so-called Shepherders Act of September 3, 1954, (8 U.S.C. 1182a). That statute provided that a first offense involving moral turpitude should not be a ground for exclusion if it were a misdemeanor classified as a petty offense under section (1) (3) of Title 18 U.S.C. "by reason of the punishment actually imposed". The latter statute defines as a petty offense "any misdemeanor the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than \$500 or both". Since the punishment here was but \$25 or ten days, it was well within the limits established for petty offense by the United States Code.

On November 23, 1955, the alien submitted his application for a visa to the American Consul at Havana, Cuba, and in his application he swore that he had never been arrested. When interviewed by immigration authorities, he testified that he had so sworn when asked whether he had ever been arrested or convicted on his application for a visa because he believed that that question referred only to his record in Cuba. At his deportation hearing, however, he changed his story and said that he had not read the question and no one had read it to him, the word "never" having been filled in by a clerk at the American Consulate upon her referring to papers he had previously submitted to the Consulate.

The Court refused to accept the alien's explanation stating that his first voluntary statement that he thought the question related to arrest and conviction in Cuba was utterly inconsistent with his later claim that he did not know that he had signed a statement that he had never been arrested or convicted. Since that statement was false, the substantial question to be determined was whether his misrepresentation was material. The Court said that if the alien had disclosed his arrest for loitering to solicit homosexual acts an attempt almost certainly would have been made to exclude him under the provisions of the immigration law debarring aliens afflicted with psychopathic personality from obtaining a visa and from admission to the United States. Even though an attempt to prove that the alien is a homosexual might have been unsuccessful, since he presents in the deportation case a certificate from a physician that he was not such a person, the fact nevertheless remained that by his false statement that he had never been convicted of a crime, he succeeded in escaping an investigation by the Consular officer as to whether he was a homosexual. The Court said that a decision that an alien may make a false statement in his application for a visa in order to avoid the raising of a substantial question as to his eligibility and then, if he is caught in the false

statement after having successfully choked off investigation, may try out his eligibility as if nothing had happened would be an invitation to false swearing. The Court said that the rule in the Second Circuit was that while not every misrepresentation warrants a finding of fraud or materiality there must be a showing that the misrepresentation concealed facts which "might well have prompted a final refusal of the visa" or "might have resulted in a proper refusal of the visa".

Under the circumstances here presented, the alien was properly ordered deported.

* * *

INTERNAL SECURITY DIVISION

Acting Assistant Attorney General J. Walter Yeagley

Suits Against the Government. Leslie L. Barger v. L. Quincy Mumford (C.A. D.C.) On March 26, 1959, the Court of Appeals affirmed the lower court's judgment denying appellant's demand for reinstatement to his former probational position at the Library of Congress. Appellant, a veteran of World War II, was employed by the Library in a temporary position from February 3, 1954 to September 27, 1954. From September 27, 1954 to November 11, 1955, he was employed in a probational position, from which he was separated with thirty days' notice on the ground that he falsified his application for employment, Standard Form 57. The Court held that appellant was not entitled to be accorded the procedural protections of Section 14 of the Veterans' Preference Act, 5 U.S.C.A. 863, which admittedly he did not receive, because the Library of Congress is an agency in or under the legislative branch, and as such is excluded from the operation of the Act by the provisions of Section 20 thereof, 5 U.S.C.A. 869. The Court also held that even if the Library derived most or all of its funds to pay appellant's salary from an agency in the executive branch of the government, such would not change appellant's employment status from being that of an employee of an agency in or under the legislative branch. The Court also held: "Appellant contends that he was entitled to the special remedial procedures established by the Library of Congress to administer its security program. This contention is based on his claim that he was in fact separated from his position for reasons of national security, although the Librarian made no reference to that reason in the notice of separation, and now expressly states that he did not discharge appellant on any ground of national security. Appellant does not charge bad faith on the part of the Librarian but insists that the Librarian believed appellant to be a security risk, and that therefore we should treat appellant's discharge as though it were ordered for that reason. The Librarian had a wide discretion in choosing the ground upon which he should base his order separating appellant from his probational position. Without reaching the question whether the Librarian could have lawfully discharged appellant from his probational position without stating any reason, we have here a termination of employment made in good faith for a rational reason within the employer's discretion.

Staff: Oran H. Waterman and Benjamin C. Flannagan
(Internal Security Division)

* * *

LANDS DIVISION

Assistant Attorney General Perry W. Morton

WHERRY HOUSING

Right of United States to Condemn Subject to Mortgage and Valuation of Mortgagee's Interest. The Department has just filed in the United States Court of Appeals for the Seventh Circuit the first appellate brief on a Wherry Housing case, dealing with the right of the United States to condemn simply the interest of the mortgagee subject to the mortgage, and also with the principles of valuation which should be applied. This is on appeal from a decision in United States v. Certain Interests in Property in Champaign County, Illinois, 165 F.Supp. 474 (E.D. Ill. 1958). Extra copies of the brief are available and anyone interested is invited to request a copy by writing to Mr. Roger P. Marquis, Chief, Appellate Section, Lands Division.

* * *

TAX DIVISION

Assistant Attorney General Charles K. Rice

CIVIL TAX MATTERS
Appellate Court Decisions

Depletion Allowance: Coal Mining Contractors Held Not to Have Acquired Economic Interest and, Accordingly, Not Entitled to Deduction for Depletion. Parsons v. Smith and Huss v. Smith. The Supreme Court unanimously affirmed the Court of Appeals for the Third Circuit in these two cases. The question involved was whether coal mining contractors who, under contract with the owners of coal lands, extract coal for delivery to the owners at a fixed price per ton of coal extracted and delivered are entitled to a depletion allowance on income received by them under their contracts. Reaffirming the basic proposition that the purpose of the allowance for depletion is to permit the owner of a capital interest in a mineral deposit to make a tax-free recovery of his depleting capital asset and also reaffirming the principle that the particular legal form of his interest is not significant in determining whether a taxpayer is entitled to a depletion deduction, but that an economic interest in the mineral is sufficient for an allowance of the deduction, the Supreme Court agreed with the government's contention that the taxpayers in these cases did not acquire a depletable interest in the coal by virtue of their contracts with the coal land owners.

The Court held that nothing in the taxpayers' contracts indicated that they "made a capital investment in, or acquired an economic interest in, the coal in place, as distinguished from the acquisition of a mere economic advantage to be derived from their mining operations" and rejected the taxpayers' contention that their contribution of equipment, organizations and skill to the project, as required by their contracts, amounted to the "capital investment" necessary for an "economic interest". The Court considered that the taxpayers' contracts, which were terminable by the coal owners on short notice without cause, did not provide any factual basis for an assertion that the coal owners surrendered to the taxpayers "any part of their capital interest in the coal in place."

Staff: Howard A. Heffron, First Assistant, and Marvin W. Weinstein (Tax Division)

Liens; Government's Junior Tax Lien Divested When Mortgagee Confessed Judgment and Caused Real Property to Be Sold in Satisfaction of Senior Mortgage. United States v. William J. Brosnan, et al. (C.A. 3, March 26, 1959.) The taxpayers, George H. and Gladys M. Parkman, purchased Pennsylvania real property giving the vendor a note and purchase money mortgage in the amount of \$45,000. Subsequently, tax

liens for assessed taxes of the taxpayers and their corporation were recorded and duly attached to the property. When payment on the bond was in default the mortgagee caused judgment to be confessed on the bond and mortgage and a sheriff's sale was set. However, the sale was postponed while an order was obtained from the state court purporting to join the United States as a party to the foreclosure proceeding, under 28 U.S.C. 2410. The United States did not appear at the sale and the owners of the mortgage bought in for costs and taxes. A year later the government attempted to redeem the property from the sheriff's sale by offering to pay the purchasers the amount of their bid, but this offer was rejected.

This action was brought by the United States seeking alternative relief: (1) If the government was properly made a party to the state court proceeding under 28 U.S.C. 2410, it requested a decree that the property had been redeemed; (2) If the government was joined in the foreclosure proceeding, it prayed that its lien on the property be foreclosed under Section 7403 of the Internal Revenue Code of 1954. The district court held that while the government had not been made a party to the proceeding by the attempt to join it after judgment had already issued, nevertheless it was not entitled to foreclose its lien because the lien had been extinguished by the execution sale.

On the government's appeal, this analysis was affirmed. The Court refused to accept the proposition advanced by the government that tax liens are statutory and once they attach to property may be removed only as federal law permits (See 28 U.S.C. 2410; Internal Revenue Code of 1954, Sections 6325, 7403 and 7424.) The Court found that the tax lien evaporated when the taxpayer's rights in the property were cut off by the confession of judgment and execution sale which related back, under state law, to the date of the mortgage. The Court of Appeals specifically rejected contrary reasoning by the Ninth Circuit in Bank of America v. United States, decided February 2, 1959, 59-1 U.S.T.C., par. 9249, petition for rehearing pending, and by the Sixth Circuit in Metropolitan Life Insurance Co. v. United States, 107 F. 2d 311, preferring the reasoning in Boyd v. United States, 246 F. 2d 477 (C.A. 5), certiorari denied, 355 U.S. 899. Decision on whether to seek Supreme Court review of this case had not yet been made.

Staff: Assistant United States Attorney Thomas J. Shannon (W.D. Pa.); James P. Turner, George F. Lynch (Tax Division.)

Injunctive Relief: Suit to Restrain Sale of Taxpayer's Crops Under Jeopardy Assessment. Noel Smith v. Flinn (C.A. 8, March 25, 1959.) The District Director determined deficiencies in taxpayer's income taxes for the years 1955 and 1956, and made a jeopardy assessment on August 9, 1956 in the amount of \$375,000. The taxpayer was a farmer who grew corn, milo and soybeans. After petitioning the Tax Court, taxpayer filed a complaint in the district court seeking to enjoin the District Director from selling any of his property. A hearing was held, and at the conclusion of taxpayer's case the district court granted the Director's motion to dismiss.

Taxpayer appealed. The Court of Appeals reversed, and remanded the case with directions to enter an order restraining the District Director from selling any of the taxpayer's property in violation of Section 6863(b)(3) of the 1954 Code. See 261 F. 2d 781.

Section 6863(b)(3) of the Code, which is applicable to jeopardy assessments made on or after January 1, 1955, provides that "property seized for the collection of the tax shall not be sold" while proceedings are pending in the Tax Court unless the taxpayer consents to sale, or the cost of conserving the property is too great, or the property is determined to be perishable under Section 6336 of the Code. On the record then before it, the Court of Appeals found that the Director had sold some of taxpayer's property without making any determination that it was perishable, and without giving the taxpayer any opportunity to pay the appraisal value or post a bond as required by Section 6336. The Director relied solely on the provisions of Section 7421(a) of the Code prohibiting the maintenance of suits to restrain the assessment or collection of a tax, but the Court found that the facts gave rise to the special and extraordinary circumstances sufficient to bring the case within the recognized exception to this statutory rule. As an additional ground, the Court pointed out that it was "in no way restraining the assessment or collection of any tax" since the Director was simply "being prohibited from making a sale of seized property in contravention of Congressional edict".

The Director subsequently filed a petition for rehearing pointing out that the Court of Appeals had decided the case solely on the basis of the evidence offered by taxpayer, because the District Court had granted the Director's motion to dismiss at the conclusion of taxpayer's case before the Director had introduced any evidence. The petition was supported by affidavits of the District Director and Revenue Agents controverting the evidence of illegal sales of taxpayer's property. While the Court of Appeals denied the petition for rehearing, it did modify its prior order by remanding the case to the district court to hold a further hearing on the facts and to enter judgment accordingly.

Staff: United States Attorney Harry Richards and Assistant
United States Attorney John A. Newton (E.D. Mo.)

District Court Decisions

Bankruptcy; Allowance of Penalty Lien Arising Prior to Bankruptcy and Denial of Deficiency Judgment for Post Bankruptcy Interest and Penalties. In the Matter of Harvey and Florence Mighell (D. Kansas, December 30, 1958). On April 30, 1953, the bankrupts instituted a proceeding for an arrangement under Chapter XII of the Bankruptcy Act. Subsequently on July 9, 1956, they were adjudicated bankrupt and on November 5, 1956, a general order of discharge was entered. The relevant facts, as to which there was no dispute, were that as of the date of bankruptcy a tax assessment had been made and a lien had arisen against the bankrupts for a tax deficiency in the amount of \$78,312.26

and that interest had accrued thereon to the date of bankruptcy in the amount of \$26,931.35 making a total of \$105,243.81. In addition the United States claimed a penalty under Sec. 293(b) in the sum of \$46,798.38 which lien arose before the date of bankruptcy. Notices of liens were filed as to the penalty and the tax deficiency prior to bankruptcy. Other penalties under Sec. 294 (d) in the sum of \$14,132.62 were not assessed prior to bankruptcy and therefore no lien arose as to them prior to bankruptcy.

The referee's order, which was affirmed by the District Court held that the taxes and interest accrued thereon to the date of bankruptcy in the amount of \$105,243.81 were an allowable claim; that the penalty in the sum of \$46,798.38 was allowable, but only to the extent of the value of the security; and that the penalties and post-bankruptcy interest were discharged by the general order of discharge and do not survive bankruptcy, so that the United States was not entitled to a deficiency judgment.

While Section 57(j) of the Bankruptcy Act provides that debts owing to the United States as penalties are not to be allowed, except for the amount of the pecuniary loss sustained by the act giving rise to the penalty, the referee and the District Court in allowing the United States penalties to the extent of the lien stated they were bound by the decision in Grimland v. United States, 206 F. 2d 599 (C.A. 10) which held that where a lien for penalties arose prior to bankruptcy the claim may be enforced to the extent of the lien.

Decision has not been reached as to whether appeal shall be prosecuted as to that part of the judgment which held that the United States is not entitled to a deficiency judgment with respect to unrecovered penalties and post-bankruptcy interest.

Staff: United States Attorney Wilbur G. Leonard and Assistant
United States Attorney E. Edward Johnson (D. Kansas);
Paul T. O'Donoghue (Tax Division)

Liens; Relative Priority Between Federal Tax Lien and Wage Claims.
Edward E. Cook v. Wyco Construction Company, Inc., United States, And
Others, Interveners (3 AFTR 2d 940, DC Col., 1959.) This action was brought by Cook, an employee of the defendant, Wyco Construction Company, to obtain a judgment against the Company on behalf of himself and all other employees similarly situated for wages due for services performed. A garnishee named in the complaint, Continental Oil Company, deposited the amount owed by it to Wyco Construction Company, Inc., \$5,382.04, with the Court and was discharged. Interveners in this action include: the United States claiming under a tax lien for withholding and FICA taxes in the amount of \$2,745 filed on February 18, 1957, the Continental Oil Company claiming \$1,473.18 for services performed for Wyco Construction Company, Inc., and the First National Bank of Fleming claiming all of the amount deposited under accounts receivable which it alleged had been assigned to it by Wyco Construction Company, Inc., and notice of which

assignment had been given to the Secretary of State of Colorado on November 5, 1956. The wages claimed by Cook and the other employees represented were earned during 1956.

On the evidence presented at the trial, the Court found that Wyco Construction Company, Inc., "withheld from wages paid to the plaintiffs the sum of \$1,262.54 as and for federal withholding tax, and the sum of \$198.06 as and for Social Security taxes, and the defendant is further liable to the United States Government for its share of the employees' Social Security taxes in the amount of \$202.44." Judgment was given the government for these amounts, and it was held to have a prior lien in this amount against property of Wyco Construction Company, Inc., including the amount deposited in the registry of the Court.

The claim of the Bank under its assignment of accounts receivable was held to be invalid as against the employees of Wyco Construction Company, Inc., because of a finding that the President of the Bank and the President of Wyco Construction Company, Inc., who was subject to the control of the former, "acted together to further the interests of the Bank at the expense of the defendant", in that they agreed to divert Wyco Construction Company's assets to the Bank.

The wage claims, which had not been reduced to judgment, were subordinated to the tax lien. The record does not indicate whether the wage claimants actually asserted that they had a prior lien to that of the government or, if such lien was asserted, the basis therefor. The Court cites no authorities in its opinion, although the case can probably be cited as following United States v. White Bear Brewing Company, 350 U.S. 1010, in that a federal tax lien was accorded priority over the unperfected and inchoate claims for wages which under state law probably had a lien status (see paragraph 12 of the opinion).

Staff: United States Attorney Donald E. Kelley, and Assistant United States Attorney Tom O. Kimball (D. Colo.); Harrison B. McCawley (Tax Division)

State Court Decision

Liens; Federal Taxation; Filing of Lis Pendens in State Court Foreclosure Action Effectively Cuts Off Subsequently Filed Federal Tax Lien. Puritan Dairy Products Co. v. Christoffers, et al. (Sup. Ct. N.J., Chancery Div., Union County, CCH 59-1 U.S.T.C. par. 9304.) The complaint in this case was filed to foreclose a mortgage given by defendants to plaintiff. The foreclosure suit proceeded to judgment and public sale. The property was bid in at the sale, but subsequently the bidder discovered, through title examination, that after the filing of the lis pendens in the cause three federal tax liens had been filed against one of the defendants. Thereupon, the bidder moved to be relieved of her bid, contending that there were federal tax liens outstanding against the property which had not been disclosed to her at the time of sale. The bidder conceded that the lis pendens had been properly filed

pursuant to the state statutory provision stating that any person claiming a lien upon the real estate would be bound by any judgment entered in the suit in which the lis pendens was filed as though such lien-holder had been made a party to the suit and served with process. However, the bidder claimed that such statutory provision was not binding upon the United States.

Held, a federal tax lien is discharged by a state court foreclosure when the lien is recorded after a lis pendens has been filed. The Court, in so holding, stated that there is no reason why the lien of the Federal Government should not be just as effectively discharged in a foreclosure suit conducted according to the state statute as are other liens, when a lis pendens is properly filed under the lis pendens statute. It is submitted that the Court's decision is erroneous in two regards.

In the first place, the Court appears to have found that a federal tax lien does not arise until it is filed in the proper recording office. Having thus found, the Court was able to say that the tax lien arose subsequent to the lis pendens, and, therefore, was effectively discharged upon entry of judgment in the lis pendens action. This conclusion on the part of the Court is directly contrary to the provision of Section 6322 of the Internal Revenue Code of 1954, which provides that the tax lien shall arise at the time the assessment is made. The lien exists from date of assessment as an encumbrance on taxpayer's property, and its status as an encumbrance persists, of course, even though the lien may be invalid as to a particular mortgagee because the lien was filed subsequent to the mortgage. The filing date of the lien is controlling vis-a-vis the lien and the mortgage, but the assessment date constitutes the effective date of the lien as an encumbrance against the property. Thus, in the instant case if the tax assessment was made prior to the filing of the lis pendens (the Court's opinion does not relate when the assessment was made), the United States stood in the position of a lienor prior to notice by lis pendens, and its rights would not be affected by the filing of said lis pendens. See N. J. S. 2A:15-8.

It is submitted that the Court erred in the second regard by holding that the instant foreclosure proceeding could effectively discharge the federal tax lien. This attempt to eliminate the federal tax lien by the State Court action runs contrary to the intention of Congress expressed in 28 U.S.C. 2410. In Section 2410, Congress has not only provided the manner in which the federal tax lien is to be removed by a mortgagee or other lienholder desiring to remove it, but also has provided that where the priority of the United States is beneath that of the mortgagee, as in the instant case, the United States shall have the right to redeem within one year. The decision of the Court herein has completely eliminated the statutory right of the United States to redeem. It is noted that for authority the Court has cited United States v. Boyd, 246 F. 2d 477 (C.A. 5, 1957), cert. denied, 355 U.S. 889. The decision in the instant case appears to be an extension of the Boyd doctrine which would permit extinction of the federal tax lien through the particular state court procedure. In recent decisions, the government's opposition to the Boyd result has been sustained in Bank

of America v. United States, 59-1 U.S.T.C. para. 9348 (C.A. 9, 1959),
but rejected in Brosnan v. United States, 59-1 U.S.T.C. para. 9249 (C.A. 3,
1959) reported in this issue of the Bulletin, supra. The United States
was not a party to this proceeding and, therefore, cannot appeal.

Staff: Frank W. Rogers, Jr. (Tax Division)

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