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

January 15, 1960

United States

DEPARTMENT OF JUSTICE

Vol. 8 No. 2

UNITED STATES ATTORNEYS

BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 8 January 15, 1960 No. 2

OBITUARY

It is with sincere regret that the Executive Office for United States Attorneys announces the death on December 25, 1959 of Assistant United States Attorney Cavett S. Binion, Northern District of Texas. Mr. Binion, who had served as an Assistant since May, 1944, had been for many years in charge of the Criminal Division of the office and was well known throughout the District as an extremely able trial lawyer. In paying tribute to his ability, the Chief Judge of the District termed Mr. Binion one of the most efficient and hard-working attorneys ever to appear before him.

MONTHLY TOTALS

As of November 30, 1959, totals in civil cases and criminal matters were up. However, the sharp drop in pending triable criminal cases kept the increase in the over-all total of pending cases and matters to a minimum. The following comparison shows the caseload pending on October 30 and at the end of the preceding month:

	October 31, 1959	November 30, 1959	
Triable Criminal	7,716	7,314	-402
Civil Cases Inc. Civil Tax Less Tax Lien & Cond.	14,081	14,310	+229
Total	21,797	21,624	-173
All Criminal	9,390	9,004	-386
Civil Cases Inc. Civil Tax & Cond. Less Tax Lien	16,685	16,908	+223
Criminal Matters	10,616	10,846	+230
Civil Matters	13,277	13,239	- 38
Total Cases & Matters	49,968	49,997	+ 29

More cases have been filed during the first five months of fiscal 1960 than during the similar period of the previous year and terminations have also risen during the same period. Despite the fact that a total of 2,394 more cases were filed than were terminated, the pending caseload was reduced from the same period of the previous year. The following table shows the comparative achievements of both years:

		1st 5 Months F. Y. 1959	1st 5 Months F. Y. 1960	Increase or Decrease Number	%
Filed					
Criminal		12,233	12,664	+431	+3.5
Civil		9,753	10,108	+355	+3.6
	Total	21,986	22,772	+786	+3.6
Terminated					
Criminal		11,012	11,626	+614	+5.6
Civil		9,168	8,752	-416	-4.5
	Total	20,180	20,378	+198	+1.0
Pending					
Criminal		8,591	8,529	- 62	- .7
Civil		19,703	19,633	- 70	- .4
	Total	28,294	28,162	-132	- .5

For the month of November 1959, United States Attorneys reported collections of $2,448,378. This brings the total for the first five months of this fiscal year to $11,067,516. This is $3,847,445 less than the $14,914,961 collected in the first five months of fiscal year 1959.

During November 67 suits were closed in which the government as defendant was sued for $3,173,879. 33 of them involving $1,425,472 were closed by compromise amounting to $202,213. In 10 of them involving $895,055, judgment against the government amounted to $211,828. The total saved in these suits amounted to $1,206,423. The amount saved for the first four months of fiscal year 1960 was $11,432,467 and is a decrease of $6,984,734 from the $18,327,201 saved during the first five months of the previous fiscal year. The remaining 24 suits involving $853,352 were won by the Government.

DISTRICTS IN CURRENT STATUS

As of November 30, 1959, the districts meeting the standards of currency were:

CASES

Criminal

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

Civil

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

MATTERS

Criminal

Ala., N.	Idaho	Miss., N.	Ohio, S.	Utah
Ala., M.	Ind., N.	Miss., S.	Okla., N.	Vt.
Ala., S.	Ind., S.	Mont.	Okla., E.	W.Va., S.
Alaska #3	Iowa, N.	Neb.	Okla., W.	Wis., E.
Ariz.	Iowa, S.	N. H.	Pa., W.	Wis., W.
Ark., E.	Ky., E.	N. J.	P. R.	Wyo.
Calif., N.	Ky., W.	N. Mex.	R. I.	C. Z.
Conn.	La., W.	N. C., E.	S. D.	Guam
Ga., S.	Me.	N. C., M.	Tenn., E.	V. I.
Hawaii	Md.	N. C., W.	Tenn., W.	

Civil

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

QUESTIONNAIRE

Replies to the recent questionnaire on United States Attorneys Manuals registered a new high for promptness and completeness. A total of 90 districts out of 94 responded with remarkable promptness and accuracy, thus establishing a new record for percentage of response, without the need for follow-up letters. This type of cooperation is very much appreciated.

JOB WELL DONE

The Chief of the Rights-of-Way Section, Department of Agriculture, has expressed appreciation of the outstanding manner in which Assistant United States Attorney Leo C. Rodkin, Southern District of California, handled a recent condemnation case.

Assistant United States Attorney Patrick H. Shelledy, Eastern District of Washington, has been complimented by the District Attorney in Charge, Department of Agriculture, for the efficient and expeditious manner in which he took care of a recent civil case.

The Legal Adviser, Department of State has expressed appreciation and congratulations for the splendid manner in which Assistant United States Attorneys Robert J. Asman and Harold D. Rhynedance, Jr., District of Columbia, handled some recent civil cases.

The Director, Federal Bureau of Investigation has commended United States Attorney Donald G. Brotzman and Assistant United States Attorney Robert Wham, District of Colorado, for their cooperation on a recent bank robbery case. The Director stated that it was through their able handling of the case that the matter came to a successful conclusion.

Assistant United States Attorney W. Farley Powers, Eastern District of Virginia, recently served as a Career Day Consultant at Virginia State College, Norfolk Division, in the College's Workshop on Law and Government. His work there has been highly commended by both the Faculty Sponsor and Guidance Counselor of the College who reported that the students were united in their commendation of Mr. Powers' participation.

The State's Attorney of Cook County, Illinois, has commended United States Attorney Robert Tieken and his staff, particularly Assistant United States Attorneys Glenn Heyman and James D. Montgomery, Northern District of Illinois, on their fine presentation of a recent narcotics case. In expressing deep appreciation for the cooperation rendered by Mr. Tieken and his staff, the State's Attorney observed that the conviction is an example of what can be accomplished when the prosecuting arms of the local and federal governments combine to serve the public interests.

Assistant United States Attorney Thomas D. Ireland, District of the Virgin Islands, has been commended by the Attorney General of the Virgin Islands on his handling of a recent murder case which was one of first impression under the newly revised statute relating to mental illness.

In paying tribute to Mr. Ireland's excellent and lawyer-like approach to the case from the initial interviewing of Government witnesses to the settlement of the instructions and argument to the jury, the Attorney General stated that had it not been for his grasp of the psychiatric aspects of the evidence, as produced through expert witnesses, and the unique problem of the statute, the case probably would have ended differently and have established a burdensome precedent in the Virgin Islands.

The General Counsel, Securities and Exchange Commission, has expressed to United States Attorney Don A. Tabbert and Assistant United States Attorneys Phil Melangton, Jr. and John C. Vandivier, Jr., Southern District of Indiana, congratulations and sincere appreciation for the tremendous job they performed in a recent case, and stated that the successful results are a tribute to the superior manner in which the case was handled. The case was a difficult criminal prosecution in which the results were accomplished without the benefit of the Government's chief witness who was disabled with a heart condition.

United States Attorney Paul W. Cress, Western District of Oklahoma, has been commended by the Director, Bureau of Inquiry and Compliance, Interstate Commerce Commission, for his cooperation in the successful prosecution of a recent case.

The Chief Inspector, Post Office Department, has commended United States Attorney Jack D. H. Hays, District of Arizona, for the public interest he displayed in causing the prompt arrest of an individual involved in a mail fraud case following presentation of the case to Mr. Hays by a local postal inspector. The Chief Inspector stated that the prompt attention given the matter was deeply appreciated.

In a year-end letter to United States Attorney Robert Tieken, Northern District of Illinois, expressing appreciation for the cooperation and assistance received throughout the year from Mr. Tieken and his staff, the District Director of Immigration and Naturalization specifically commended Assistant United States Attorneys A. F. Manion, Chief of Criminal Division, George E. Sweeney, Chief of Civil Division, John F. Grady, P. D. Keller, Burton Berkeley, Donald S. Manion, E. M. Walsh, Robert M. Caffarelli, Howard Kaufman, J. D. Montgomery, J. B. Parsons and J. J. Quan for their skill in preparation and presentation of cases, and Assistants John P. Lulinski and Charles R. Purcell for their very excellent presentation of cases in the Court of Appeals.

* * *

ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

Notice to Federal Housing Administration of Expenses

In the Bulletin of February 13, 1959, United States Attorneys were advised of an agreement with the Federal Housing Administration that expenses chargeable to that agency under the Comptroller General Decision of November 3, 1958, 38 C.G. 343, might be incurred up to $100 without notice to the FHA. There was an exception that advertising expenses of whatever amount, pursuant to court order or statute, need not be reported to the FHA in advance even if the cost exceeded $100. (Bulletin of June 19, 1959.) Expenses in excess of the $100, except for advertising charges, are required to be reported to the FHA before incurrence.

The Federal Housing Administration has reported an instance of the appointment of a referee to determine the amount due on a note, to advertise and hold a sale, and to execute proper conveyance. For performing these services the referee was allowed a fee of $1,500. The Federal Housing Administration was not advised of this expense in advance and feels that it should have been notified.

If your office has information to the effect that the court intends to appoint a referee or other officer to perform certain duties in consequence of which fees will be allowed, you should advise the Federal Housing Administration if it is anticipated those fees will exceed $100.

In the $1,500 instance referred to above, the Federal Housing Administration points out that the referee performed no services that could not have been done by a United States Marshal without charge to the United States. If you become aware of the possibility of a similar appointment by your court, it would be in the interests of the Government if you took up with the court the advisability, from a monetary standpoint, of permitting the Marshal to perform these services at no extra cost.

The following Memoranda applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 23, Vol. 7, dated November 20, 1959.

ORDER	DATED	DISTRIBUTION	SUBJECT
198-59	11-12-59	U.S. Attorneys	Delegating to the Assistant Attorney General, Civil Rights Division, Certain Authority of the Attorney General Relating to Proceedings Against Juveniles.

MEMO	DATED	DISTRIBUTION	SUBJECT
256-1	12-1-59	U.S. Attorneys	Correspondence with other government agencies re: status of cases - Federal Housing Administration.
255 R1	12-11-59	U.S.Attys and Marshals	Social Security Fund Deductions.
173 S-11	12-16-59	U.S. Attys and Marshals in Alaska and Panama, Canal Zone	Per Diems in Lieu of Subsistence-Districts Outside Continental U.S. and Alaska.
184 S-4	12-28-59	U.S. Attys and Marshals	Position Schedule Bonds for 1960-61.

* * *

ANTITRUST DIVISION

Acting Assistant Attorney General Robert A. Bicks

SHERMAN ACT - CLAYTON ACT

Price Fixing - Automobiles; Section 1 of Sherman Act - Section 3 of Clayton Act. United States v. Renault, Inc., et al., (S.D. N.Y.). On December 28, 1959 a civil complaint was filed against Renault, Inc., Peugeot, Inc., and 16 distributors of Renault and Peugeot automobiles in the United States, charging a violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act in connection with the sale and distribution of Renault and Peugeot automobiles and parts.

Renault and Peugeot automobiles are imported into the United States by Renault, Inc., and Peugeot, Inc., and are distributed throughout the country by the 16 distributors who resell to over 700 dealers. In 1958, retail sales of new Renault and Peugeot automobiles in the United States amounted to approximately $85,000,000 out of an estimated total of $700,000,000 for all new foreign cars.

The complaint charges that Renault, Inc., and Peugeot, Inc., and their distributors and dealers have fixed wholesale and retail prices of Renault and Peugeot automobiles and parts, and that exclusive sales territories have been allocated to Renault and Peugeot distributors and dealers. The complaint further charges that Renault and Peugeot distributors and dealers have agreed not to sell new automobiles or parts other than Renault and Peugeot automobiles and parts.

The complaint seeks injunctive relief against continuance of the restrictive practices.

Staff: John D. Swartz, Morris F. Klein, John H. Clark and Bernard Wehrmann (Antitrust Division)

CLAYTON ACT

Monopoly - Petroleum; Section 7 Case. United States v. The Standard Oil Company (Ohio) et al., (E.D. Mich.). A civil antitrust complaint was filed on December 31, 1959 at Detroit charging that an agreement, dated October 12, 1959, between The Standard Oil Company, an Ohio corporation, and Leonard Refineries, Inc., a Michigan corporation, whereby all the properties and assets of Leonard would be transferred to Sohio, may substantially lessen competition or tend to create a monopoly, in violation of Section 7 of the Clayton Act.

The Government also filed a motion for a preliminary injunction to enjoin the consummation of the acquisition pending a determination on the merits of the issues raised by the complaint.

Sohio is alleged to be one of the largest integrated companies in the petroleum industry, ranking fourteenth in terms of domestic refining capacity. In 1958 its assets were approximately $400,000,000, and its gross income in that year was more than $390,000,000. It is engaged in the production of crude oil, and in the refining, transportation and marketing of crude oil and refined petroleum products, including operations in the State of Michigan.

Leonard is alleged to be the largest independent petroleum company in Michigan, and the second largest independent petroleum company operating in those areas of the United States which supply the Michigan market with substantially all of its gasoline and distillate fuels. In 1959 Leonard's assets were in excess of $33,000,000, and its sales were in excess of $54,000,000. Leonard is alleged to control about 65 per cent of the crude oil produced in Michigan, and its refining capacity is about three times as great as that of the next largest independent refiner in Michigan.

According to the complaint, Sohio and Leonard compete with each other in the production and sale of refined petroleum products, including gasoline, distillate fuels, jet fuel, heavy fuel oil and naphtha. They are alleged to be substantial factors in the marketing of refined petroleum products in Michigan.

The suit charges that the effect of the proposed acquisition by Sohio of Leonard will eliminate competition between them and will enhance Sohio's competitive advantage over smaller competitors in Michigan. It further alleges that concentration in the industry involved will be increased with consequent deterrence to new entrants. It also charges that Leonard will be eliminated as a substantial competitive factor in the industry and as a substantial actual and potential source of supply for purchasers of refined petroleum products.

Staff: Robert B. Hummel and Robert M. Dixon (Antitrust Division)

SHERMAN ACT

Restraint of Trade-Incentive Planning Services; Section 1 Case. United States v. The E. F. MacDonald Company, (S. D. Ohio). On December 30, 1959 a civil complaint was filed, charging the E. F. MacDonald Company with violating Section 1 of the Sherman Act in connection with the incentive planning industry.

Incentive planning is a service performed by an organization which devises, installs and administers employee incentive programs for business concerns. Generally the program culminates in the award of merchandise or other prizes to successful contestants. The prizes are purchased by the subscribing company from the incentive planners.

Incentive programs devised and administered by MacDonald accounted

for more than 70 percent of the dollar volume of business done by incentive planners in the United States during the year 1958. During that year MacDonald's gross income from the incentive planning business was more than $27,000,000 which was seven times greater than that of any other incentive planner.

The complaint charges a combination and conspiracy pursuant to which suppliers of MacDonald agreed with MacDonald to refrain from selling merchandise to incentive planners other than MacDonald.

On the same day a consent judgment was entered enjoining the defendant from continuing the practices alleged to be unlawful.

Staff: Robert B. Hummel, Norman H. Seidler, Robert M. Dixon and Stewart J. Miller (Antitrust Division)

Price Fixing - Groceries; Section 1 Case. United States v. San Diego Grocers Association, Inc., et al. (S.D. Calif.). A civil antitrust suit has been filed, charging the San Diego Grocers Association, Inc., a trade association of retail grocers operating in San Diego and Imperial counties, California, and eleven grocery chains, with violating Section 1 of the Sherman Act.

The complaint charges that since 1949, defendants have conspired to (a) establish and maintain minimum prices and uniform terms and conditions, including uniform charges for cashing checks in the sale of groceries; (b) refrain from advertising groceries at less than the minimum prices agreed upon among themselves; and (c) induce grocers not a party to the conspiracy to adopt and adhere to the prices and terms agreed upon by defendants. Defendants are also charged with trying to induce grocers outside San Diego and Imperial counties to adopt the same unlawful agreement.

By way of relief, the complaint prays inter alia, that defendants and each of them and their successors, officers, directors, etc., be perpetually enjoined and restrained from carrying out, directly or indirectly, the combination and conspiracy in restraint of interstate trade and commerce; that they be perpetually enjoined and restrained from participating in any agreements or understanding have the purpose of continuing, reviving, or renewing the imposing, or otherwise levying, of a charge for the cashing or accepting of checks or other similar negotiable instruments.

Staff: George B. Haddock, James M. McGrath, Stanley E. Disney and Maxwell M. Blecher (Antitrust Division)

* * *

CIVIL RIGHTS DIVISION

Acting Assistant Attorney General Joseph M. F. Ryan, Jr.

Prison Brutality; Deprivation of Due Process Under 14th Amendment; Violation of 18 U. S. C. 242. In September 1958, the Department received a complaint that prisoners in the Maximum Security Building of the Florida State Prison at Raiford were receiving brutal treatment for petty offenses.

An extensive investigation by the Federal Bureau of Investigation revealed that many inmates of the Maximum Security Building had been chained to the bars of their cells for periods ranging from 24 hours up to ten days. In many cases the prisoners so chained were denied food or clothing. While secured to the bars of their cells many were hosed with water under high pressure. Other forms of mistreatment also were employed in some instances.

The evidence developed by the Bureau was presented to a federal grand jury sitting at Jacksonville commencing in October. As a result, 21 indictments were returned on December 15th charging the former Captain of the Guards at the Prison and the former Lieutenant in charge of the Maximum Security Building, as well as 12 other guards and former guards with numerous counts of violating section 242 of Title 18 U. S. C. in addition to two indictments charging conspiracy, one under section 241 and one under section 371.

Staff: Acting Assistant Attorney General Joseph M. F. Ryan, Jr., and John L. Murphy, Philip J. Bassford and Frank M. Dunbaugh (Civil Rights Division)

* * *

CIVIL DIVISION

Assistant Attorney General George Cochran Doub

SUPREME COURT

ADMIRALTY

Personal Injury; Warranty of Seaworthiness Not Extended to Shore-Based Employee of Government Contractor Performing Reactivation Repairs; Ship Owner Not Obliged to Provide Safe Place to Work on Ship Being Totally Reconditioned, When Ship Owner Has No Control Over Repairs and Turned Vessel Over Without Concealing Hidden Defects. West v. United States (Supreme Court, December 7, 1959). The SS MARY AUSTIN, a Government vessel, had been totally deactivated and in the "mothball fleet" for several years when, in 1951, it was ordered reactivated. Atlantic Port Contractors, Inc., libelant West's employer, contracted to overhaul and reactivate the vessel completely, to clean and repair all water lines, replacing defective or missing plugs, and to test such lines before closing and placing them in active operation. West was injured while performing repairs on the main engine when a plug from one of the vessel's water lines was forced out, striking him on the knee. He sought to recover on the theories that the vessel was unseaworthy because of the insecurely fitted plug and that the Government was negligent in not providing him with a safe place to work. Both contentions were rejected by the Supreme Court, as they had been by the district court and the court of appeals.

The Supreme Court found the doctrine of Seas Shipping Co. v. Sieracki, 328 U.S. 85, inapplicable. In the Sieracki line of cases, the vessels were in active maritime service. Moreover, since they were involved in the course of loading or unloading cargo pursuant to a voyage, the shore workers-longshoremen in those cases were held to be doing seamen's work and incurring seamen's hazards. The MARY AUSTIN, however, had been withdrawn from operation for several years and the reactivation contract represented that she was not seaworthy and that major repairs would be necessary before she would be seaworthy. The Court held that it would be "an unfair contradiction to say that the owner" of the MARY AUSTIN "held the vessel out as seaworthy" when the work being performed was part of a complete overhauling to make her seaworthy. The test, said the Court, "should be . . . the status of the ship, the pattern of the repairs, and the extensive nature of the work contracted to be done, rather than the specific type of work that each of the numerous shore-based workmen are doing on shipboard at the moment of injury." Accordingly, the doctrine of seaworthiness was held inapplicable here.

Unlike the doctrine of seaworthiness, which is a form of absolute liability, the Court stated that the duty to furnish a safe place to work can establish no basis of liability apart from fault. In the case at bar, the Government, having no control over the vessel or the repair work during the reactivation process and having turned the vessel over with full

notice of all defects, had no further duty with regard to providing West with a safe place to work. Having hired the contractor to reactivate the vessel, the Government "was under no duty to protect petitioner from risks that were inherent in the carrying out of the contract."

Staff: Leavenworth Colby; Herbert E. Morris (Civil Division)

COURTS OF APPEALS

COMMODITY CREDIT PROGRAM

Administrative Determination of Factual Questions; District Court Cannot Re-examine Factual Determinations of County Committee Not Contested in Administrative Process. United States v. Jeffcoat (C.A. 4, November 20, 1959). Defendant, a cotton farmer, was notified in June 1956 that he had overplanted his acreage allotment for the 1956 crop year. He was told that he could dispose of the excess, but was to inform the county Agricultural Stabilization and Conservation Committee of that fact. Upon defendant's failure to inform the Committee of a disposal of the excess, he was notified that a penalty would be levied based on the yield of the excess acreage. He was told on several occasions that, if he did not submit evidence to the Committee as to the actual yield, the penalty would be assessed in accordance with the normal yield for the area. Defendant ignored all these notices and requests. In March 1957 he was notified that a $1,969.83 penalty was due and payable.

The Government instituted this action to recover the penalty. The district court allowed the defendant to enter evidence as to the actual yield of his excess acreage. From this evidence, the district court found that defendant had plowed under all but one of the excess acres and that that acre yielded only one bale of cotton. On the basis of the value of that bale, the court entered judgment for the United States for $80.

The Court of Appeals reversed, holding that, as defendant had not availed himself of the many opportunities to show administratively that his actual yield was different from the normal, he could not now be heard on the subject. The Court pointed out that the statutory requirement of prompt administrative determination of such factual questions was intended to prevent just what occurred in this case in district court: an evidentiary tangle in which a decision had to be based on credibility.

Staff: United States Attorney N. Welch Morrisette, Jr., Assistant United States Attorney George E. Lewis (E.D. S.C.)

GOVERNMENT EMPLOYEES

Federal Employee's Resignation, Submitted After Presentment With Alternative of Resigning or Facing Dismissal Charges, Held Not Coerced. Rich v. Mitchell (C.A.D.C., November 27, 1959). After the Department of Labor's acceptance of his resignation and his unsuccessful attempt to repudiate it, plaintiff brought an action against the Secretary of Labor for reinstatement, contending the resignation had been coerced. The complaint alleged that the Department's Director of Personnel informed plaintiff that the Department intended to institute dismissal charges against him, based on falsification of application forms, if he did not resign by a certain date. Plaintiff alleged that he became "frightened and upset" and submitted his resignation as a result of being presented with the alternatives of resigning or facing the charges. The district court granted summary judgment for the Secretary. The Court of Appeals affirmed, holding that plaintiff's allegations did not show that the conduct of the Personnel Director amounted to coercion. The Court noted that the plaintiff did not allege "that the Director knew or believed that the proposed charges were false."

Staff: William E. Mullin (Civil Division)

NATIONAL SERVICE LIFE INSURANCE

Period of Limitations; Congress, by Extending Period to File Administrative Claim from Five to Seven Years, Did Not by Implication Extend Period in Which to File Suit for Judicial Review. Germana E. Prado Del Castillo v. United States (C.A. 9, November 19, 1959). Plaintiff on June 11, 1948, filed a National Service Life Insurance claim with the Veterans Administration, claiming entitlement to benefits as the beneficiary of a serviceman killed in action on April 3, 1942. On July 31, 1956, plaintiff was notified that her claim was denied. Less than thirty days after an appeal to the Administrator of Veterans Affairs was dismissed, plaintiff filed suit in district court. That court dismissed her action holding that it was barred by the expiration of the six-year period of limitations on judicial actions on National Service Life Insurance claims. 38 U.S.C. 784.

On appeal, plaintiff recognized that more than six years had passed before she had filed her claim with VA, but asserted that (1) Congress had extended by implication the limitation period for court review to seven years when in 1948 it extended the period for filing administrative claims from five to seven years, 54 Stat. 1014, 38 U.S.C. 802(d)(5) (1952), and (2) by the force of 38 U.S.C. 784 the period of limitations was tolled while the administrative claim was being adjudicated. The Court of Appeals affirmed, holding that, as waivers of sovereign immunity are to be strictly construed, an extension of a period of limitation would not be implied, and that there existed no evidence of a congressional intent to extend the limitation period here applicable.

Staff: United States Attorney Jack D. H. Hays; Assistant United States Attorney Mary Anne Reimann (D. Ariz.)

SOCIAL SECURITY

Substantial Evidence Rule Applies to Factual Inferences Drawn by Referee and Appeals Council; Where Such Inferences Differ, Courts Are To Determine Which Are Supported by Substantial Evidence. Heikes v. Flemming (C.A. 7, December 2, 1959). Michael Heikes was born of plaintiff's marriage to one Hodges in January 1953, several months after the parties to that marriage separated. In February 1955, Michael's parents were divorced and Hodges was directed to pay $7.50 per week for Michael's support. In April 1955, plaintiff married one Heikes. Michael lived with a grandparent before plaintiff remarried and for two months thereafter. He then became a part of the separate household of the plaintiff and Heikes. In October 1955, Michael's natural father, Hodges, died. Plaintiff thereafter filed a claim with the Social Security Administration, asserting entitlement for child's benefits on behalf of Michael. Upon denial of the claim by the Social Security Administration, a hearing was held by a referee. The only question was whether Michael was ineligible for child's benefits because more than half of his support came from his stepfather, 42 U.S.C. 202(d)(3). The evidence as to the support furnished by Heikes, the plaintiff, and the grandparent during the period that Michael lived in the Heikes household was largely undisputed. The issue devolved to the inferences to be drawn from that evidence. The referee concluded that Heikes had not furnished Michael with one half of his support and therefore found an entitlement for benefits. Upon review, the Appeals Council reversed, drawing inferences different from those determined by the referee. The district court reversed the Appeals Council and reinstated the award, holding that there existed no substantial evidence to support the Appeals Council decision.

The Court of Appeals affirmed. In so doing, it rejected the Government's argument that this was not a question of substantial evidence but one of policy determinations on the part of the Secretary as to the inferences to be drawn from facts established by the evidence. The appellate court determined that, whereas substantial evidence supported the referee's findings, no substantial evidence supported that of the Appeals Council.

Staff: Alan S. Rosenthal (Civil Division)

TRANSPORTATION ACT OF 1940

Section 322; Where Government Deducted from Current Freight Charges Amount of Prior Overcharges, Carrier Has Burden of Going Forward with Evidence and Proving That Prior Bills Were Correct. New York, New Haven, and Hartford Railroad Co. v. United States (C.A. 1, November 30, 1959). This action was brought by the carrier under the Tucker Act (28 U.S.C. 1346) for $3,710.20 for transportation services. The Government defended on the grounds that it had paid the carrier all but $397.11 by check, and the latter amount had been deducted pursuant to Section 322 of the Transportation Act of 1940 (49 U.S.C. 66) as overpayments made by the Government on prior bills. At the trial, plaintiff failed to introduce any

evidence as to the correctness of these prior bills but relied, instead upon the assertion that the Government had the burden of going forward with the evidence on this issue. The district court entered judgment for the Government.

The First Circuit affirmed. The Court noted that in United States v. New York, New Haven and Hartford Railroad Co., 355 U. S. 253, the Supreme Court had decided that the burden of proof in this matter was on the carrier. Accordingly, the Court held that the carrier, perforce, had the burden of going forward as well.

Staff: Former United States Attorney Anthony Julian; Assistant United States Attorney Norman A. Hubley (D. Mass.)

DISTRICT COURTS

CONSTITUTIONAL LAW

Commerce Clause; Statutes; Absolute Prohibition by Congress of Dealings in Onion Futures Held Within Commerce Power and Not Prohibited by Fifth Amendment Where Rational Basis for Legislation Found in Legislative Record. Chicago Mercantile Exchange v. Tieken (N.D. Ill., November 10, 1959). Plaintiffs, the Chicago Mercantile Exchange and various brokers, producers and distributors, filed a complaint seeking to enjoin the United States Attorney from enforcing Public Law 85-839, 72 Stat. 1013, 7 U.S.C. 13-1, which prohibits under criminal penalties all dealings in onion futures on boards of trade. On October 6, 1959, a three-judge court granted defendant's motion to strike from the amended complaint allegations of fact which, if established, would tend to show that there existed no rational basis for the legislation. See United States Attorney's Bulletin, November 20, 1959, Vol. 7, p. 699; 177 F. Supp. 660. Subsequently, defendant filed a motion for summary judgment. The Court granted the motion and rendered judgment for defendant, and at the same time dissolved a preliminary injunction that had been in effect. The Court held (1) that the legislation is within the interstate commerce power of Congress because, whether or not plaintiff's business is local or interstate, it suffices that it affects interstate commerce; (2) that the interstate commerce power embraces the power to entirely prohibit activities which are harmful to interstate commerce; and (3) that such a prohibition does not violate the due process clause of the Fifth Amendment, which permits reasonable, experimental, economic, or social legislation. The Court also held that whatever discrimination the Act makes between onion futures and futures of other commodities is not unreasonable due to the differences which have been found to exist between onions and other commodities. The Court refused to recognize the existence of a genuine material fact on this issue, holding that it would take judicial notice that the legislative record discloses a rational basis in fact for the legislative judgment.

Staff: Harland F. Leathers; Richard M. Meyer (Civil Division)

FOREIGN COURTS

STATUS OF FORCES AGREEMENT

Sovereign Immunity. Athanasopoulos v. United States (Court of Appeals Athens, Greece, June 27, 1959). The appellee had secured a default judgment for 34,000 Drachmas against the United States from the Labor Disputes trial term of the Athens Court of First Instance for unpaid overtime, statutory bonuses, and termination pay.

The appellate court, in reversing and ruling in favor of the United States, recognized that while Greece was a country using the so-called restrictive theory of sovereign immunity (which permits the taking of jurisdiction over foreign sovereigns in acts of a "private" nature), the essential problem was to find an acceptable criterion of a "private" act. The United States had urged the appeals court that in making this determination it should not consider in isolation the circumstances of appellee's employment but should look to the purpose of the employing agency. This point was of importance since appellee was employed by the Air Force Exchange System. Our argument was accepted by the Court, which stated;

> "The criterion to determine the character of an act of a foreign State is not so much the nature of such act in itself, as the purpose of the total activities of the foreign State in each case for which the act was done."

An additional point of major significance was the court's holding that the United States had not subjected itself to local jurisdiction under the Status of Forces Agreement. A previous ruling in Italy had held that this was so with respect to Article IX of the treaty. The Greek Court, however, treated the question more broadly, holding "that all of these treaties deal with the extraterritoriality of the members of the U.S. Armed Forces in Greece, but do not deal with the immunity of the U.S. Government."

Staff: First Assistant George S. Leonard, Joan T. Berry (Civil Division); Constantine Lambadarios, Athens.

* * *

CRIMINAL DIVISION

Assistant Attorney General Malcolm R. Wilkey

ANTI-RACKETEERING (29 U.S.C. 186)

Loans Considered Thing of Value. United States v. William E. Golden, et al. (N.D. N.Y.). Golden and two construction companies were indicted for violation of Sections 186(a) and 186(b) of Title 29, U.S.C., in that the companies paid and delivered to Golden and the latter received and accepted from them a thing of value, to wit: the loan of a tugboat.

Defendants moved for a dismissal of the indictment on the ground that the violations charged against them were insufficient to constitute offenses under the statute as it existed on the date the offenses were alleged to have been committed. Primarily, defendants argued that loans were not things of value and that the inclusion of loans in the 1959 revision of the statute indicated that loans were not previously within its purview.

In denying the motions, Brennan, J., stated that while the statute must be strictly construed it must not be construed in complete disregard of the purpose of the legislature which was to prevent the granting of favors by an employer and the receipt of same by the representative of labor (citing United States v. Ryan, 350 U.S. 299). The Court further stated "The fact that the act of lending and the receipt of a loan is specifically mentioned in the amended statute, does not in itself require that the previous statute under which these defendants are indicted would exempt the delivery by the employer and the receipt by the representative of a tugboat, same being accomplished through the medium of a lending or loan procedure."

Concluding, the Court construed the words "the loan of a tugboat" to mean that the use or control of the boat was delivered by the employer and accepted by the representative.... The loan was a part of the transaction by which delivery was accomplished. It may not be used as a device to circumvent the statute. To recognize as valid such a simple device would 'reduce the legislation to a practical nullity.' (U. S. v. Ryan, supra, at 306)."

Staff: United States Attorney Theodore F. Bowes; Assistant United States Attorney Francis J. Robinson (N.D. N.Y.).

SECURITIES ACT OF 1933, AS AMENDED

Conspiracy; False Inventory and Financial Statements. United States v. Maurice Olen, et al. (S.D. N.Y.). An indictment in eight counts was returned on December 3, 1959, against Maurice Olen, former president of H. L. Green Co., Margaret Mandeville, the Olen Company bookkeeper, Lewie F. Childree and Homer Kerlin, former accountants with Olen Company, and their employee, Luther E. Clements, charging violations of and a conspiracy to violate United States

securities laws (15 U.S.C. 77q, 18 U.S.C. 371). The offense arose out of the use of false financial statements by Maurice Olen and the Olen Company, Inc., when the company sold 100,000 shares of common stock in April, 1958, and when it merged with H. L. Green Company, Inc. in November, 1958. The Grand Jury found that various defendants failed to record in the ledgers of Olen Company, Inc. all of the outstanding accounts payable to vendors of merchandise; failed to conduct a physical inventory of merchandise held in the warehouse and recorded instead on the books of the company a figure lower than the correct value of the merchandise; recorded as operating expenses a substantial portion of the expenditures for capital improvements; filed a registration statement with the SEC in connection with the sale of the 100,000 shares of stock which contained false and misleading statements concerning the accounts payable, the merchandise inventory, the cost of the property and equipment and the earnings of the company; and issued prospectuses and proxy statements which contained false and misleading statements. The accountants were charged with the certification of financial statements which did not fairly present the position of the Olen Co., Inc.

ERRATA

The volume and number of the Appendix to the United States Attorneys Bulletin for December 31, 1959 should be corrected by striking "Vol. 7, No. 27" and inserting Vol. 8, No. 1.

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

NATURALIZATION

Good Moral Character; Failure to Reveal Arrests; Admission of Illegal Sales of Liquor. Petition of Orphanidis (N.D. W. Va., December 8, 1959). Petitioner filed his petition for naturalization October 1, 1958. In his preliminary examination before the designated naturalization examiner he admitted an arrest and conviction in 1953 for a liquor violation for which he paid a fine of $106 and costs. He denied other arrests. An investigation, however, disclosed that he was arrested in January 1956 for driving on an expired license and was fined $25 and costs; that in January 1958, he was arrested for allowing minors to play pin-ball machines, which charge was dismissed; and that on the same date he was arrested for assault, which charge was also dismissed. Moreover, at a further preliminary examination held on February 5, 1959, he admitted he had been and continued to be engaged in the illegal sale of liquor at his place of business.

The question was whether on these facts petitioner had established good moral character for the five years preceding the filing of his petition as required by statute. (Section 316(a) of the Immigration and Nationality Act, 8 U.S.C. 1427(a)).

The Court stated that a more or less flexible judicial standard had been judicially created by which to measure good moral character of an applicant. Citing Repouille v. United States, (C.A. 2) 165 F. 2d 195. The Court stated that good moral character is evidenced by that conduct which measures up to the standards of the average citizen of the community in which the applicant resides. Citing Tutun v. United States, 270 U.S. 568, 578, to the effect that the opportunity to become a citizen is a privilege and not a right, the Court said that under the law the burden is on petitioner to establish that he possesses the good moral character required during the period set by the statute.

The fact that it has been stipulated that there were a substantial number of businesses in the petitioner's locality which sell liquor in violation of law and that the liquor laws were not being enforced, the Court said did not relieve petitioner of his moral obligation to obey the law. Friends and officials who knew petitioner had expressed the opinion that he would make a good citizen and ought to be admitted to citizenship. But the Court stated that in Marcantonio v. United States, 185 F. 2d 934, Judge Parker has made it clear that the test is not what the people or even the judge thinks about the applicant as a future citizen, but whether he has established good moral character during the required period.

Considering petitioner's conduct, including the illegal sale of liquor, the Court concluded that he had failed to meet the burden of

proof of good moral character. The petition for naturalization was denied.

Staff: Ned Haimovitiz, United States Naturalization Examiner, Pittsburgh, Pennsylvania

Good Moral character; Illicit Relationship. Petition of Posusta (S.D. N.Y., December 8, 1959). The question presented was whether petitioner had established good moral character during the five-year period required by the Immigration and Nationality Act immediately preceding the date of her petition, April 20, 1959.

The naturalization examiner recommended that the petition be granted, but the Regional Commissioner of Immigration and Naturalization recommended that it be denied.

Petitioner, 40 years of age, a native of Czechoslovakia has resided in the United States since October 23, 1952. She met Vladmir Posusta, to whom she is now married, in Czechoslovakia in 1936. She became sexually intimate with him shortly thereafter and they have maintained their relationship both in Europe and the United States. On December 30, 1939 Posusta married one Jana Krausova. Petitioner stated that she persuaded Posusta to marry Krausova in order to legitimatize a child fathered by Posusta. Notwithstanding this marriage, petitioner and Posusta continued their relationship from which two children have been born - in 1940 and 1947 respectively. Petitioner's defense of this relationship was that Posusta had represented to her that his first wife had agreed to divorce him and that he would then marry the petitioner. Petitioner followed Posusta to France in 1948 and then took up residence in the United States in 1952. In December 1952, Posusta was separated from his first wife and obtained a divorce which became final in March 1954. The following May he obtained admission to the United States for permanent residence and the following July petitioner and the two children took up residence with Posusta in Passaic, New Jersey. Two or three months thereafter petitioner, her two children and Posusta moved to New York City where they since have lived.

In her preliminary examination petitioner stated that she had never represented herself as Mrs. Posusta but that "some people" thought she was. She always used her own name before marriage. Petitioner desired to marry Posusta earlier but they were not married until January 24, 1959. Petitioner apparently relied on statements of Posusta that they should not marry sooner because such a marriage might interfere with his plans to gain custody of a child by his first wife. There was evidence of their mutual intent to marry as indicated by a marriage license application filed in New York City October 27, 1954 by them.

The Court, at great length, examined the various cases interpreting and applying various definitions of the term "good moral character." It cited the provisions of section 316(a) of the Immigration and

Nationality Act, 8 U.S.C. 1427(a) which requires that petitioner establish that she is a person of good moral character. Also cited was section 10(f) of the same Act, 8 U.S.C. 1101(f) to the effect that no person may be regarded as a person of good moral character who, during the period for which that status is required, was one who had committed adultery. In conclusion and after reviewing the statutory provisions and numerous cases, the Court stated that it was inclined to follow the philosophy of such cases as Ralich v. United States, 8 Cir., 1950, 185 F. 2d 784 and Petition of Pecora, D.C.S.D.N.Y., 1951, 96 F. Supp. 595.

The Court stated that "while extenuating circumstances and possible reformation may be considered, the fact that there may be in certain cases a tolerant forgiveness as to past offenses does not necessarily indicate that the community accepts the standard of the conduct for which the forgiveness was given."

Stating that it was the Court's opinion that the American standard of such behavior is antagonistic to the conduct of the petitioner, the Court held that the petitioner had failed to sustain her burden of establishing that she had been a person of good moral character for the period of five years immediately preceding the date of the filing of her petition.

Accordingly the petition was denied.

Staff: Howard I. Cohen, United States Naturalization Examiner, New York, New York

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Contempt of Congress. United States v. Sidney Turoff; United States v. Sidney Herbert Ingerman (W.D. N.Y.) On December 15, 1959 a jury in Buffalo, New York returned a verdict of guilty against Sidney Turoff, an avowed former member of the Communist Party, on two counts of contempt of Congress. Judge Harold P. Burke sentenced Turoff to a $100 fine and sixty days' imprisonment on each count, the prison sentences to run concurrently. The conviction was on an indictment returned by a Grand Jury in Rochester on June 23, 1959, charging Turoff with contempt of Congress arising out of hearings of the House Committee on Un-American Activities in Buffalo in October 1957. The Committee at that time, through a subcommittee, was inquiring into Communist activities in the Buffalo area generally, with emphasis on Communist penetration of heavy industry and operation of the Party's underground apparatus (see Bulletin, Vol. 7, No. 14, p. 419). Turoff was charged in a three-count indictment for refusal to disclose names of Party members and to identify the Party member to whom he had delivered printing equipment for use in the Party underground. At the same time, in an indictment arising out of the same hearings, Sidney Herbert Ingerman was charged in a single count for refusing to identify persons whom he knew to be members of the Communist Party in 1957. The two cases were tried together, and on completion of the Government's proof Judge Burke ruled that the evidence failed to show that the question directed to Ingerman, comprising the single count against him, and one of the questions directed to Turoff, comprising one of the three counts against him, were within the scope of the subcommittee's inquiry. Accordingly, he dismissed the indictment against Ingerman and dismissed the apposite count in the indictment against Turoff. The jury found Turoff guilty on both of the remaining counts. Turoff had based his refusals to answer the subcommittee's questions on lack of pertinency and a claim of privilege under the First Amendment. Judge Burke found as a matter of law that the questions directed to Turoff were pertinent to the subject matter under inquiry, while leaving it to the jury to determine whether pertinency had in each instance been adequately explained to Turoff by the subcommittee.

Staff: Acting United States Attorney Neil R. Farmelo (W.D. N.Y.); Charlotte P. Horwood (Internal Security Division)

Conspiracy: Expedition Against Friendly Foreign Power. United States v. Carlos Prio Socarras, et al., (S.D. Fla.) On February 13, 1958, Carlos Prio Socarras and eight others were indicted in the Southern District of New York for conspiring to violate 18 U.S.C. 960, (expedition against friendly foreign power). (See United States Attorneys Bulletin, Volume 6, No. 5) On the motion of Prio and five other defendants, the case was transferred for trial to the Southern District of Florida. On December 21, 1959, Prio and four defendants in the Southern District of

Florida pleaded guilty to an information charging a conspiracy to violate 22 U.S.C. 1934, (export of munitions without a license). They were sentenced to two years, which sentence was suspended. The indictment was dismissed as to the six defendants who had the case transferred to the Southern District of Florida.

Staff: United States Attorney E. Coleman Madsen, Assistant United States Attorney David Clark

Conspiracy to Violate "National Firearms Act" and Federal Firearms Act. United States v. Stanley J. Bachman, et al. (D.C. D.C.) On April 2, 1958 a Federal Grand Jury returned a three-count indictment against the corporate and individual defendants. (See United States Attorneys Bulletin, Volume 6, No. 8). The trial started on October 20, 1958 and on November 28, 1958 the jury was discharged after having been unable to agree on a verdict. On December 21, 1959 defendants appeared before Federal District Judge Charles F. McLaughlin; the defendant Stanbern Aeronautics Corporation entered a plea of guilty to Count 2 of the indictment (willful attempt to evade payment of taxes) and the defendant Stanley J. Bachman entered a plea of guilty to an information charging him with knowingly and willfully delivering a false and fraudulent document to the Director of the Alcohol and Tobacco Tax Division, United States Treasury Department. (26 U.S.C. 7207) At the time of sentencing, for which no date has yet been set, the Government will move to dismiss the remaining counts in the indictment.

Staff: Paul C. Vincent and Joseph T. Eddins (Internal Security Division)

Conspiracy to Defraud United States. United States v. Albert Pezzati, et al. (D. Colo.) On November 16, 1956, a federal grand jury in Denver, Colorado, indicted Albert Pezzati, Raymond Dennis, Irving Dichter, James Durkin, Asbury Howard, Graham Dolan, Alton Lawrence, Chase J. Powers, Harold Sanderson, Albert Skinner, Maurice E. Travis, Jesse R. Van Camp, Jack C. Marcotti, and Charles H. Wilson, officers and former officials of the International Union of Mine, Mill and Smelter Workers, for violation of 18 U.S.C. 371, charging that they conspired to defraud the United States and the National Labor Relations Board by means of false Taft-Hartley affidavits filed with the Board and illegally qualifying said union with the board. Prior to trial which began November 2, 1959, Albert Pezzati, Graham Dolan, and Alton Lawrence entered pleas of nolo contendere. At the close of the Government's case, the Court on December 2, 1959 granted motions for acquittal as to Asbury Howard and Jack C. Marcotti. On December 17, 1959 the jury returned a verdict of guilty against the nine remaining defendants. Judge Alfred A. Arraj continued all defendants on bail and granted defendants until January 18, 1960 within which to file motions for a new trial.

Staff: United States Attorney Donald G. Brotzman, Assistant United States Attorney Charles M. Stoddard (D. Colo.), Lafayette E. Broome and Francis X. Worthington (Internal Security Division)

Discharge of Veterans' Preference Government Employee. Hazel T. Ellis v. Frederick Mueller, Secretary of Commerce (D. D.C.) The complaint was filed on August 7, 1959 alleging that plaintiff was unlawfully discharged from her position within the Department of Commerce. Plaintiff was employed by Commerce as an economic analyst and was discharged for making certain statements about a fellow employee which, upon investigation by Commerce proved to be false or unwarranted. A subsequent hearing before the Civil Service Commission sustained the agency dismissal. Plaintiff averred, inter alia, that certain remarks which she made during an interview by Commerce Department investigators relative to this fellow employee were privileged and could not later be made the basis of charges leading to her dismissal. In addition, she complained that the procedures employed within Commerce in dismissing her deprived her of due process. On December 21, 1959 the District Court granted defendant's motion for summary judgment and dismissed the complaint on the grounds that plaintiff had been accorded all procedural rights before both the Commerce Department and the Civil Service Commission which the Veterans Preference Act of 1944 and Commerce Regulations afforded her and under the limited judicial review permitted the Court could not inquire into the merits of the case.

Staff: Anthony F. Cafferky and DeWitt White (Internal Security Division)

Dishonorable Discharge. Robert O. Bland v. William B. Franke, Secretary of the Navy (D. D.C.) Plaintiff, a resident of California, filed suit against the Secretary of the Navy in the United States District Court for the District of Columbia on December 15, 1959 for declaratory judgment and injunctive relief to the effect that all Navy security proceedings which resulted in his receiving a discharge from the USNR in 1956 under conditions other than honorable be declared void, unlawful and of no effect, and directing defendant to issue him an honorable discharge in place of the discharge of which he complains. Plaintiff alleges that he served as a naval officer from 1942 to 1946 at which time he was honorably separated (in the rank of Lieutenant) from active duty and transferred to the inactive reserve from which he was discharged on security grounds in 1956 under conditions other than honorable and for the good of the service. Plaintiff asserts that he has exhausted his administrative remedies and alleges that the pertinent naval regulations, and the proceedings held thereunder, including his 1956 discharge, exceeded the powers of the Secretary of the Navy and were violative of Section 6 of the Naval Reserve Act of 1938; the Administrative Procedures Act; as well as the First, Fifth and Sixth Amendments of the Constitution, and the Uniform Code of Military Justice. Plaintiff contends that he was deprived of the right to confront witnesses against him; to subpoena witnesses in his behalf; to have disclosed to him the confidential investigative file used against him in said proceeding; to be informed of the nature and cause of the charges against him and that said proceedings and discharge constituted punishment as to him by reason of his alleged activities as a civilian which are protected by the First Amendment. Plaintiff

asserts that because of the character of the discharge he has and will be deprived of the rights of an honorably discharged veteran under federal and state legislation; of employment and professional opportunities, and that he has and will encounter substantial prejudice in civilian life in situations where his discharge has a bearing, all of which are valuable property rights.

Staff: Samuel L. Strother and Herbert E. Bates (Internal Security Division)

Removal from Department of Air Force Upheld. John D. Lofton v. James H. Douglas, et al. (D. D.C.) The complaint was filed on April 15, 1959 alleging that plaintiff was improperly separated from a career-conditional (probationary) appointment as a scenario-writer with the Department of the Air Force (see U.S. Attorneys Bulletin July 17, 1959, Vol. 7, No. 15, p. 455). Plaintiff filed a motion for summary judgment on November 15, 1959 and therein averred that his separation had been effected in violation of the procedures contained in Air Force Regulation (AFR) 11-1. Defendants filed a motion for judgment on the pleadings or in the alternative cross-motion for summary judgment with attached exhibits demonstrating that plaintiff's separation was actually effected under the procedures contained in AFR 120-3 and that the procedures of this regulation were complied with. Consequently the case did not fall within the prohibition of Service v. Dulles, 354 U.S. 363. By order dated December 21, 1959 the District Court granted defendant's cross-motion for summary judgment and dismissed the complaint.

Plaintiff filed a motion for a "new hearing" (new trial) dated December 25, 1959 with amendment thereto dated December 26, 1959 which was answered by defendants in the nature of an opposition to said motion on December 31, 1959. This motion is presently pending before the District Court.

Staff: Oran H. Waterman and Samuel L. Strother (Internal Security Division)

* * *

LANDS DIVISION

Assistant Attorney General Perry W. Morton

Condemnation; District Court Lacks Jurisdiction to Compel United States to Take Avigation Easement Over Property When Clearance Easement Is Described in Declaration of Taking. United States v. Lilly Lind Brondum, et al. (C.A. 5, December 8, 1959). The United States condemned an easement affecting property near the Brookley Air Force Base, Mobile, Alabama. The easement was described in the declaration of taking as the continuing perpetual right to clear, and keep clear, those portions of all trees or other growth extending into or above a plane 10 feet below and parallel to the Glide Angle Plane and/or Transitional Plane described in an attached schedule, and to remove, and to prohibit the future construction of structures, embankments of earth and other materials infringing upon the above-described planes. The district court interpreted this as an avigation easement, or right to fly over the land, and admitted evidence of the landowners' witnesses to that effect. The jury's verdict was based on the landowners' valuations. The Government's valuations were based on a clearance easement. The grounds for the Government's appeal were the court's errors in admission of evidence and its interpretation of the easement, and in refusing to set aside the verdict which was based on incompetent evidence.

The Court of Appeals reversed and remanded the case for a new trial. It stated that the appeal "turns on the distinction between a clearance or obstruction easement and an avigation or flight easement. These terms are not jargon leading to fruitless semantics; not in condemnation proceedings, anyway. In condemnation proceedings, they are useful tags to identify distinctive estates in property." The Court found that there is no ambiguity in the description of the easement, and that it is a ceiling to increase the margin of safety for flying by assuring that the glide zone will be free from natural growth or manmade obstructions and the pilot's vision unobscured above a designated altitude. The Court described an avigation easement as permitting free flights over the land in question, providing for flights that may be so low and so frequent as to amount to a taking of the property. It stated that the Government has complete discretion in determining whether to take a clearance easement or an avigation easement, and upon the filing of the declaration of taking and the depositing of estimated compensation, the title described therein passes to the Government. It held that the district court lacked jurisdiction to compel the Government to take an avigation easement, and the verdict based thereon should have been set aside since it was based on valuations grounded on assumed facts that were not present in the case.

The Court pointed out that if in the future the runways should be changed and if there should be low and frequent flights, the Government

may institute a condemnation proceeding to acquire an avigation easement or in the absence of such proceeding the landowners have a remedy under the Tucker Act, 28 U.S.C.A. 1491.

Staff: Elizabeth Dudley (Lands Division)

Condemnation; Objections to Reference to Commissioners Under Rule 71A(h). The Department has recently filed a petition for writ of mandamus in the Ninth Circuit to set aside a reference of all cases in four pending projects to commissioners. The brief in support thereof contains a full description and collection of almost all the authorities on this subject. Anyone interested is invited to write to Mr. Roger P. Marquis, Chief, Appellate Section, Lands Division, for a copy of the brief. The case is entitled United States v. Honorable Peirson M. Hall, Chief Judge, United States District Court for the Southern District of California, C.A. 9, No. 16707.

* * *

TAX DIVISION

Assistant Attorney General Charles K. Rice

CIVIL TAX MATTERS

Appellate Decision

Jurisdiction; District Court Has no Authority to Review or Annul Decision of Tax Court Even When Such Decision is Based on Fraudulent Return. Jefferson Loan Company, Inc. v. Arundell et al. (C.A.D.C. December 10, 1959) In 1951 the Tax Court determined the tax liability of taxpayer, a Missouri corporation, for 1947 and 1948 on the basis of a stipulation between the corporation and the Commissioner and payment was made accordingly. It was afterwards discovered that taxpayer's president had fraudulently concealed its financial condition from its stockholders and creditors, and that it had no taxable income for 1947 and 1948. In 1955, after the fraud was discovered, taxpayer asked the Tax Court to withdraw the stipulation and revise its decision but the Tax Court denied the motion on the ground of laches. Taxpayer then took an appeal to the Court of Appeals for the Eighth Circuit but that Court held that since the Tax Court's original decision had become final before taxpayer asked to have it set aside neither it nor the Tax Court could grant the relief requested. See Jefferson Loan Co. v. Commissioner, 249 F. 2d 364, 368 (C.A. 8). Taxpayer next filed a suit in the District Court of the District of Columbia asking that the Tax Court's original decision be set aside, and that judgment be entered in its favor for the total deficiency determined by the Tax Court. The grounds for asking such relief were that the District Court had jurisdiction to act either under the Administrative Procedure Act, c. 324, 60 Stat. 237 or on general equitable principles. The District Court dismissed the Complaint and its decision was affirmed upon appeal. In refusing to grant the requested relief, the Court of Appeals stated that even if the Tax Court were to be considered an agency within the Administrative Procedure Act, the review provisions therein could not be construed as giving a district court any right to review Tax Court decisions because prior to the passage of that Act Congress had already given the exclusive opportunity for the review of such decisions to courts of appeals. See Section 1141(a) of the 1939 Internal Revenue Code. Thus the Court of Appeals held that the Administrative Procedure Act did not give the District Court any right to review or set aside the Tax Court's decision, and it also decided that the District Court had no jurisdiction to grant the requested relief under general equitable principles or otherwise. Taxpayer has indicated that it intends to file a petition for certiorari.

Staff: Louise Foster (Tax Division)

District Court Decision

Refund; Renegotiation Act Credit Constitutes Refund and May Be Basis for Government Suit to Recover Erroneous Refund. United States v.

Rushlight Automatic Sprinkler Co. (D. Ore., Nov. 6, 1959). In July 1956 the District Director approved defendant's filed application for refund on a claimed overpayment of taxes, for the fiscal year ended October 31, 1953, due to a loss arising in 1955 and carried back to 1953. After this tax refund, defendant's adjusted tax liability for said fiscal year became nothing.

During 1956 the income received for the aforementioned fiscal year also became the subject of renegotiation, and in September 1956 the Renegotiation Board determined that defendant's share of excess profits was $22,250. Utilizing this figure, and without considering the previously granted tax refund, the District Director notified the Board that defendant was entitled to a credit of $8,560.71 against the excess profits under Section 3806(b) of the 1939 Code. As a result, defendant only paid the Government $13,689.29 of the excess profits.

The United States instituted a suit to recover the $8,560.71 plus interest pursuant to 7405 of the 1954 Code. The Court granted the Government's motion for summary judgment and held (1) that a credit allowed under the Renegotiation Act is the legal equivalent of a refund to a contractor-taxpayer and could be the basis for an erroneous refund suit, (2) that the Government recover $8,560.71 from the defendant, and (3) that the Government recover 6% interest on said amount from the date of judgment.

Defendant, Rushlight, has filed notice of appeal. Since the Government contends that interest should run from the date the erroneous credit was given, the Department is determining whether or not a cross appeal on the interest question should be pursued.

Staff: United States Attorney C. E. Luckey, Assistant United States Attorney Edward J. Georgeff (D.C. Oregon)
Alben E. Carpens (Tax Division)

* * *

I N D E X