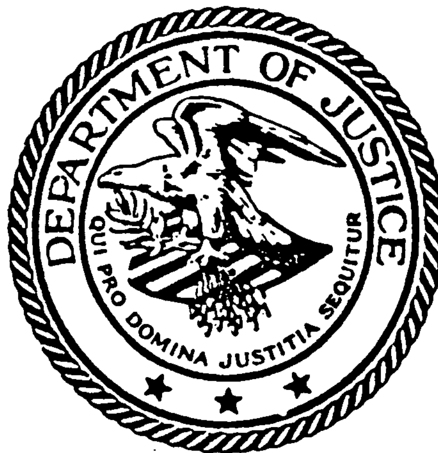
Published by Executive Office for United States Attorneys,
Department of Justice, Washington, D. C.

October 21, 1960

United States
DEPARTMENT OF JUSTICE

Vol. 8 No. 22



UNITED STATES ATTORNEYS
BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 8 October 21, 1960 No. 22

IMPORTANT NOTICE

Public Law 86-691, 86th Congress, approved September 2, 1960, amends Section 3568, Title 18, U. S. Code, relating to the effective date of sentence, by providing that in the case of a sentence imposed under a statute requiring imposition of a minimum mandatory sentence the Attorney General shall give credit toward service of sentence for any days spent in custody prior to the imposition of sentence for want of bail set for the offense under which sentence was imposed. The Act is effective as to sentences imposed on or after October 2, 1960, the 30th day after the date of enactment.

In order that Federal Bureau of Prisons institutions may be able to identify sentences to which the Act applies, it will be important that the statute under which sentence is imposed be correctly shown on the judgment and commitment and Form 792 in each instance.

ERRATA

The citation on lines 11 and 12 of the case of Guerrieri v. Herter, page 650 of the last Bulletin, should be 8 U.S.C. 1484 (a)(2).

MONTHLY TOTALS

The downward trend in the work of the United States Attorneys, which was reflected in the fiscal year-end figures and which continued through July, was reversed during August. The yearly comparison set out below shows that total case filings and terminations registered increases over the same month of fiscal 1960, with filings running ahead of terminations, with the rate of increase in filings running ahead of the rate of increase in terminations by a margin of almost 3 to 1. Because terminations did not keep pace with filings, the pending caseload showed an increase of 1,157 cases over the total pending on August 31, 1959. The rate of increase in new criminal cases filed was over 4 times that of new civil suits filed, while the reverse was true in terminations, where the increase rate in civil suits closed was almost twice that of criminal cases terminated. The greater volume of new criminal work received, as compared with new civil work, continues the pattern of increase which criminal work showed throughout fiscal 1960. Except for the sharp rises in new criminal cases filed and civil cases pending, however, the difference in the production figures for August 1959 and 1960 appear minimal.

	August 1959	August 1960	Increase or Decrease Number	%
Filed				
Criminal	3,849	4,055	+ 206	+ 5.4
Civil	4,112	4,167	+ 55	+ 1.3
Total	7,961	8,222	+ 261	+ 3.3
Terminated				
Criminal	3,340	3,372	+ 32	+ 1.0
Civil	3,309	3,369	+ 60	+ 1.8
Total	6,649	6,741	+ 92	+ 1.4
Pending				
Criminal	8,236	8,420	+ 184	+ 2.2
Civil	19,146	20,119	+ 973	+ 5.1
Total	27,382	28,539	+1157	+ 4.2

The monthly comparison set out below shows an increase in both criminal and civil filings and terminations over those for July. As in the previous month of July, when criminal filings lagged behind civil filings but criminal terminations exceeded civil ones, new criminal cases filed in August were slightly below civil filings, while civil terminations totaled less than criminal ones. Again the differences are minimal, with the exception of new criminal cases, which had a rise of almost 4 per cent.

	July 1960	August 1960	Increase or Decrease Number	%
Filed				
Criminal	1,709	2,346	+ 637	+ 3.7
Civil	1,863	2,304	+ 441	+ 2.4
Total	3,572	4,650	+1078	+ 3.0
Terminated				
Criminal	1,600	1,772	+ 172	+ 1.0
Civil	1,463	1,906	+ 443	+ 3.0
Total	3,063	3,678	+ 615	+ 2.0

Although collections by United States Attorneys during the month of August fell to almost half the amount collected in July, the cumulative total for fiscal 1961 is still more than that for the same period of fiscal 1960. Collections amounting to $1,801,810 were reported during August, a decrease of $1,360,775 or 43 per cent from last month's total. Aggregate collections for the two-month period of fiscal 1961 total $4,964,395, an increase of $741,489 or 14.9 per cent over the $4,222,906 collected in the similar period of fiscal 1960.

The most effective device for obtaining increased collections is a well-organized and efficient Collections Unit. A regular system of follow-up and reminder letters sent out on a certain date each month increases collections much more than the temporary results obtained from the now-and-then drives conducted by some offices during comparatively slow periods in the work of the office.

During August $1,993,020 was saved in 88 suits in which the government as defendant was sued for $3,008,356. 53 of them involving $1,845,176 were closed by compromises amounting to $504,867 and 15 of them involving $892,764 were closed by judgment against the United States amounting to $510,469. The remaining 15 suits involving $270,416 were won by the government. The total saved for August 1960 amounted to $1,993,020. The amount saved for the first two months of the current fiscal year was $3,403,687 and is a decrease of $1,767,928 from the $5,171,615 saved in July and August of fiscal year 1960.

* * *

ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

PSYCHIATRIC EXAMINATION EXPENSES

In the June 3, 1960 Bulletin, you were advised of our concern over the increasing number of commitments (under 18 U.S.C. 4244) of accused persons for mental examinations. These costs are still rising.

There are also a large number of commitments under 18 U.S.C. 4246 where, because of the mental condition of the accused, there is little or no possibility of a trial or successful prosecution. These commitments have resulted in prolonged custody, care and treatment by the federal government in many cases where the same are the primary obligation of the state and local authorities. Situations of this type should be avoided whenever possible.

Therefore, where you suspect that an accused may have had a prior commitment to a mental institution or an extensive background of mental illness, the facts should be ascertained in that regard. If it is established that he has previously been institutionalized for, or has had an extensive history of, serious mental illness, consideration should be given to withholding the filing of charges (or dismissal as required) in favor of civil commitment to an appropriate state or local institution. The nature of the offense, the ready availability of suitable state or local facilities, and the protection of the interests of the government are factors to be taken into consideration.

WEST'S MODERN FEDERAL PRACTICE DIGEST

The Comptroller General of the United States in his decision of July 28, 1960, B-57413, held that Section 205 of the General Government Matters Appropriation Act, 1961, 74 Stat. 477, is applicable to the new West's Modern Federal Practice Digest.

This decision holds that appropriated funds may not be used to pay in excess of $4.25 per volume for the digest. The new digest, composed of fifty-eight volumes, sells for $354.38 or $6.11 per volume. Before we can pay the price established by the publishers the Congress must authorize the increased cost.

Under the circumstances the Department is unable to purchase this Digest until such time as Congress raises or removes the limitation on price.

ORDERS AND MEMOS

The following Memoranda applicable to United States Attorneys' Offices have been issued since the list published in Bulletin No. 17, Vol. 8 dated August 12, 1960.

ORDER	DATE	DISTRIBUTION	SUBJECT
207-60	7-18-60	U.S. Attorneys	Regulations Governing Appellate Proceedings.
210-60	9-6-60	U.S. Attys & Marshals	Designation of Youth Center Division, Lorton, Virginia, as Institution for certain Male Youth Offenders.
211-60	9-12-60	U.S. Attys & Marshals	Miscellaneous Amendments of Order No. 175-59 of January 19, 1959

MEMO	DATE	DISTRIBUTION	SUBJECT
282	8-17-60	U.S. Attys & Marshals	Establishing uniform Payday
283	8-26-60	U.S. Attys & Marshals	Attendance at meetings
284	6-10-60	U. S. Attorneys	Redelegation of authority to U.S. Attorneys to Compromise Condemnation Cases
285	9-23-60	U.S. Attorneys	Land Condemnation Commissioners
167R-S4	9-20-60	U.S. Attys & Marshals	Pay Increases for U.S. Attorneys and Assistant U.S. Attorneys

* * *

ANTITRUST DIVISION

Assistant Attorney General Robert A. Bicks

Violation of Consent Judgment; Termination of Civil Contempt Action - United States v. A. B. Dick Company (N.D. Ohio). On September 13, 1960, an Order terminating the civil contempt action against the A. B. Dick Company was signed.

On March 28, 1960, an Order directing the A. B. Dick Company to show cause why it should not be adjudged in criminal and civil contempt of the Final Judgment entered on March 25, 1948 was signed. The Government's petition for the contempt order charged that A. B. Dick, beginning in 1952, engaged in activities in alleged violation of certain provisions of the final judgment.

The Court's order modifies in two respects the 1948 judgment, and in a letter addressed to the Department of Justice, and also filed with the court, A. B. Dick has agreed to amend its current distributor and dealer contracts so as to remedy the practices complained of in the petition.

As amended, the judgment enjoins A. B. Dick until 1968 from acquiring any stock or assets of any company engaged in the manufacture or sale of stencil duplicating products. Certain exemptions to this prohibition permit acquisitions where the franchise is terminated by death of the distributor, and the heirs of such distributors offer to sell to A. B. Dick, or where the distributor terminates the franchise with A. B. Dick and offers to sell. The second amendment requires that until March 25, 1965, if A. B. Dick terminates its franchise with any distributor it must continue to sell upon request stencil duplicating products to that distributor for resale as a dealer.

In the letter filed with the Court, A. B. Dick agrees to amend, within 90 days from August 1, 1960, its distributor contracts. Some of the important amendments to these contracts are: (1) the cancellation date of a franchise must be extended from 30 days to 90 days; (2) during the 90-day termination period A. B. Dick must fill the distributor's normal orders and, when the distributor can show the need for amounts above his normal orders, A. B. Dick must fill such orders; and (3) A. B. Dick must delete from these contracts the provisions whihh require that there shall be mutual cooperation and consultation between representatives of A. B. Dick and the distributor for the development of profitable sales volume within the distributor's territory.

Also as agreed to, beginning in 1961, A. B. Dick must inform its distributors fully of the methods used in arriving at their sales quotas. In the event A. B. Dick adopts a different method of computing

such quotas, it must continue to determine them on a uniform basis for all of its distributors, and further, it must supply the information necessary to enable any distributor to verify its own quota calculation. Finally, the sales quota assigned by A. B. Dick to each distributor for the sale of impression paper cannot be used to judge a distributor's over-all performance with respect to the sale of stencil duplication products.

The criminal action is pending.

Staff: Edward R. Kenney, Norah C. Taranto, Barbara J. Svedberg and William F. Costigan (Antitrust Division)

CLAYTON ACT

Truck Company Acquisitions; Complaint Under Section 7. United States v. Ryder System, Inc. (S.D. Fla.). On October 3, 1960, a civil antitrust suit was filed against Ryder System, Inc. charging that a series of acquisitions of truck renting and leasing companies by Ryder System, Inc., violates Section 7 of the Clayton Act.

According to the complaint, Ryder, the nation's second largest truck renting and leasing company, during the past five years has acquired the stock or assets of numerous companies engaged in truck leasing or truck renting or both in various geographic areas of the United States at a cost of about $20,000,000.

The complaint charges that the effect of the acquisitions and many of them, considered separately, may be to lessen competition or tend to create a monopoly in violation of Clayton Act Section 7 in the following ways, among others:

(1) Actual or potential competition between defendant and the acquired companies and among some of the acquired companies in those sections of the country where the acquired companies operated have been eliminated.

(2) Actual and potential competition may be substantially lessened or the tendency toward monopoly increased in the truck renting and leasing industry throughout the United States or in certain sections thereof.

(3) The acquired companies have been eliminated as independent competitive factors in the truck renting and leasing industry.

(4) Defendant's competitive advantage over other truck renting and leasing companies may be enhanced to the detriment of actual and potential compatition.

(5) Industry-wide concentration in the industry may be further increased nationwide and in certain sections of the country.

The suit seeks to restore competition to this relatively new and fast growing industry. Thus, the action prays for the Court, among other things, to

(1) require Ryder to divest itself of the unlawfully acquired stock and assets and

(2) enjoin Ryder from acquiring additional companies for such period of time as the Court may deem just and proper.

Staff: Samuel Z. Gordon (Antitrust Division)

Bank Merger; Plan for Disposition of Litigation. United States v. Firstamerica Corporation (N.D. Calif.). On September 30, 1960 a stipulation between the parties and a letter from the Department of Justice dated September 27, 1960, attached thereto, was approved by the Court and filed as part of the record in this case. The stipulation stays proceedings for at least 90 days and voids the effect of an earlier stipulation dated March 31, 1959 which blocked the merger of Firstamerica's subsidiary bank, First Western, and California Bank. The stipulation and letter require Firstamerica to seek approval of the Federal Reserve Board to establish a New Bank with about 65 existing branches and 10 approved new branches, and with about $500,000,000 in deposits, New Bank to be subsequently divested as a step toward settlement of the action.

The letter provides that Firstamerica will make application to the Federal Reserve Board and other appropriate banking authorities, and in accordance with such approvals to cause to be established New Bank, a banking corporation to be organized under the laws of the State of California under the name of First Western Bank and Trust Company. It also provides that after the New Bank has been in operation for two years, Firstamerica will take such steps as may be necessary to accomplish a prompt divestiture of the stock or assets of New Bank, but in any event to complete the divestiture within a six-year period by distribution of the stock of New Bank to the stockholders of Firstamerica if other means of disposing of its interest in New Bank have not been accomplished. If approval under the appropriate banking laws are obtained by Firstamerica and the banks involved so that they are in a position to carry out substantially the program outlined in the letter, the Department will, within 30 days after such approvals have been given, dismiss the complaint filed March 30, 1959.

The complaint charged that the agreement between Firstamerica and California Bank under the terms of which Firstamerica acquired over 80% of the stock of California Bank with the purpose of merging the

latter with First Western Bank and Trust Company, the bank holding company's California subsidiary, violated Section 7 of the Clayton Act and Section 1 of the Sherman Act. Subsequent to the suit, Public Law 86-463 was approved on May 13, 1960 placing in the banking agencies control over bank mergers.

Staff: Larry L. Williams, William D. Kilgore, and Lyle L. Jones (Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General George Cochran Doub

COURTS OF APPEALS

ADMIRALTY

Longshoreman's Injury; Warranty of Seaworthiness Does Not Apply to Deactivated Vessel Removed from Navigation. Roper v. United States, et al. (C.A. 4, January 7, 1960). Roper was a longshoreman foreman in charge of storage grain discharge from a dead Liberty vessel of the "moth ball" fleet used in connection with the Government's surplus grain storage program. While operating a "grain plow" in a recess corner of a hold of the vessel, he was struck in the face when a lead block broke from its strap and flew at him. The block was attached to a "marine leg," a shoreside device which is partially lowered into the vessel's holds and by means of buckets or scoops on a continuous belt, raises the grain from a vessel's hold and transmits it to bins in a grain elevator ashore.

The unmanned vessel had undergone an extensive deactivation overhaul, which rendered it incapable of navigation and made its mechanical and cargo handling gear completely inoperative. It was being used only for dead storage of grain at the time of the injury.

The Court of Appeals, in affirming the district court, held that a deactivated vessel withdrawn from navigation does not warrant her seaworthiness, and that the warranty of seaworthiness does not again arise until such time as the vessel has been reconditioned and restored to service. Rather than having warranted the seaworthiness of her appliances, the deactivated ship affirmatively represented itself as being entirely without operable equipment and usable gear.

The dissenting opinion argued, however, that since the vessel moved storage grain from the "moth ball" fleet to the elevator, she was comparable to a barge, and as such warranted her seaworthiness, including cargo equipment brought aboard, in favor of longshoremen engaged in unloading the vessel, the performance of traditional seaman's work.

Staff: Carl C. Davis and Alan Raywid (Civil Division)

FEDERAL TORT CLAIMS ACT

Government Owes No Duty to Supervise Potentially Dangerous Conduct of Persons Who Come Upon Federal Land for Recreational Purposes. Schultz v. United States, (C.A. 1, October 6, 1960). Plaintiff filed suit for permanent injuries arising out of a hunting accident which occurred on government property. At the time of the accident plaintiff, then 15, had been invited to the Portsmouth, New Hampshire Naval Base as a social guest

of a son of a naval officer. He spent the night on base and the next morning joined a party of four teenagers including his host for an overnight camping trip to Fort Foster, an abandoned coastal artillery site which had been transferred to Navy jurisdiction. The boys were transported to that site, located five miles from the main base in the state of Maine, by Marine Security guards who unlocked the gates and let them in. The party stayed in the area overnight and the next morning shortly before they were to return home, plaintifff was critically injured when he stood up in the line of fire just as one of his companions was firing at an object he had thrown into the air.

Plaintiff's suit against the Government claimed that it had been negligent in failing to take adequate precautions to prevent the injury from occurring. The district court found the Government liable because of a "negligent failure of responsible Government employees in their official capacities to supervise or stop the dangerous practices which have been described." Judgment was entered for $60,000 plus costs.

On appeal the Government argued that it had no responsibility as a landowner to supervise the conduct of those persons whom it merely allowed to be on its land. Absent proof that the Government knew or should have known that the conduct of third persons was dangerous, there was no affirmative duty to regulate the activities of visitors.

The First Circuit adopted the Government's position and reversed the decision of the district court. The Court of Appeals held that the Government as a landowner owed no duty to supervise the conduct of those who come upon its land for their own recreation and enjoyment. The Court reasoned that these persons are not "invitees" merely because the Government acquiesces in their presence and use of its land without charge. They were held to be mere licensees to whom there was no affirmative duty to supervise even their potentially dangerous conduct such as hunting and shooting.

This decision will have a far-reaching effect in enabling the Government to avoid being saddled with liability in the many cases where injuries occur on federal property set aside for recreation or conservation purposes.

Staff: United States Attorney Peter Mills; Assistant United States Attorney Conrad K. Cyr (D. Maine); Ronald A. Jacks (Civil Division)

SOCIAL SECURITY ACT

Second Marriage Declared "Void Ab Initio" in State Annulment Proceedings Is Not "Remarriage" Within Section 202(e). Yeager v. Flemming (C.A. 5, October 3, 1960). Plaintiff filed a claim for reinstatement of her widow's insurance benefits under the Social Security Act, which had been terminated by the Department of Health, Education, and Welfare because of her remarriage.

Plaintiff based her claim for reinstatement on the fact that a Connecticut state court had annulled the second marriage on the grounds of fraud. The Secretary denied the claim and plaintiff brought suit in district court. The district court affirmed the decision of the Secretary and plaintiff appealed.

The Fifth Circuit reversed. It held that plaintiff was entitled to reinstatement of widow's benefits because the order of the Connecticut state court annulling the marriage clearly declared that the "purported marriage" was "void ab initio." The Court of Appeals chose to give full force and effect to this declaration and rejected the Government's argument that a marriage annulled by a court which has power to award alimony, nevertheless constituted a "remarriage" within Section 202(e) of the Social Security Act.

Staff: Douglas Kahn (Formerly of Civil Division, now with Tax Division)

DISTRICT COURTS

FEDERAL TORT CLAIMS ACT

Visitor in National Park Held to Be Mere Licensee. Thomas Stewart Smith, et al. v. United States (S.D. Texas, September 27, 1960.) Plaintiff, a five-year old boy, while visiting with his parents in the Chickamauga and Chattanooga National Military Park, Georgia, was injured when a loose cannon ball fell off a monument upon which the boy was sitting or standing. The ball crushed his thumb, and resulted in permanent damage thereto.

The Court in holding for the United States held that plaintiff was merely a licensee on the premises, and thus, was owed no greater duty than to be warned of a known danger. On that basis, the Court found that there had been no failure on the part of federal employees to use reasonable care. This holding by the district court is in line with the holding of the Court of Appeals in the Schultz case discussed supra, p. 664.

* * *

CRIMINAL DIVISION

Assistant Attorney General Malcolm Richard Wilkey

MAIL FRAUD

Admissibility of Evidence Obtained by "Mail Watch" by Postal Inspector. United States v. Sam Schwartz (C.A. 3, Oct. 6, 1960). Appellant Schwartz was convicted of using the mails to defraud, 18 U.S.C. 1341, solely on the basis of evidence produced by a "mail watch" placed by a postal inspector of the Post Office Department on first class mail addressed to Schwartz. A "mail watch" consists of the compiling of a record by a letter carrier of information appearing on the face of envelopes of letters addressed to specified persons. In the present case the procedure was successfully used to discover the names of Schwartz's victims, which were then furnished to the Department of Justice by postal inspectors for the purpose of instituting criminal proceedings.

The sole issue on appeal was whether the "mail watch" evidence was properly admissible against the appellant. Appellant argued that this information was furnished to the Department of Justice in contravention of part 311.6 of the postal regulations, and was therefore inadmissible. The Circuit Court rejected this contention, holding that the prohibition against dissemination of information as contained in part 311.6 of the regulations has no application to postal inspectors; and therefore the evidence in question was in no sense obtained illegally and was admissible against the appellant.

Staff: United States Attorney Walter E. Alessandroni;
Assistant United States Attorney James P. Dorndengor
(E.D. Pa.).

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Expatriation; Constitutionality of Statute; Due Process; Estoppel. Mendoza-Martinez v. Rogers (S.D., Calif., Sept. 22, 1960.) For the third time this Court ruled on this case. In 1955 it held sec. 401(j), NA of 1940, to be constitutional and that the plaintiff expatriated under its provisions. The Court of Appeals affirmed.

On April 7, 1958, the Supreme Court remanded to the District Court (356 U.S. 258) for a redetermination in light of Trop v. Dulles, 356 U.S. 86. On September 24, 1958, the District Court held section 401(j) to be unconstitutional (See this Bulletin, Vol. 6, No. 22, p. 640; Mendoza-Martinez v. Mackey, et al.).

The case again reached the Supreme Court on direct appeal, and again it was remanded to the District Court in order that a possible question of collateral estoppel, which might have arisen as the result of the plaintiff's 1947 conviction of draft evasion, could be put in issue and adjudicated (362 U.S. 384). The constitutional question was not reached.

On rehearing the District Court concluded that the prior criminal proceedings did not necessarily nor in actual fact make any determination as to plaintiff's citizenship and, therefore, the doctrine of collateral estoppel did not apply.

It reaffirmed its 1958 holding on the constitutional question and construed section 401(j) as unconstitutional in that it is essentially penal in character and, in automatically divesting plaintiff of citizenship, it deprived him of procedural due process.

By stipulation the action was dismissed as to Mackey who is no longer the Commissioner, Immigration and Naturalization Service.

Habeas Corpus; Right to Deportation Hearing and Administrative Bail; Deserter from Foreign Naval Vessel; Adjustment of Status. U.S. ex rel. Juan Perez-Varela v. Esperdy (S.D. N.Y., October 4, 1960). Relator, a Spanish national, deserted from a Spanish naval vessel in the port of New York between April 26 and May 3, 1960. The day before he was apprehended by the Service he married a citizen of the United States. After his apprehension he petitioned for a writ of habeas corpus seeking a deportation hearing under sec. 242(a), 1952 Act (8 U.S.C. 1252(a)) and administrative bail pending the outcome of that hearing. He also moved to suppress certain documentary evidence allegedly the subject of an illegal search and seizure in violation of his constitutional rights.

The Court found that he was not being proceeded against under the immigration law but rather under Article 24 of the Treaty of Friendship and General Relations between this country and Spain (33 Stat. 2117). That article provides that consular officers of the two countries may cause such crewmen of their ships of war to be arrested and sent on board or returned to their own country, who may have deserted in one of the ports or the other. His rights being thus governed by treaty, section 242(a) is not applicable to him. The Court also found that he deserted after being given temporary shore leave upon a predetermined intention to remain in the United States and was ineligible to adjust his status to that of a permanent resident under section 245, 1952 Act (8 U.S.C. 1255), despite his marriage to a citizen, since he was not lawfully admitted as a non-immigrant.

Since the evidence which he contended was illegally seized was not employed in any past proceedings and no future proceedings could be contemplated in which it could be employed the motion to suppress was without merit. So, too, was the application for administrative bail since the record indicated that respondent was acting with all dispatch to turn the relator over to the appropriate Spanish authorities pursuant to Article 24 of the Treaty.

Application for the writ and motion to suppress denied.

NATURALIZATION

Residential Requirements; Petition Filed as Spouse of Citizen Under 1940 Act; Preservation of Status by Savings Clause of 1952 Act. Petition of Levi (S.D. N.Y., Sept. 27, 1960). Petitioner for naturalization became a permanent resident of the United States on August 19, 1949, and on August 15, 1954, he married a naturalized citizen of the United States. He filed his petition on February 3, 1960, and sought to have his eligibility determined under section 311 of the Nationality Act of 1940 (8 U.S.C. 711), which provided certain residential exemptions to the petitioning spouse of a United States citizen.

Despite the fact that he and his wife had been absent from this country for approximately 57 months and physically present here only 3 months from the time of his marriage until he filed his petition, he contended that because he was residing in the United States when the 1952 Act was enacted he acquired a status or condition from such residence which was preserved by section 405(a), the Savings Clause of the 1952 Act (8 U.S.C. 1101, note). Accordingly, he claimed a right to be naturalized under section 311 supra. He relied on U.S. v. Menasche, 348 U.S. 528; Petition of Pauschert, 140 F. Supp. 485; and Medalion v. U.S., 279 F. 2d 162. (NOTE: Menasche and Pauschert digested this Bulletin, Vol. 3, No. 8, p. 29 and Vol. 4, No. 11, p. 377, respectively).

The Court distinguished Menasche and Medalion in which the petitioners had either filed a declaration of intention or had acquired a residence status preserved by the Savings Clause of the 1952 Act so as

to permit them to take advantage of the more liberal provisions of the general residential requirement and to have their petitions determined under section 307 of the 1940 Act (8 U.S.C. 707). In Pauschert the residence in marital union with the citizen spouse commenced in 1951, so that when the 1952 Act became effective he had an inchoate right to attain citizenship under section 311 of the 1940 Act which the 1952 Act would have destroyed but for the savings provision of section 405.

In this case, however, petitioner gained no advantage under section 311 of the 1940 Act of which he was stripped by the 1952 Act (he did not become the spouse of a citizen until 1954) and there was, therefore, nothing to be preserved to him by section 405.

Petition denied.

IMMIGRATION

Declaratory Judgment; Adjustment of Status to Permanent Resident; Alien Crewman. Podaras v. Cornell (S.D., Tex., September 1, 1960). Plaintiff, an alien crewman, filed a complaint for a declaratory judgment seeking relief by way of an adjustment of his immigration status to that of a permanent resident under the provisions of section 245 of the 1952 Act (8 U.S.C. 1255).

The Court held that since the Act of July 14, 1960 (P.L. 86-648; 74 Stat. 505) amending section 245 specifically excluded alien crewman from such relief, the question is foreclosed by the statute and the matter is moot.

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Recent Supreme Court Actions - On October 10, 1960, the Supreme Court granted the petition for writ of certiorari in the case of Bernhard Deutch v. United States, a criminal conviction for contempt of Congress which arose in the District of Columbia for his refusals to answer certain questions propounded by the House Committee on Un-American Activities. In the Committee hearings Deutch had testified as to his own activities in the Communist Party but refused to identify certain other persons with whom he had been active in the Party.

Also on October 10 the Court granted certiorari in the case of Cafeteria and Restaurant Workers, et al. v. McElroy. This case also arose in the District of Columbia and involves the validity of an action taken by the security officer at the Naval Gun Factory (now the Naval Weapons Plant) in taking up the base access pass of a woman employee of a private concessionaire which operated a restaurant on the premises of the Gun Factory. The employee's security badge was withdrawn without a hearing of any kind.

On the same date the Supreme Court denied the petition in the case of Charles O. Porter v. Christian A. Herter, which involved a refusal by the Secretary of State to validate Congressman Porter's passport for travel to Communist China, an area which is presently proscribed for travel by American citizens. Almost a year ago, Congressman Porter had petitioned for certiorari before judgment in the Court of Appeals, but that petition was denied also. The Court of Appeals later affirmed the judgment of the district court granting summary judgment for the Secretary of State on the basis of that court's previous decisions in Worthy v. Herter, 270 F. 2d 905 and Frank v. Herter, 269 F. 2d 245.

* * *

TAX DIVISION

Assistant Attorney General Charles K. Rice

CIVIL TAX MATTERS
Appellate Decision

Tax Liens; Validity Against Mortgagee. Attention is called to the fact that the decision in The Union Central Life Insurance Company v. Peters, et al. (Mich. Sup. Ct., Sept. 16, 1960), holding a mortgagee's lien superior to a federal tax lien against the mortgagors because the federal liens had not been filed according to the requirements of state law, is contrary to the position the Government is taking in these matters; and is in direct conflict with United States v. Rasmuson, 253 F. 2d 944 (C.A. 8). The Solicitor General is now considering the question of whether to petition for certiorari on this question.

The holding of the Michigan court that the federal liens were superior to the mortgagee's claim for local taxes it had paid is in accord with United States v. Bond, ___ F. 2d ___; 5 A.F.T.R. 2d 1722 (C.A. 4), pending on petition for certiorari, and United States v. Christensen, 269 F. 2d 624 (C.A. 9).

Staff: George F. Lynch and Moshe Schuldinger (Tax Division)

District Court Decision

Enforcement of Internal Revenue Summons; Examination of Books and Witnesses; Right of Witnesses to Counsel of Own Choice. In Matter of Application for Enforcement of Summons Against Florence Richards (N.D. Ill., May 23, 1960). In the Matter of the Application for Enforcement of a Summons Against Mary Danielson, (N.D. Ill., May 23, 1960). Administrative summonses were served upon two witnesses directing them to appear before a special agent who was investigating the business affairs of the taxpayer and certain corporations which taxpayer controlled. One witness was a secretary of and minority stockholder in each of the corporations under investigation and was also a sister of the taxpayer. The other witness was also an employee of the corporations. Both witnesses declined to testify unless taxpayer's attorney who was also their attorney was permitted to be present at the interrogation. The special agent offered to continue the interrogation to a later date to permit the witnesses to obtain other counsel, refusing to permit the same attorney who represented taxpayer to be present at their interrogation. Thereafter, application was made to the District Court for enforcement. The Court denied the Government's petition on the ground that the witnesses had responded and appeared as required by the summonses but had been refused the right to be represented by counsel of their own choice because counsel also was the taxpayer's attorney.

The same issue involved here was recently the subject of an appellate decision adverse to the Government. See Backer v. Commissioner, 275 F. 2d 141 (C.A. 5). There, the Court pointed out that the policy of the Internal Revenue Service which prohibits the presence of taxpayer's counsel at any interrogation of a witness subpoenaed by the Service is not based upon any Treasury Regulation but is a printed instruction appearing in a Manual of Instructions for Special Agents, Intelligence Unit. This, the Court observed, could not be regarded as any legal limitation upon the broad provisions of the Administrative Procedure Act (5 U.S.C.A. 1005(a)) which accord the right to "any person" to be accompanied, represented and advised by counsel when compelled to appear before any agency or representative thereof. The Court went on to hold that the term "right to counsel" meant counsel of one's choice. However, the Court did note that the situation in Backer was different from that in Torras v. Stradley, 103 F. Supp. 737 (N.D. Ga.), where counsel engaged in improper conduct so as to obstruct the inquiry.

Note: Since the holdings in these two proceedings appear to unduly impair the inquisitorial powers of the Internal Revenue Service, the Solicitor General has authorized appeals to the Court of Appeals for the Seventh Circuit.

Staff: United States Attorney Robert Tieken and
Assistant United States Attorney Robert A. Maloney
(N.D. Ill.)
Clarence J. Nickman (Tax Division)

CRIMINAL TAX MATTERS
Appellate Decision

Proof of Evasion of Individual and Corporate Income Taxes on Constructive Dividends Theory; No Prejudice Resulted from Inclusion of Non-Fraudulent Items. Samuel G. Jones v. United States (C.A. 4, October 10, 1960.) Appellant was convicted on six counts of evasion of his own income taxes and those of a corporation owned by him. The Government's evidence showed that corporate funds had been used to build two homes for appellant and to maintain a farm owned by him; that such expenditures served no corporate purpose; that the entire benefit accrued to appellant personally; that the expenditures had been charged to expense on the corporate books and tax returns; and that they were not reported as income on the individual returns. Appellant's main contention on appeal was that he was prejudiced by the inclusion in the Government's corrected net income and tax deficiency figures of certain items which were concededly not fraudulent, e.g., the expensing of machinery and other depreciable corporate assets which should have been capitalized. Appellant argued that the effect of the Government's computations was improperly to suggest to the jury that all of the corporate tax deficiencies were attributable to funds fraudulently diverted to him from the corporation. The Court of Appeals rejected the contention, pointing out that (1) the jury was

"clearly and repeatedly told that there was no claim of fraud * * * in connection with the corporation's expensing disbursements for capital assets"; (2) that appellant failed to take advantage of the opportunity he had at the trial to introduce a computation to show exactly what proportion of the deficiency was attributable to the "fraud" items; and (3) that appellant did not object to the Government's computations when they were offered and received in evidence.

United States Attorneys should not construe the holding in this case to sanction generally the inclusion of non-fraud items in criminal tax cases. Ordinarily such items are considered irrelevant to, and are therefore eliminated from, the computations for purposes of criminal prosecution. This obviates such contentions as that raised in the instant case, and reduces the possibility that defense counsel may be able to confuse the jury with technicalities of the tax laws.

Staff: United States Attorney Joseph S. Bambacus;
Assistant United States Attorney Plato Cacheris
(E.D. Va.)

* * *

I N D E X

Subject	Case	Vol.	Page
A			
ADMIRALTY			
Longshoreman's Injury; Warranty of Seaworthiness Does Not Apply to Deactivated Vessel Removed from Navigation	Roper v. U.S. et al.	8	664
ANTITRUST MATTERS			
Bank Merger; Plan for Disposition of Litigation	U.S. v. Firstamerica Corp.	8	662
Clayton Act:			
Truck Company Acquisitions; Complaint Under Sec. 7	U.S. v. Ryder System, Inc.	8	661
Violation of Consent Judgment; Termination of Civil Contempt Action	U.S. v. A.B. Dick Co.	8	660
B			
BACKLOG REDUCTIONS			
Monthly Totals		8	655
D			
DEPORTATION			
Expatriation; Constitutionality of Statute; Due Process; Estoppel	Mendoza-Martinez v. Rogers	8	668
Habeas Corpus; Right to Deportation Hearing & Administrative Bail; Deserter from Foreign Naval Vessel; Adjustment of Status	U.S. ex rel. Juan Perez-Varela v. Esperdy	8	668
F			
FEDERAL TORT CLAIMS ACT			
Govt. Owes No Duty To Supervise Potentially Dangerous Conduct of Persons on Federal Land for Recreational Purposes	Schultz v. U.S.	8	664

Subject	Case	Vol.	Page
F (Contd.)			
FEDERAL TORT CLAIMS ACT (Contd.)			
Visitor in National Park Held Mere Licensee	Smith, et al. v. U.S.	8	666
I			
IMMIGRATION			
Declaratory Judgment; Adjustment of Status to Permanent Resident; Alien Crewman	Podaras v. Cornell	8	670
INTERNAL SECURITY MATTERS			
Recent Supreme Court Decisions	Deutch v. U.S. Cafeteria v. Restaurant Workers, et al. v. McElroy Porter v. Herter	8	671
L			
LAW BOOKS			
West's Modern Federal Practice Digest Unavailable		8	658
M			
MAIL FRAUD			
Admissibility of Evidence Obtained by "Mail Watch" by Postal Inspector	U.S. v. Schwartz	8	667
N			
NATURALIZATION			
Residential Requirements; Spouse of Citizen Under 1940 Act; Preservation of Status by Savings Clause of 1952 Act	Petition of Levi	8	669
O			
ORDERS & MEMOS			
Applicable to U.S. Attys' Ofcs.		8	659

Subject	Case	Vol.	Page
P			
PSYCHIATRIC EXAMINATION EXPENSES			
Avoidance of Where Possible		8	658
S			
SOCIAL SECURITY ACT			
Second Marriage Declared "Void Ab Initio" in State Annulment Proceedings Is Not "Remarriage" Within Sec. 202(e)	Yeager v. Flemming	8	665
T			
TAX MATTERS			
Enforcement of Internal Revenue Summons; Examination of Books and Witnesses	In Matter of Florence Richards; In Matter of Mary Danielson	8	672
Liens; Validity Against Mortgagee	Union Central Life Ins. Co. v. Peters	8	672
Proof of Evasion of Individual and Corporate Income Taxes on Constructive Dividends Theory	Jones v. U.S.	8	673