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DEPARTMENT OF JUSTICE

Vol. 8 No. 24

UNITED STATES ATTORNEYS

BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 8 November 18, 1960 No. 24

MONTHLY TOTALS

As of September 30, 1960, total filings of both civil and criminal cases had increased over the same period in fiscal 1959. Total terminations, however, decreased in both categories of cases in the first quarter. The substantial gap between filings and terminations resulted in a sizeable increase of almost five per cent in the number of cases pending. The rise in the number of civil cases pending was especially marked. Set out below is a comparison of the work accomplished during the first quarter of fiscal years 1959 and 1960.

	First Quarter F. Y. 1960	First Quarter F. Y. 1961	Increase or Decrease Number	%
Filed				
Criminal	7,039	7,256	+ 217	+ 3.1
Civil	5,953	6,064	+ 111	+ 1.9
Total	12,992	13,320	+ 328	+ 2.5
Terminated				
Criminal	5,780	5,700	- 80	- 1.4
Civil	5,179	5,167	- 12	- .2
Total	10,959	10,867	- 92	- .8
Pending				
Criminal	8,963	9,221	+ 258	+ 2.9
Civil	19,118	20,160	+1,042	+ 5.5
Total	28,081	29,381	+1,300	+ 4.6

Since the beginning of the fiscal year, criminal work has shown a consistent rise each month both in filings and terminations. Civil work, however, reflected a sharp drop in September in filings and terminations. The very marked increase in criminal work helped to maintain the upward trend in total filings and terminations for both categories of cases. Set out below is an analysis of the comparative activity in the first three months of the fiscal year.

	July	August	September
Filed			
Criminal	1,709	2,346	3,201
Civil	1,863	2,304	1,897
Total	3,572	4,650	5,098
Terminated			
Criminal	1,600	1,772	2,328
Civil	1,463	1,906	1,798
Total	3,063	3,678	4,126

Collections for September rose very appreciably over those for August but did not quite reach the level established in July, the first month of the fiscal year. For the month of September 1960, United States Attorneys reported collections of $3,069,557. This brings the total for the first three months of this fiscal year to $7,733,943. This is $1,472,480 or 23.5 per cent more than the $6,261,463 collected in the first three months of fiscal year 1960.

During September $1,676,148 was saved in 66 suits in which the government as defendant was sued for $2,289,254. 37 of them involving $802,227 were closed by compromise amounting to $344,118 and 12 of them involving $290,931 were closed by judgment against the United States amounting to $154,997. The remaining 17 suits involving $1,196,096 were won by the government. The amount saved for the first three months of the current year was $5,079,835 and is a decrease of $2,386,371 from the $7,466,206 saved in the first three months of fiscal year 1960.

DISTRICTS IN CURRENT STATUS

As of September 30, 1960, the districts meeting the standards of currency were:

CASES

Criminal

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

CASES

Civil

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

MATTERS

Criminal

Ala., N.
Ala., M.
Ala., S.
Ariz.
Ark., E.
Ark., W.
Calif., N.
Conn.
Del.
Dist. of Col.
Ga., S.
Hawaii
Idaho
Ill., E.
Ind., N.
Ind., S.
Iowa, N.
Kan.
Ky., E.
Ky., W.
La., W.
Me.
Md.
Mass.
Mich., E.
Mich., W.
Miss., N.
Miss., S.
Mo., E.
Mont.
Neb.
N. M.
N. Y., E.
N. C., M.
N. C., W.
Ohio, S.
Okla., N.
Okla., E.
Okla., W.
Pa., E.
Pa., W.
P. R.
R. I.
S. D.
Tenn., W.
Tex., E.
Utah
Va., W.
W. Va., N.
W. Va., S.
Wis., E.
Wis., W.
Wyo.
C. Z.
Guam
V. I.

Civil

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

JOB WELL DONE

Assistant United States Attorney Edward P. Troxell, District of Columbia, has been commended by the Prosecuting Attorney, County of Cuyahoga, Ohio, for the fine job he did in a recent case involving an extradition matter.

The District Engineer, Army Engineers Corps, has expressed his appreciation to United States Attorney Paul W. Cress and staff, Western District of Oklahoma, for the great assistance rendered to that office in a recent series of condemnation cases. These proceedings involved twenty cases with 148 separate tracts and nearly 500 defendants. The letter stated that the prompt filing of the complaints to acquire interests in land for the construction of the missile complex inter-site communication systems was of great importance in obtaining the right of way required for this important national defense project.

Assistant United States Attorney Irving Younger, Southern District of New York, has been congratulated by the presiding judge for a most difficult task that was indeed well done in a recent case. The letter stated that Mr. Younger displayed the talents of a good trial lawyer and an excellent prosecutor, but that at all times he was most careful to protect the rights of all of the accused.

The FBI Special Agent in Charge has commended Assistant United States Attorney James M. FitzSimons, Eastern District of New York, for his diligence and for the extensive knowledge he displayed of the intricacies of a recent case involving interstate transportation of gambling devices. The letter stated that it was through Mr. Fitzsimons' efforts in this matter that the Government was able to obtain a successful verdict in the case.

Assistant United States Attorney John R. Hargrove, District of Maryland, has been commended by the District Supervisor, Bureau of Narcotics, for his handling of a recent case. The letter stated that the case originated with undercover purchases from a group of retailers supplying Washington, whose testimony proved pivotal in the prosecution, and that Mr. Hargrove's handling of the witnesses before the grand jury and his effective prosecution were major factors in the successful results. The letter further stated that this conviction marks a distinct contribution to narcotic enforcement in the District of Maryland.

The Chief Postal Inspector has expressed his appreciation for the prompt and effective efforts of United States Attorney Charles P. Moriarty and Assistant United States Attorney Joseph McKinnon, Western District of Washington, in the prosecution of a recent case involving the use of the mails in a scheme to defraud Seattle businessmen. The defendants, operating as "Northwestern Directory Company," billed their victims for listings in a manner to induce the erroneous belief that the listings were for the Seattle telephone directory or the city directory, obtaining over $10,000 before their arrest halted the operation. All three defendants entered guilty pleas.

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ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

WITNESSES--ADVANCE NOTICE

Some United States Attorneys' offices have been obtaining Armed Forces witnesses directly instead of clearing the requests through the Administrative Assistant Attorney General. It is urged that all staff members review the regulations in the United States Attorneys Manual, Title 8, page 122, and the United States Attorneys' Bulletin No. 21, Vol. 6, page 607, October 10, 1958, concerning the use of Form DJ 49 which was devised to reduce administrative details. Only an original of the form is required and no transmittal letter is necessary. It is important that serial numbers of military personnel be furnished as well as the date of the last known address of the witness.

Also there have been occasions recently when a United States Attorney's office waited until the last minute to secure a witness in the Armed Forces. It is realized that emergency situations occur, but in many instances careful advance planning would avoid last minute calls. If the definite attendance date of the witness is not known, it is urged that this fact be stated in the DJ 49 with an indication of the approximate trial date. The military agencies can set up orders on the basis of a witness reporting at an approximate time with notification by the United States Attorney to the witness direct of the exact date. This alerts the witness and results in better relations with the military agencies.

When time does not permit action on a request by mail, please telegraph, or telephone Extension 3147. (Note change in number.)

ORDERS AND MEMOS

The following Memoranda applicable to United States Attorneys' Offices have been issued since the list published in Bulletin No. 22, Vol. 8, dated October 21, 1960.

MEMO	DATED	DISTRIBUTION	SUBJECT
106-2	10-11-60	U.S. Attys. & Marshals	Political Activities
278-1	10-17-60	U.S. Attys.	Social security Decisions Unreported in Federal Reporter System
173-12	11-1-60	U.S. Attys. & Marshals	Amendment to Standardized Government Travel Regulations.

* * *

ANTITRUST DIVISION

Assistant Attorney General Robert A. Bicks

CLAYTON ACT

Government Given Right to Inspect Plants. United States v. National Steel Corporation, et al., (S.D. Texas). On October 25, 1960, the Court rendered an opinion granting plaintiff's motion under Rule 34 for inspection of the manufacturing plants of defendants' Stran-Steel Corporation and Metallic Building Company. The decision is important in that it is the first time the question of the right of the plaintiff to inspect the plants of the defendants has arisen in a Section 7, Clayton Act proceeding. In United States v. Bethlehem Steel Corp., 168 F. Supp. 576 (S.D. N.Y., 1958) plant inspection had been granted on a voluntary basis.

The complaint charges that the acquisition on January 30, 1959, by Stran-Steel Corporation of Detroit, Michigan, a subsidiary of National Steel Corporation, of a 75 percent stock interest in Metallic Building Company of Houston, Texas, may substantially lessen competition in the manufacture and sale of prefabricated metal buildings. Both Stran-Steel and Metallic were engaged in manufacturing and selling such buildings prior to the acquisition, and they competed in the Southwest where Metallic made most of its sales. Defendants' answers denied that there was any substantial competition between Stran-Steel and Metallic. The Court sustained the Government's contention that inspection of the defendants' plants would shed light upon the extent to which the companies were capable of producing competitive products. On this point the Court stated:

> A crucial question is the amount of competition between Stran-Steel and Metallic. Inspection of these plants will give plaintiff information as to the comparability of processes, machinery, and materials in each of them. Such information is pertinent to the question of the extent to which defendants' plants were capable of producing competitive products after acquisition and at the time of acquisition. Knowledge can be gotten as to the relative output potential of the two plants. This data is relevant to whether a threat to competition is posed by the attacked sale.

Judge Ingraham rejected the defendants' objection that the same information could be obtained by way of interrogatories, stating:

> I am satisfied the nature of information sought here cannot suitably be obtained through interrogatories. Examination of processes and machinery can be made more readily via inspection. Defendants complain they are already overburdened with numerous and lengthy interrogatories, and they believe they ought not further be imposed upon. Fed. Rule Civ. Pro. 33 places no limit on the number of interrogatories. Rules 33 and 34 are cumulative, not alternative.

To defendants' contention that inspection of the plants would reveal "trade secrets" the Court countered:

> While it is true that "privileged" matters are not open to discovery, secret trade processes are not so privileged. 2 Barron & Holtzoff, Federal Practice and Procedure, Sec. 798 (1950). It has been repeatedly held that a party has no absolute right to refuse information upon the sole basis that it involves disclosing trade secrets. Cities Service Oil Co. v. Celanese Corporation, 10 F.R.D. 458, 460 (D. Del. 1950). The disclosure of trade secrets rests in the court's discretion. Our problem is one of weighing the need for discovery against the desirability of maintenance of secrecy of processes. In my opinion the Government's need for the information to be gotten by inspection outweighs defendants' secrecy requirements on these particular facts.

However, the Court ruled that any information obtained in the course of inspection with respect to "trade secrets" should not be revealed except in the course of judicial proceedings, and that such revelation at the trial would be under such terms as the court considered suitable at the time. The Court also ruled that the plaintiff's personnel making the inspection should be limited to plaintiff's counsel and economist assigned to the case, and a Government engineer.

Staff: Allen A. Dobey, John C. Fricano and S. Robert Mitchell (Antitrust Division)

SHERMAN ACT

Price Fixing-Asphalt, Road Tar and Bituminous Concrete. United States v. The Lake Asphalt and Petroleum Company of Massachusetts, et al., (D. Mass.). This action is one of three civil cases alleging combinations and conspiracies to fix prices and allocate territories in the sale of asphalt, road tar, and bituminous concrete respectively, to purchasers thereof, including various states and cities and towns. Each of these cases was also brought on the criminal side. These criminal cases ended with the acceptance by the Court of nolo pleas proferred by defendants. The Department opposed acceptance of these pleas because, among other reasons, it wanted to handle these cases in a manner which would put at the disposal of governmental bodies victimized by these conspiracies judgments which would constitute prima facie evidence in treble-damage suits brought by them.

Having failed to obtain such judgments in the criminal cases, the Department decided that, in accordance with the opinions in United States v. Standard Ultramarine and Color Co., 137 F. Supp. 167 (S.D. N.Y.) and United States v. Cigarette Merchandisers Assn., Inc., 136 F. Supp. 212 (S.D. N.Y.), it would use the civil cases to obtain such judgment. To that end the Government refused to enter into consent judgments unless such judgments, by their terms, put a prima facie case at the disposal of the victimized governmental bodies.

The above-captioned civil case was the first of the three to be scheduled for trial. The complaint in that case charged ten defendants with having combined and conspired to fix prices and allocate territories in the sale of asphalt to the Commonwealth of Massachusetts and the State of New Hampshire, and to cities and towns therein; and to fix the price of asphalt sold to private contractors. The case was called for trial on October 17, 1960. When the Government announced that it was ready for trial, all defendants except Allied Chemical Corporation and Koppers Company, Inc., in the presence of the Court, signed a consent judgment (negotiated the week before) which was thereupon approved by the Court, enjoining the illegal activities alleged and containing the following provisions never before obtained by the Government in a consent judgment:

> The plaintiff, United States of America, having filed its complaint herein on October 13, 1959, and defendants signatory hereto having admitted the allegations contained in the Government's complaint herein solely for the purpose and to the extent necessary to give to the following adjudication the prima facie effect stated in Section I below in the suits specified below, and for no other purpose,
>
> NOW, THEREFORE, before any testimony has been taken herein without trial and upon the consent of all the parties hereto, it is hereby
>
> ORDERED, ADJUDGED AND DECREED as follows:
>
> I
>
> That on the basis of said limited admission the defendants signatory hereto have engaged in an unlawful combination and conspiracy in violation of Section 1 of the Sherman Act as charged in the said complaint, this adjudication being for the sole purpose of establishing the prima facie effect of this final judgment, in the suits specified below, and for no other purpose;
>
> Each defendant is enjoined and restrained from denying that this final judgment has such prima facie effect in any such suit; provided, however, that this section shall not be deemed to prohibit any such defendant from rebutting such prima facie evidence or from asserting any defense with respect to damages or other defenses available to it. The specified suits referred to above are the suits instituted in this court by the Commonwealth of Massachusetts wherein the defendants signatory hereto are named as defendants and numbered 60-229-S on the docket of this court and any other suit instituted by any Massachusetts city or town against any of the defendants signatory hereto prior to the date of entry of this final judgment, and which alleges violation of the Federal antitrust law and claims damages growing out of the purchases of asphalt from any such defendant. . . .

Defendant Allied thereupon made a motion for the entry of a consent judgment identical in all respects to that signed by the other eight

defendants except for the provisions quoted above or, in the alternative, to dismiss the complaint. The Court denied the motion forthwith. Allied then moved for a stay of the trial until it would have had an opportunity to obtain appellate review of the denial of its first motion. This motion for a stay was also denied forthwith. Allied then announced that it had made arrangements to have the refusal to grant a stay reviewed by the Supreme Court on that same day, whereupon Judge Wyzanski recessed the trial until the following day. In the late afternoon of October 17, 1960 the Supreme Court denied Allied's motion. The trial against Allied and Koppers accordingly began on October 18, 1960.

During the examination of the second witness, the trial was interrupted. Defendant Allied, the next day, stated that it was satisfied that a judgment should be entered against it on the basis of the evidence already adduced. Defendant Koppers, against which no evidence had yet been adduced, then made an admission that it had engaged in a combination and conspiracy to fix the price of asphalt sold to the Commonwealth of Massachusetts in one specified year for use in one specified locality.

On October 20, 1960 Judge Wyzanski made findings of fact concerning Koppers which reflected the substance of its admission, and in the case of Allied, made findings to the effect that it had combined and conspired to fix prices and allocate territories in the sale of asphalt to the Commonwealth of Massachusetts for the year 1957. The injunctive relief entered against the defendants Allied and Koppers was in all respects identical to that entered against the eight defendants who signed the consent judgment.

Staff: John D. Swartz, John J. Galgay, Bernard Wehrmann, Elhanan C. Stone and Paul J. McQueen (Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General George Cochran Doub

COURTS OF APPEALS

AGRICULTURAL MARKETING AGREEMENT ACT OF 1937

Government's Suit Enforcing Milk Marketing Order; Accord and Satisfaction Between Handler and Producers' Association Held Bar to Government's Suit to Enforce Payment of Minimum Price to Association. United States v. Tapor-Ideal Dairy Co. (C.A. 6, October 21, 1960). Order No. 75, 7 C.F.R. Part 975, promulgated by the Secretary of Agriculture, pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601, et seq., to prescribe conditions for the handling of milk in the Cleveland marketing area, requires regulated "handlers" to pay specified minimum prices, on a monthly basis, to each producer or cooperative association from which milk was purchased during the month. Defendant, a regulated handler, contracted to buy milk from a producers' association for ten years at the minimum price set by the Order. Subsequently, the association notified defendant that it would no longer be able to deliver milk at the contract price, whereupon defendant made payments in excess of the contract price for several months. At the end of that period, defendant claimed a set-off for the payments in excess of the contract price, and tendered the association a check for the current month, for an amount under the contract (and minimum) price, but which was marked "payment in full". The association cashed the check, noting on it "not a payment in full".

The United States brought suit, as authorized by 7 U.S.C. 608(a)(6), to compel defendant to pay to the association the minimum price under the Order for the month in question. The Government contended that, irrespective of the contractual rights between defendant and the association, defendant was not permitted, under the Order, to claim a set-off, but was, instead, forced to pay the minimum prices on a monthly basis as prescribed by the Order. Defendant asserted that the cooperative's "acceptance" of the check constituted an accord and satisfaction under Ohio law and that, as the purpose of the Government's suit was to enforce a "private debt" owed to the cooperative, the Government, like the cooperative, was subject to the defense of accord and satisfaction. The Government argued that, under United States v. Ruzicka, 329 U.S. 287, defendant was precluded from raising its defense in the Government's enforcement suit, as the defense could only be raised in a review proceeding brought pursuant to 7 U.S.C. 608c(15). The Government also contended that, in any event, its enforcement of the Order could not be barred by an accord and satisfaction between the handler and the association.

The district court dismissed the Government's complaint. It held that, under Ruzicka, it had jurisdiction to consider the defense of

accord and satisfaction because it was "strictly of a legal nature" and did not require a "special understanding of the milk industry". The court then held that, under Ohio law, an accord and satisfaction had been reached between defendant and the producers' association, and that this defeated the Government's claim here because the Government, in seeking to compel payment of the minimum price to the association, "stood in the shoes" of the association. On the Government's appeal, the Sixth Circuit affirmed on the basis of the district court's opinion. The Government is considering the filing of a petition for certiorari.

Staff: Mark R. Joelson (Civil Division)

APPELLATE PRACTICE

District Court Order Granting Government's Motion of Dismissal Not "Final Decision" Under 28 U.S.C. 1291 Where Counsel Directed to Prepare Findings and Conclusions. Barreto v. United States (C.A. 1, October 19, 1960). Plaintiff brought suit under the Federal Tort Claims Act for the death of his ten-year-old son who drowned while swimming in a lake located on Government property. The Government moved to dismiss on the ground that plaintiff had failed to establish a prima facie case of negligence. On May 18, 1960, as shown by the Clerk's docket entry, the court granted the Government's motion with direction to Government counsel to prepare proposed findings of fact, conclusions of law and the form of judgment. These documents were filed on May 31 and later adopted and entered by the court on June 22. The docket entry for June 22, stated "findings of fact, conclusions of law, and judgment dismissing complaint filed. Judgment entered June 22, 1960."

On July 29 plaintiff filed a notice of appeal from the order granting the Government's motion to dismiss, which the notice asserted was filed on May 31. No further notice of appeal was filed. On September 27 the Government moved to dismiss the appeal for lack of appellate jurisdiction on ground that the "final decision" within the meaning of 28 U.S.C. 1291 was the one entered on June 22, in which the court adopted and entered the proposed findings, conclusions and judgment prepared by the Government. Since plaintiff had failed to take a notice of appeal from this action within 60 days, the Government argued that the court of appeals lacked jurisdiction to hear the case. The First Circuit sustained the Government's position and dismissed the appeal for lack of jurisdiction.

This case clearly demonstrates the need for a careful analysis of the nature of the district court's orders and actions to determine when a "final decision" has been entered for purpose of taking an appeal.

Staff: United States Attorney Francisco A. Gil, Jr. (Puerto Rico)

FEDERAL EMPLOYEES COMPENSATION ACT

FECA Coverage Must Be Determined in First Instance by Agency Which Administers Act. Somma v. United States (C.A. 3, October 10, 1960). Plaintiff, a Navy employee, brought suit against the Government under the Torts Claims Act for injuries caused by a disabling recurrence of tuberculosis which he alleged was negligently overlooked by Government doctors in periodic chest x-rays. The Government argued inter alia that plaintiff was covered by FECA and hence the remedy provided by that Act was exclusive. The district court refused to pass on the application of FECA because it found a substantial question as to whether plaintiff was covered by the Act, but dismissed the complaint on the ground of contributory negligence.

On appeal, plaintiff sought reversal of the finding of contributory negligence and a ruling on the application of FECA. The Third Circuit, however, refused to pass on the question of whether plaintiff was covered by FECA and remanded the case to the district court with instructions to vacate the judgment and allow plaintiff a reasonable time in which to file his claim before the agency which administers the FECA. The court reasoned that Congress had created special administrative procedures to determine the application of FECA and that the principles of uniformity and consistency required it to stay its hand until the agency could make an initial determination on the question of whether plaintiff was a federal employee within the meaning of the Act.

Staff: Leavenworth Colby (Civil Division); Assistant United States Attorney Charles M. Donnelly (E.D. Pa.)

POSTAL SAVINGS BANK ACT

Suit by Depositor Must Be Brought Against Trustees of Postal Savings Bank and Not Against United States Under Tucker Act. Armstrong v. United States v. Holmes et al. (C.A. 3, October 12, 1960). Plaintiff sued the Government under the Tucker Act to recover money deposited in a postal savings account by his deceased wife. The Government filed a third-party complaint against two sisters of the deceased who had withdrawn the amount in question under an order which had been signed by the deceased. The district court entered judgment for the Government on the merits but held that the issue raised in its third-party complaint against the sisters was moot.

On appeal the Third Circuit reversed, holding that the trial court had no jurisdiction to enter judgment in a suit against the United States under the Tucker Act because it had not consented in the Postal Saving Bank Act, 39 U.S.C. 751 et. seq. to be sued for a debt due on a deposit in the Postal Savings System. The Court pointed out that plaintiff's proper remedy was a suit against the trustees of the Postal Savings Bank which could be brought in either a state or federal court. If plaintiff obtained a final judgment in such an action declaring him to be the owner

of proceeds in question, then he had a right to reimbursement from the Postmaster General under Section 17 of the Postal Savings Bank Act, 39 U.S.C., 767.

Judge Staley dissented, arguing that the district court had jurisdiction to entertain a contract suit under the Tucker Act because the Postmaster General is empowered by statute to make regulations governing the deposit system. He took the position that these regulations covering deposits and withdrawals created a contract of deposit between the Postmaster General and plaintiff's wife which supported the action in the federal district court against the United States.

Staff: United States Attorney Walter E. Alessandroni; Assistant United States Attorney Joseph J. Zapitz (E.D. Pa.)

SOCIAL SECURITY ACT

Adequacy of Evidence to Support Agency Determination of Failure to Establish Entitlement to Disability Benefits Under Act. John Kraynak v. Arthur S. Flemming (C.A. 3, October 24, 1960). Claimant sought to establish that he was entitled to disability benefits, under 42 U.S.C. 416(i) and 423, by reason of injuries to a leg and hand received when he was struck by a hit-and-run driver. Under these provisions, one qualifies for benefits if he can demonstrate his inability "to engage in any substantial gainful activity" by reason of physical or mental impairment. Claimant's work background was limited essentially to manual labor, he had little education, and his last work was a part-time job from which he was released six months prior to the accident. Several doctors considered that the injuries to leg and right hand rendered him totally disabled; another concluded that despite his age of 62, he could undertake such employment as would not involve strong grip in the right hand or extended walking or standing. There was no evidence that claimant had sought any work subsequent to the accident.

The district court upheld the Secretary's denial of disability benefits primarily on the ground that the medical opinions were in conflict on the question of inability to engage in any substantial gainful activity and that the agency was entitled to choose between these opinions. The Court of Appeals affirmed, basing its decision on the substantial evidence rule.

Staff: Herbert E. Morris (Civil Division)

DISTRICT COURTS

ADMIRALTY

Disputes Clauses; Proceedings Stayed to Permit Use of Administrative Agency's Disputes Procedure. Moran Towing & Transportation Co., Inc., et al. v. United States (S.D. N.Y., October 14, 1960). Libelants sued to recover under a towing contract between Moran and the Government which

required the Government to fit out and maintain the tow (a crane barge) in a proper and sufficient manner and to indemnify the contractor against any and all loss, damage or liability arising out of or in any way contributed to by the unseaworthiness of the tow or by any deficiency in or failure of its machinery or equipment. While the barge was en route to St. Nazaire, France, in tow of libelant's tug EDMOND J. MORAN, the shackles attached to the barge parted causing it to go adrift. A French fishing trawler rescued the barge and delivered it to St. Nazaire. Libelants were sued in France by the owner of the fishing trawler for salvage and a judgment of approximately $70,000 was affirmed on appeal. Libelants sought to recover the cost of defending the salvage suit together with any amount they were required to pay pursuant to the French judgment. In their libel they alleged that the shackles were owned and furnished by the Government, were attached under Government supervision and the makeup of the tow was supervised by Government personnel. The Government, in exceptive allegations, alleged that the shackles were owned and furnished by Moran and attached by members of the MORAN crew under the supervision of the captain of the Moran tug. The exceptive allegations further alleged that the district court lacked jurisdiction and that the exclusive remedy of libelant was under the arbitral provisions of the Disputes Clause contained in the contract. A motion for alternative relief was made under 9 U.S.C. 3 to stay the suit and all proceedings because of the provisions contained in the Disputes Clause.

The Court granted the Government's motion for a stay but did not dismiss the libel. Libelants' motion to overrule the Government's exceptive allegations was denied. The Court upheld the Government's contention that issues of fact must be determined in accordance with the Disputes Clause of the contract and that it was the "clear intent" of the parties that "any dispute concerning a question of fact arising under this contract" should be decided by the contracting officer. The Court rejected libelants' contention that the final sentence of the Disputes Clause limits that clause to disputes which arise during performance of the contract. The final sentence read: "Pending final determination of a dispute hereunder the contractor shall proceed diligently with the performance of the contract and in accordance with the contracting officer's decision." The Court agreed with the Government's contention that although the purpose of this sentence was to avoid delay due to any dispute which might arise during the performance of the contract, the Dispute Clause as a whole applied to any dispute involving a question of fact under the contract, whether it arose during performance of the contract or after its completion.

Staff: Louis E. Greco (Civil Division)

Lien of Preferred Ship Mortgage Held Superior to Subsequent Statutory Mechanic's Lien. United States v. F/V Zarco v. California Electric (S.D. California, September 15, 1960). The United States executed a Preferred Ship's Mortgage on the fishing vessel ZARCO on July 29, 1958. The terms of the mortgage were sufficient to include all appurtenances including a

certain generator armature. On August 2, 1958 and again on December 15, 1958, the generator armature was delivered by the vessel to California Electric which expended labor and materials in repairing it. The United States brought a libel to foreclose the Preferred Ship's Mortgage and subsequently California Electric claimed a possessory lien under section 3051 of the Civil Code of California which provides that a possessory lien is superior to a pre-existing lien on a chattel mortgage. The United States claimed however that it had a superior maritime lien under the Federal Ships Mortgage Act, 46 U.S.C. 953(b).

The District Court ruled that the Preferred Ship's Mortgage took precedence over the California statute because the entire subject of maritime law, including substantive as well as procedural features, is under national control and therefore Congress has power to determine the maritime law to be applied throughout the country, including the priority of maritime liens.

Staff: Graydon Staring (Civil Division)

United States Entitled to Contractual Indemnity from Stevedore Where Joint Negligence of Government and Stevedore Injures Longshoreman. LaMazza v. United States v. Imparato Stevedoring Corporation, (S.D. N.Y. October 25, 1960). On February 18, 1955 libelant was working as a longshoreman in Imparato's employ loading stores aboard a Government vessel. The gangway along which the stores were being rolled into the ship had been moved out of position on top of a stack of pallets on the pier by the gradual outward motion of the ship from the pier. Before leaving for lunch, the longshoreman foreman requested the ship's purser to move the ship in closer to the pier and was told it would be done during lunch. Upon returning, and without inquiry as to whether the ship had been breasted in, the foreman sent LaMazza and another longshoreman on top of the pallet base. While there, the ship was breasted in and the motion of the gangway knocked LaMazza from the pallets, causing injury. The Court ruled that the breasting in of the vessel without checking as to conditions on the pier was negligence on the part of the Government but that the longshoreman foreman was also negligent in ordering LaMazza onto the pallet base without first checking on whether his request that the ship be breasted in had been complied with. The Court accordingly awarded recovery by libelant from the Government and awarded full indemnity from the stevedore on the basis of the indemnity provision of the contract which stated that the stevedore would hold the Government harmless from all "liability and expense for bodily injury * * * of persons occasioned in whole or in part by the negligence or fault of the Contractor * * *." The Court has ordered a further hearing as to the Government's attorney's fees should the value of such fees not be stipulated.

Staff: Walter L. Hopkins (Civil Division)

CONSTITUTIONAL LAW

Constitutionality of Section 8(d) of Alaska Statehood Act and Section 3 of Alaska Omnibus Act. Interior Airways, Inc. v. Wien Alaska Airlines,

et al. (D. Alaska). Interior Airways sought to enjoin a hearing before the Civil Aeronautics Board on a complaint brought by Wien Alaska Airlines, upon the ground that since Alaska became a State the Civil Aeronautics Board had no jurisdiction over purely intrastate air commerce. The principal point urged was that Section 8(d) of the Alaska Statehood Act (Public Law 85-508) and Section 3 of the Alaska Omnibus Act (Public Law 86-70) (which provided for interim functioning of federal agencies pending establishment of similar services by Alaska) were unconstitutional. The hearing was temporarily restrained, but the order was subsequently modified to permit the hearing to continue and a three-judge court was convened. This Court overruled the Government's claim that there had not been exhaustion of administrative remedies and sustained the constitutionality of the statutes on the merits. This is the first case squarely upholding the validity of this type of provisions.

Staff: First Assistant George S. Leonard (Civil Division), United States Attorney George M. Yeager (D. Alaska), and Harland F. Leathers (Civil Division)

FALSE CLAIMS ACT

Forfeitures Assessed on Basis of Number of Vouchers Presented by Prime Contractor to United States; Statute of Limitations Commences to Run Against Defrauding Subcontractor from Date of Presentation of Claim by Prime Contractor to United States. United States v. Ueber Tool and Manufacturing Co. (E.D. Mich., October 5, 1960). Trial without a jury resulted in judgment for the United States under the False Claims Act in the sum of $158,900. That sum was made up of (a) double the Government's actual damage of $25,450 and (b) 54 forfeitures of $2,000 each. Defendant was a subcontractor which submitted fraudulently inflated invoices to prime contractors operating under cost-plus contracts with the United States with the result that the Government prime contractors thereafter innocently presented inflated vouchers to the United States for payment. The number of forfeitures assessed against defendant was measured by the number of "tainted" vouchers presented by the prime contractors to the United States rather than the much greater number of fraudulent invoices submitted by defendant to the prime contractors. Some of the invoices were submitted by defendant to the prime contractors more than six years prior to the commencement of the Government suit. However, the Court ruled that the statute of limitations under the False Claims Act did not commence to run against defendant subcontractor until the presentation by the prime contractors of their claims to the United States.

Staff: Assistant United States Attorney Willis Ward (E.D. Mich.); Douglas J. Titus (Civil Division)

TORT CLAIMS ACT

Induction and Discharge Physical Examinations Incident to Military Service; Statute of Limitations Bars Suit Two Years After Failure to

Advise Plaintiff of Tuberculosis; If Warranty Allegation Proves to Sound in Contract Rather Than Tort, Suit May Be Transferred to Court of Claims. Kilduff v. United States, (E.D. Va., Oct. 19, 1960). Count 1 of the complaint charged that the Government was negligent in failing to advise plaintiff that he was suffering from tuberculosis, both upon Army induction in 1942 and discharge in 1946. Count 2 charged that, in 1958, the Government negligently transfused plaintiff with blood contaminated with a hepatitis virus, after having warranted the purity of the blood. The Court sustained the Government's motion for judgment on the pleadings (confined to count 1) on the grounds that the injury alleged in count 1 occurred as an incident to military service, and the statute of limitations barred the action in 1948. The Court rejected plaintiff's theory of a continuing obligation to discover his tuberculosis, saying: "Surely two years was reasonable time for the appearance, and for warning of the plaintiff, of any injury done him through the reticence of the medical officer"; and "The very spirit and intent of these exceptive provisions [i.e., 28 U.S.C. 2680(h)] of the Act are violated if the maintenance of an action is in any degree whatsoever dependent upon the assertion of fraud." The Court denied, without prejudice, the motion to strike the warranty allegation of count 2, noting that under the amendment of September 13, 1960, P.L. 86-770, to 28 U.S.C. 1406, plaintiff might later request transfer of the case to the Court of Claims.

Staff: Assistant U. S. Attorney Cary Branch (E.D. Va.); John Roberts (Civil Division)

Substitution of United States as Defendant After Statute of Limitations Bars Action. Evelyn Fisher v. United States of America (N.D. Ill., October 6, 1960). Plaintiff was injured in a routine intersection collision which occurred on November 13, 1957, in Chicago, Illinois. On November 13, 1959, plaintiff filed an action against the Post Office Department and James Woolridge. After being advised there was no diversity of citizenship between the plaintiff and Woolridge, a postal employee, and that the Post Office Department was not a proper party to the action, plaintiff filed an amended complaint on December 15, 1959, specifying the United States of America as the sole defendant.

On the Government's motion, the Court dismissed plaintiff's entire claim for relief holding that the agency could not be sued eo nomine by virtue of 28 U.S.C. 2679 and that the amended complaint was defective in that it was filed beyond the statutory period of the statute of limitations. 28 U.S.C. 2401(b). The basis of the Court's holding was that an improper party was named in the original complaint and that the amended complaint attempted to bring in a different party after the statutory bar.

Staff: United States Attorney Robert Tieken and Assistant United States Attorney Joseph L. Cwik, Jr. (N.D. Ill.); Milan M. Dostal (Civil Division)

Prenatal Injury - Damages. Gina Fox, by her Guardian ad Litem, Julia Gladys Fox v. United States, (E.D. S.C., October 7, 1960). A

$260,000 judgment was entered for an alleged prenatal injury which occurred during the sixth month of pregnancy when the child's mother suffered a fractured pelvis in a collision with a Government vehicle. The child is now admittedly mentally and physically retarded as a result of brain injury. X-rays showed that the child's head was in the area of the pelvis at the time of the accident. Evidence was introduced to show the need for care and nursing, the costs thereof, and the child's life expectancy.

The Court included as elements of damage (a) injury and resulting impairment of mind and body, (b) cost of past and future care, and (c) deprivation of normal life expectancy. The Court appears to have ignored the South Carolina evidentiary requirement of probability of future damages rather than mere possibility. No reason was given for including a separate element of damages for shortening life expectancy. Although this is the first prenatal injury case decided on the merits in South Carolina, the recent decision in Hall v. McCarthy, 113 S.E. 2d 790 holds that there is a cause of action for prenatal injuries in that jurisdiction.

Staff: United States Attorney N. Welch Morrisette, Jr.; Assistant United States Attorneys George E. Lewis and Thomas P. Simpson (E.D. S.C.); Joseph Langbart (Civil Division)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Harold R. Tyler, Jr.

Youth Corrections Act; Narcotics Control Act; Appealability of Order Granting Probation; Mandamus. United States v. Lane; United States v. Honorable Fred Kunzel (C.A. 9).

The District Courts in California have for some time been granting probation to youth offenders convicted of narcotics offenses notwithstanding that the Narcotics Control Act (26 U.S.C. 7237(d)) specifically prohibits such sentences. The Department has been anxious to secure an appellate determination of the underlying legal question in order to achieve uniformity of treatment. Because of uncertainty concerning the proper procedural device, an appeal and a petition for writ of mandamus were filed simultaneously with the Court of Appeals for the Ninth Circuit when the district court granted probation to a youth offender in the Lane case.

The Court of Appeals held that neither the Criminal Appeals Act (18 U.S.C. 3731) nor the general appeals statute (28 U.S.C. 1921) permitted an appeal under these circumstances. However, the Court further decided that mandamus was a proper procedural device for testing the correctness of the lower court's determination, and on the merits, it held that the Narcotics Control Act prohibition on probation was not superseded by a general reference to probation in the Youth Corrections Act (18 U.S.C. 5010(a)). The Court directed the district court to correct its sentence in conformity with the decision. It is to be noted that this ruling does not in any way affect the existing power of trial courts to sentence youth offenders under the substantive provisions of the Youth Corrections Act even if they are guilty of narcotics offenses.

Staff: Harold H. Greene, Howard A. Glickstein and Gerald P. Choppin (Civil Rights Division)

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CRIMINAL DIVISION

Assistant Attorney General Malcolm Richard Wilkey

OBSCENITY

Use of Expert Testimony in Obscenity Cases. A memorandum entitled "Use of Expert Testimony in Obscenity Cases" is being transmitted with this issue of the Bulletin to each United States Attorney. The memorandum should be of assistance in considering prosecution of obscenity cases. Additional copies of the memorandum will be furnished upon request.

FRAUD

Furnishing Defective Surgical Dressing Gowns Under Contract with GSA. United States v. Superior Surgical Manufacturing Company, Inc. (E.D. N.Y.). This case arose as a result of a contract between the General Services Administration and Superior Surgical Manufacturing Company, Inc. for 200,000 surgical dressing gowns with a total contract price of approximately $396,000. These gowns were purchased by GSA for the Office of Civilian Defense and Mobilization as part of that agency's emergency hospital program. The gowns were transshipped to various sites throughout the United States for use in possible future emergencies. As the result of an exhaustive investigation by the FBI and the reinspection of the gowns at points of destination, it was revealed that from 15 to 50 per cent of the gowns were defective.

The subject company has waived grand jury action in this case and on October 13, 1960, pleaded guilty to seven counts of a twelve count information charging violation of Title 18 U.S.C. 1001. Sentencing is scheduled for November 3, 1960.

Staff: United States Attorney Cornelius W. Wickersham, Jr.; Assistant United States Attorney James M. Catterson, Jr. (E.D. N.Y.).

POULTRY PRODUCTS INSPECTION ACT

Provisions for Inspection of Records (21 U.S.C. 460 and 458(g)) Held Constitutional. United States v. Pine Valley Poultry Distributors Corp., et al (S.D. N.Y.). The Act requires that persons in the business of processing or transporting poultry products in commerce keep records of such activities and permit access to and copying of such records by authorized Department of Agriculture representatives. Refusal to permit access to and copying of the records is made a criminal act.

In this case, defendants allowed the inspector to look at and copy records. After the information was filed, they moved to suppress the evidence thus obtained, contending that evidence which must be made

available if criminal liability is to be avoided cannot, under the 4th and 5th Amendments, constitutionally be used as incriminating evidence in a subsequent criminal prosecution. The Court held that since Congress had the power to, and did, provide that such records were, in effect, "public records", no constitutional rights were infringed, and further held that there was no basis to defendants' contention that the absence of an immunity clause or of subpoena power in the regulatory agency to compel production of records presented a constitutional question.

This was the first case under the Poultry Products Inspection Act referred to the Department of Justice for prosecution, and the opinion of Judge Weinfeld on the motion to suppress is the first written opinion under the Act.

Staff: United States Attorney S. Hazard Gillespie, Jr.; Assistant United States Attorney George F. Roberts (S.D. N.Y.).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Judicial Review; Denial of Deportation Stay; Physical Persecution; Constitutionality of Discretionary Power; Trial De Novo. Obrenovic v. Pilliod and Petrovic v. Pilliod (C.A. 7, Oct. 14, 1960). Plaintiffs are aliens, natives of Yugoslavia, who were ordered deported. They applied for a stay of deportation under sec. 243(h) 1952 Act (8 U.S.C. 1253(h)) alleging that their deportation to Yugoslavia would result in their physical persecution.

After interrogations at which they were permitted to submit evidence to support their applications the Regional Commissioner, after considering all the evidence and noting current conditions in Yugoslavia, concluded that the evidence was not convincing and denied the applications. They then sought judicial review in the district court and contended that the delegation of discretionary power under 8 U.S.C. 1253(h)) is unconstitutional, that the administrative discretion was exercised arbitrarily, and that they were entitled to a trial de novo in the district court. They did not contest the validity of the deportation order. The district court granted defendant's motion for summary judgment and plaintiffs appealed.

The Court of Appeals held that there was no impairment of the constitutional guarantee of separation of powers in the enactment of 8 U.S.C. 1253(h) granting discretionary power to the Attorney General to stay deportation, and that the Fifth Amendment to the Constitution does not require a trial de novo on the issues of fact in these cases. It also found that the court below examined and considered the findings of the Regional Commissioner and concluded that there was no abuse of discretion. It said that if the reasons stated for refusing to stay deportation are sufficient on their face, the court cannot make further inquiry (U.S. v. Shaughnessy, 180 F. 2d 489).

Plaintiffs had full benefit of the limited judicial review available to them and the judgments below were affirmed.

Declaratory Judgment; Review of Deportation Order; Deportation Charge - Single Act of Procuring. Mirabal v. Esperdy (S.D. N.Y., Oct. 26, 1960). The question of whether a single act of procuring makes an alien deportable under the provisions of sec. 241(a)(12), 1952 Act (8 U.S.C. 1251(a)(12)) because that act placed her within one of the excludable classes described in sec. 212(a)(12) of the Act (8 U.S.C. 1182(a)(12)) appeared to the Court to be one of first impression. Since the Congressional intent was not made crystal clear it must be determined by means of an evaluation of the probable legislative intent, and it was sought by a process of reasoning and inference from analogy.

The Court said that a persuasive analogy can be drawn to the clause in the same section dealing with prostitution. Judicial and administrative decisions on that subject hold (under the present and predecessor section) that a single act of prostitution is insufficient to warrant deportation (U.S. ex rel. Mittler v. Curran, 8 F. 2d 355; Matter of R--, 2 I & N Dec. 50; Matter of T--, 6 I & N Dec. 474).

The Court could see no sound reason why the same requirement of a continuous, regular pattern of behavior applied to the prostitute was not meant to apply to the procurer as well. It concluded that the section was intended to allow for the deportation of those who, by a continuous course of immoral conduct, have evidenced a character rendering them unfit for residence in the United States, whereas the evidence in this case showed an isolated instance of procuring with no evidence of continuity or a course of conduct.

Plaintiff's motion for judgment on the pleadings granted.

Judicial Review of Deportation Order; Excludable at Entry - Psychopathic Personality (Homosexual). Harb-Quiroz v. Neelly (W.D., Texas, August 22, 1960). Plaintiff last entered the United States on January 6, 1960 as a returning legally-resident alien. Subsequently a special inquiry officer ordered her deported under section 241(a)(1) of the 1952 Act (8 U.S.C. 1251(a)(1)) because she was excludable at the time of her entry under section 212(a)(4), (8 U.S.C. 1182(a)(4)), as an alien afflicted with psychopathic personality (homosexual).

Her appeal from that order was dismissed by the Board of Immigration Appeals and she then sought judicial review to vacate the deportation order on the grounds that there is insufficient evidence to sustain it.

The Court, after reviewing the administrative record and hearing argument, concluded as a matter of law that since the record shows that plaintiff is a homosexual she is a person of psychopathic personality, and found no error or mistake of law in the administrative proceedings.

The order of deportation was affirmed but its execution was stayed pending final disposition of plaintiff's appeal from the court's judgment.

(Appeal filed October 13, 1960)

Declaratory Judgment - Review of Executed Order and Warrant of Deportation; Constitutionality of Deportation Statute; Creation of Record of Admission for Permanent Residence; Res Judicata; Improper Joinder. Spinella v. Esperdy (S.D. N.Y., October 11, 1960). Plaintiff filed an action under the Declaratory Judgment Act (28 U.S.C. 2201) for review of a deportation order under the Administrative Procedure Act (5 U.S.C. 1009), to have a record of his lawful entry created, and for a permanent injunction against defendant to prevent the latter from arresting him, holding him without bail, and deporting him.

After extensive deportation hearings in 1952 plaintiff was ordered deported and discretionary relief from deportation was denied to him. His appeal from the adverse order was dismissed on November 7, 1952. A warrant for his deportation issued on June 11, 1953. On April 15, 1952, plaintiff appealed from the denial of his petition for a writ of habeas corpus by the U. S. District Court, Miami, Florida and submitted a petition for a writ of habeas corpus for bail, pending appeal, to Mr. Justice Black of the United States Supreme Court. He secured an order on June 25, 1952 for $10,000 bail, which he posted. On January 29, 1953 the Court of Appeals (C.A. 5) dismissed his appeal as moot (201 F. 2d 364; cert. den. 345 U.S. 975, June 8, 1953). Plaintiff was deported to Italy on June 12, 1953.

In 1956 he instituted a declaratory judgment action in the District of Columbia seeking to invalidate the deportation order, the denial of discretionary relief, and his deportation, and to enjoin the Attorney General from interfering with his return to the United States. The District Court granted the Attorney General's motion for summary judgment and Spinella's appeal to the Court of Appeals was dismissed on February 13, 1958.

Plaintiff filed the instant declaratory judgment action again seeking to: vacate the 1952 deportation order and his 1953 deportation on grounds that the deportation statute (8 U.S.C. 1252(a)) is unconstitutional; enjoin the defendant; and direct defendant to create a record of plaintiff's lawful admission for permanent residence.

The Court found no substantial constitutional questions involved which have not been previously decided in other cases. It also found that plaintiff has not shown compliance with the statutory requirements of 8 U.S.C. 1259 and its regulations (8 CFR 249.1) for the creation of a record of lawful entry, nor is there a showing that plaintiff has re-entered the United States, which he supposedly has done according to his complaint which was verified by his attorney, not by plaintiff. It also held that prosecution of this action is precluded under the doctrine of res judicata, the validity of his deportation having been litigated in the District Courts of Florida and the District of Columbia and their respective appellate courts.

Since plaintiff is not in custody and there is no indication that he is sojourning anywhere in the New York district the district director is improperly joined as defendant. The Court said "What plaintiff seeks is to preclude defendant from deporting plaintiff if plaintiff should come into custody of defendant."

Plaintiff's motion for priority in the order of taking depositions denied and defendant's motion for summary judgment granted.

NATURALIZATION

Ineligibility to Citizenship; Exemption from Military Service on Account of Alienage; Postponement of Induction. Petition of Prieto

(S.D. Texas, June 17, 1960). On March 8, 1951 petitioner was notified by his draft board to report for a physical examination on March 22, 1951. Greatly disturbed at the thought of what he considered to be his impending induction he consulted with his family and friends and, on a number of occasions, with the clerk of his draft board.

The latter advised him of his right to file Form SSS-130 (Application by Alien for Relief from Training and Service in the Armed Forces) and the effect and consequences thereof. After considering the matter he signed and filed the form on March 19, 1951. He was then reclassified IV-C and was not subject to induction. That status continued until November 30, 1951, when, by reason of a change in the statute withdrawing from permanent resident aliens this privilege for exemption, he was reclassified I-A. He has never served in the armed forces.

On April 7, 1958 he filed his petition for naturalization and at his final hearing the naturalization examiner recommended to the court that it be denied because he is ineligible to citizenship under the provisions of sec. 315(a), 1952 Act (8 U.S.C. 1426(a)). Petitioner contended that under the statute (sec. 4(a), Selective Service Act of 1948) and its regulations he should be relieved from the consequences of executing Form 130. He relied on the regulation (1622.18(c)) which contemplates that an alien who is deferable or exempt under other provisions (death of a member of his immediate family (brother) - 632.2(a); postponement of induction of a college student - 632.4(a)) is not obliged to execute Form 130 to secure deferment.

The Court distinguished between a deferment or an exemption from service on the one hand, and a postponement of induction on the other. It is the latter that is provided for in the cited regulations and petitioner had never been ordered to report for induction. If he was to be deferred, that is, placed in a classification whereby he would not be called for service, it was necessary that he execute the form. He chose to do so. The Court also found that after receiving full, accurate, and considerate advice from the clerk of the draft board, petitioner made an intelligent election and is bound by its terms.

Petition denied. Petitioner appealed.

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Contempt of Congress. United States v. Donald Wheeldin (S.D. Calif.). On October 17, 1960, the United States Court of Appeals for the Ninth Circuit, in a per curiam opinion, affirmed the conviction of Donald Wheeldin for contempt of Congress. Wheeldin was indicted on July 15, 1959 (See Bulletin, Vol. 7, No. 16, p. 483) for knowingly and willfully failing to respond to a subpoena of the House Committee on Un-American Activities. On December 10, 1959, Wheeldin was convicted as charged (See Bulletin, Vol. 7, No. 26, p. 732) and on February 9, 1960 he was sentenced to 30 days' imprisonment and a fine of $100 (See Bulletin, Vol. 8, No. 5, p. 146). At these hearings, in September 1958, the Committee was conducting an investigation into the extent, character and objects of Communist Party activities in California, with special reference to such activities in Southern California. The Court of Appeals based its affirmance on the authority of Barenblatt v. United States, 360 U.S. 109. Rejecting Wheeldin's contention that his failure to appear did not evince the requisite willfulness under 2 U.S.C. 192, the Court held that evil intent was not necessary under this misdemeanor statute and that a deliberate, conscious attempt to disobey the subpoena sufficed.

Staff: United States Attorney Laughlin E. Waters and Assistant United States Attorney Robert John Jensen (S.D. Cal.)

Discharge of Veterans' Preference Government Employee Hazel T. Ellis v. Frederick Mueller, Secretary of Commerce (D. D.C.) Plaintiff was a former employee of the Commerce Department who was discharged in 1957 for making false or unwarranted statements reflecting on the loyalty of her immediate superior. Her discharge was sustained, after hearing, by the Civil Service Commission. In the District Court she contended, inter alia, that she had been denied due process to the extent that the administrative officer within Commerce who preferred the charges leading to her dismissal, likewise had decided upon the sufficiency of her reply and subsequently had discharged her. The District Court found that she had been accorded all procedural rights which the Veterans Preference Act of 1944 and Civil Service regulations entitled her to and sustained the dismissal on December 12, 1959. This decision was subsequently sustained in a per curiam opinion of the Court of Appeals for identical reasons on June 23, 1960. Plaintiff's petition for certiorari was denied by the Supreme Court on November 7, 1960.

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

* * *

TAX DIVISION

Assistant Attorney General Charles K. Rice

CIVIL TAX MATTERS
Appellate Decision

Liens; Release; Effect of Sale Providing for Installment Payments Which When Made Would Satisfy Delinquent Taxes. United States v. Fay Heasley, et al. (C.A. 8, October 24, 1960.) This is an action to foreclose federal tax liens. The real property of taxpayer was sold for a total price in excess of the amount of the federal tax liens, with the purchase price payable in installments over a five-year period. The installment obligation was evidenced by a promissory note. The district court held that the effect of such an installment sale was to satisfy the tax liability, and it held also that certain personalty of taxpayer was discharged from the effect of the liens. The Government appealed from the order discharging the personalty from the liens, and taxpayer appealed contending, inter alia, that the judicial sale on an installment basis constituted an abuse of discretion by the trial judge. The Eighth Circuit upheld the installment sale, stating that the question under 28 U.S.C. 2001 was whether the best interests of the parties were served by such a sale, and that in this case there was no abuse of discretion by the lower court in confirming the sale. Upon the Government's appeal, however, the lower court was reversed. The Court of Appeals reiterated the principle that tax liens may be removed only as the statute provides, and it held that the installment sale, evidenced by promissory notes, did not satisfy the tax liability of taxpayer. In addition, the Court held that the fact that the Government did not object to the sale on an installment basis did not constitute an election on the part of the Government to accept the installment obligation as satisfaction of its liens. Since the tax liability was not satisfied by the installment sale of the realty, the court held that it was error to discharge the personalty from the tax liens.

Staff: Helen A. Buckley (Tax Division)

District Court Decisions

Fraudulent Conveyance; Enhanced Value of Life Estate May Be Recovered from Remainderman for Delinquent Taxes of Life Tenant. United States v. Joseph Anderson Schofield, III, et al. (E.D. Pa.) Between 1947 and the date of taxpayer's death in July 1955, he failed to pay any federal income taxes. During that period he made substantial capital improvements to a farm known as Anderson Place, in which he had only a lifetime estate under his mother's will, his son being the remainderman. Soon after taxpayer's death jeopardy assessments were made for income taxes, penalties and interest in a total of approximately $900,000. The assessments did not constitute a statutory lien on the farm property since it had already passed to the remainderman.

The Government filed this suit against the remainderman and others, seeking to recover, under the Uniform Fraudulent Conveyance Act, the value of the improvements made by taxpayer to the real property during the years when he failed to pay his federal income taxes, and during which period, the Government contended, he was insolvent by reason of the outstanding income tax liabilities. Defendants contended, among other things, that the Government was barred by the state statute of limitations ("Statute of Repose," 12 Purdon's Statutes, Sec. 83), from recovery for any improvements made more than five years prior to the date this suit was filed. About 75% of the improvements had been made prior to that five-year period.

The Court decided for the defendants on this issue. While holding that the Government was entitled to recover the amount by which the value of the property was "enhanced" at the date of taxpayer's death by reason of the improvements made thereon by the taxpayer, the court limited that recovery to the improvements made within five years prior to the date suit was filed, and held this enhanced value amounted to only $2,000.

Defendants had contended that taxpayer was not insolvent during the period in question, and that the tax penalties could not be taken into account in determining insolvency. The Court stated that the burden was upon the defendants to prove solvency, and that their evidence was insufficient for that purpose.

The Government also contended that taxpayer's estate had a cause of action against the remainderman for the cost of the capital improvements, and that the Government as a creditor of the estate was entitled to assert this right. The Court found there was nothing in the record to indicate that the taxpayer made the improvements with any expectation of being reimbursed, and concluded that taxpayer intended to contribute these improvements to subsequent owners of the property, and that the delivery required for a valid gift was accomplished when the improvements were attached to the land.

Staff: United States Attorney Walter E. Alessandroni, and Assistant United States Attorney Henry R. Heeber, Jr. (E.D. Pa.); Mamie S. Price (Tax Division)

Injunction Denied; Suits to Enjoin Assessment and Collection of Excise Tax on Pin-Ball Machines Dismissed for Lack of Jurisdiction Under Section 7421 of Internal Revenue Code of 1954. Singleton v. Mathis, Stewart v. Mathis, (E.D. Ark.) These two actions were brought to determine whether two pin-ball machines called "Nite Club," and "Lotta Fun" were taxable under the provisions of 4461 through 4463 of the 1954 Code. Plaintiff, Stewart, owned and rented the machines to plaintiff, Singleton, who operates a restaurant in North Little Rock, Arkansas.

Section 4461(a) and 4462 of the 1954 Code impose a tax of $10 upon amusement machines and a tax of $250 upon certain slot machines

as defined in Section 4462. The complaints charged that Revenue Ruling 59-294, Internal Revenue Bulletin 1959-36, purports to place the $250 tax on all amusement devices, regardless of use, which are equipped with a "push button or other device for releasing," or "with a provision for multiple conversion of increasing the odds." Plaintiffs claim that the "Nite Club" machine had all such characteristics but was used solely for amusement and subject only to the amusement tax of $10. The "Lotta Fun" machine, plaintiffs claim, had none of the listed characteristics and was only subject to the amusement tax. Plaintiffs contended that the District Director could not consider the two machines as taxable within the description of the Revenue Ruling without evidence that they were used as gaming devices. Plaintiffs, in these actions, sought an injunction restraining any assessment or collection of the $250 gaming tax which might be assessed on the basis of the ruling and from causing a forfeiture of the said machines.

The Court, in granting defendant's motion to dismiss in each action, stated that the taxpayer must, "pay first and litigate later." The Court noted that the taxes which defendant threatened to assess should the machines be placed in operation were not ruinous in amount and it would not appear that their payment would reduce the plaintiffs to a state of financial wreck or would destroy their businesses. Singleton's inability to pay the tax, if it existed, would not constitute such exceptional circumstances as would justify ignoring the prohibition of Section 7421. The Court stated that Singleton's argument that the tax would create undesirable newspaper publicity and might jeopardize his beer license was merely speculative and purely collateral and, in any event, was not of sufficient weight to justify allowing equitable relief.

With respect to the contention of Stewart, who merely leased the machines to Singleton, that forfeiture of these machines by the Revenue Service upon the non-payment of the tax would result in the seizing of his property in payment of another's taxes, the Court stated that Stewart had an adequate remedy at law in that should the machines be subjected to forfeiture, Stewart could assert his claims in the forfeiture proceedings.

The Court relied heavily upon the case of Martin v. Andrews, 238 F. 2d 552 (C.A. 9), which held that the Court had no jurisdiction to render a judgment with regard to a Revenue Ruling in view of Section 2201, Title 28 U.S.C., which prohibits a suit for declaratory judgment with respect to federal taxes.

Staff: United States Attorney Osro Cobb and Assistant United States Attorney Ralph M. Sloan (E.D. Ark.); John J. Gobel and Stanley F. Krysa (Tax Division)

CRIMINAL TAX MATTERS
Appellate Decision

Income Tax Evasion; Request for Lesser Included Offense Instruction Relating to Section 7207 of 1954 Code. Janko v. United States

(C.A. 8). Appellant was convicted on two counts of an indictment charging him with wilful attempts to evade his income tax in violation of Section 7201 of the Internal Revenue Code of 1954. On appeal he urged that the trial judge had erred in refusing to charge the jury that it might find him guilty of the lesser offense embodied in Section 7207, which makes it a misdemeanor to wilfully deliver or disclose to the Secretary or his delegate any return known by him to be fraudulent or false as to any material matter. The Government argued that Section 7207 does not apply to the income tax, just as its predecessor in the 1939 Code--Section 3616(a)--was held not to apply to the income tax in Achilli v. United States, 353 U.S. 373. The Court of Appeals, in a 2-1 decision, agreed with the Government and held that the trial judge had not erred in refusing the requested instruction because Section 7207 is inapplicable to the income tax. Judge Matthes wrote a vigorous dissent on this point.

In the brief in opposition to appellant's petition for a writ of certiorari the Tax Division is taking the position that it was unnecessary for the Court of Appeals to reach the question of whether Section 7207 applies to the income tax. Rule 31(c) of the Federal Rules of Criminal Procedure--relating to lesser included offenses--has its application where Congress "has defined two distinct offenses, but one offense requires proof of all the facts or elements necessary to establish the other, plus something more--in other words, a greater offense including a lesser." Ekberg v. United States, 167 F.2d 380, 385 (C.A. 1). A lesser included offense instruction is required where there exists a gradation of offenses, in which the greater offense alleged contains the same elements plus some aggravating ingredient not found in the lesser included offense, and where the evidence permits the jury to find the defendant not guilty of the greater offense but guilty of the lesser. The Supreme Court has held that a requested lesser included offense instruction must be given if there is any reasonable view of the evidence under which the jury might properly conclude that the defendant committed only a lesser degree of the crime charged. Stevenson v. United States, 162 U.S. 313; Andersen v. United States, 170 U.S. 481.

In the instant case the aggravating ingredient found in the greater offense of tax evasion alleged in the indictment, but not in the lesser offense (delivering fraudulent return--Section 7207), is the wilful intent to evade a tax. On the record in the instant case there is no reasonable view of the evidence, we believe, under which the jury could have found that the appellant was not guilty of violating Section 7201 but was guilty of violating Section 7207. As we read this record, appellant was either guilty of wilfully attempting to evade a part of his income tax or he was guilty of nothing. It follows that the trial court was not required to give the lesser included

offense instruction requested by appellant and that the Eighth Circuit was not required to pass on the applicability of Section 7207 to the income tax.

As you know, we have not used Section 7207 in income tax cases since the Achilli case was decided in May 1957.

Staff: United States Attorney William H. Webster;
Assistant United States Attorney John A. Newton
(E.D. Mo.)

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