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DEPARTMENT OF JUSTICE

Vol. 9 No. 10

UNITED STATES ATTORNEYS

BULLETIN

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NEW APPOINTEES

The nominations of the following United States Attorneys have been confirmed by the Senate:

Arizona - Charles A. Muecke

Mr. Muecke was born February 20, 1918, at New York City and is married. He attended William and Mary College at Williamsburg, Virginia, from September 1938 to August 20, 1941, when he received his A.B. degree, and the University of Arizona Law School at Tucson from 1950 to May 27, 1953, when he received his LL.B. degree. He was admitted to the Bar of the State of Arizona that same year. From 1935 to 1938 he was employed intermittently in New York City in banking, merchandising, advertising, radio and dramatics. From August 11 to December 2, 1942, he was a supervisor for the W.P.A. in Richmond, Virginia. He served in the United States Marine Corps from December 3, 1942, to March 29, 1946, when he was honorably discharged as a First Lieutenant. In 1947 he was a reporter for the Phoenix, Arizona Times. He then worked in the Maricopa County Assessor's Office for a few months. From 1948 to 1950 he was a labor representative for the Hotel, Restaurant Employees and Bartenders Union and later was labor representative for the State, County and Municipal Employees Union, both in Phoenix. In 1953 he became a law associate of Mr. Darrell Parker and at present is engaged in the private practice of law in Phoenix.

Colorado - Lawrence M. Henry

Mr. Henry was born October 1, 1915, at Denver, Colorado, is married and has five children. He attended Regis College in Denver from September 13, 1933 to June 4, 1936 and the University of Denver from September 21, 1936 to June 7, 1939 when he received his LL.B. degree. He was admitted to the Bar of the State of Colorado in 1939. He engaged in the practice of law in Denver from 1939 to 1942 and during that time also served one term in the Colorado House of Representatives. He served in the United States Army from May 15, 1942 to April 24, 1946 when he was honorably discharged as a Captain. From March 1, 1946 to March 1, 1948 he was Chief Deputy Clerk of the City and County Court of Denver. He then reentered the practice of law and from 1949 to 1953 he was a State Senator. He is now a member of the firm of Collins and Henry in Denver.

Georgia, Middle - Floyd M. Buford

Mr. Buford was born July 2, 1922 at Macon, Georgia, is married and has one son. He attended Mercer University from March 1946 to June 1950 when he received his LL.B. degree. He was admitted to the Bar of the State of Georgia in 1949. He served in the United States Army from September 21, 1942 to September 8, 1945 when he was honorably discharged

as a Corporal. From 1949 to 1952 he engaged in the private practice of law in Macon. On March 31, 1952 he was appointed an Assistant United States Attorney for the Middle District of Georgia, where he now serves.

Illinois, Eastern - Carl W. Feickert

Mr. Feickert was born September 24, 1906 at Belleville, Illinois, and is married. He attended the University of Illinois from September 1925 to June 1931 when he received his LL.B. degree. He was admitted to the Bar of the States of Illinois and Missouri in 1931. From February 1932 to March 1937 he was an attorney for Farthing and Farthing in East St. Louis, Illinois, with the exception of the period from November 20, 1934 to May 6, 1935 when he was an attorney with the Home Owners Loan Corporation in Chicago. On March 15, 1937 he was appointed an Assistant United States Attorney for the Eastern District of Illinois and remained until his voluntary resignation on June 4, 1940. He then became a partner in the firm of Farthing and Feickert in Belleville until his induction into the United States Army on May 21, 1942. He served until June 22, 1946 when he was honorably discharged as a Major. He then returned to the private practice of law in Belleville. He was also Assistant States Attorney from 1954 to 1956 and Master-in-Chancery from February 1958 to February 1960, both for St. Clair County, Illinois.

Michigan, Western - George E. Hill

Mr. Hill was born December 31, 1919, at Sesser, Illinois, is married and has one child. He received his B.S. degree from the University of Illinois on June 8, 1947 and his J.D. degree on June 17, 1951. He was admitted to the Bar of the State of Illinois that same year. From July 1, 1936 to April 7, 1937 he was employed as a clerk by the American Potash Institute in Washington, D.C. and from January 1, 1940 to January 2, 1941 he was employed by United States Congressman Kent E. Keller. He served in the United States Navy from July 6, 1943 to October 10, 1945 when he was honorably discharged as an Ensign. From July 9, 1951 to March 8, 1952 he was an associate attorney with Mr. Mark O. Roberts in Springfield, Illinois, and for the next three years he was a law partner of Mr. Edward H. Dembowski in Marquette, Michigan. From November 2, 1954 to November 4, 1959 he was Prosecuting Attorney for Marquette County, Michigan, and since November 5, 1959 he has been Chairman of the Michigan Public Service Commission.

New York, Northern - Justin J. Mahoney

Mr. Mahoney was born November 7, 1919, at Troy, New York, is married and has two children. He received his A.B. degree from the University of Toronto in 1940 and attended Albany Law School from October 3, 1946 to January 31, 1949 when he received his LL.B. degree. He was admitted to the Bar of the State of New York the latter year. He served in the United States Marine Corps from December 20, 1942 to January 31, 1947 when he was honorably discharged as a First Lieutenant. From 1949 to 1952 he was associated with Attorney Abraham C. Goldstein in Troy. He then entered a law partnership with his brother in Troy. On February 19, 1961 he was appointed, by the court, United States Attorney for the Northern District of New York, where he now serves.

Utah - William T. Thurman

Mr. Thurman was born October 31, 1908 at Provo, Utah, is married and has four children. He attended the University of Utah from 1927 to June 9, 1931 when he received his A.B. degree and George Washington University from September 1932 to June 10, 1936 when he received his LL.B. degree. He was admitted to the Bar of the District of Columbia in 1936 and that of the State of Utah in 1937. From 1932 to 1937 he was employed as a clerk, typist and bookkeeper by the Reconstruction Finance Corporation in Washington and on September 1, 1937 was transferred to an attorney position. He remained until May 10, 1942 when he was appointed an attorney for the Coordinator of Inter-American Affairs, Office of Emergency Management. He served until October 20, 1949. From January 1, 1951 to January 1, 1959 he was Chief Civil Deputy in the Salt Lake County Attorney's Office. Since that time he has been an attorney with the firm of McKay & Burton in Salt Lake City.

Wisconsin, Eastern - James B. Brennan

Mr. Brennan was born February 1, 1926 at Milwaukee, Wisconsin, is married and has three children. He attended Notre Dame University at South Bend, Indiana, from September 1946 to June 30, 1949 when he received his A.B. degree. He attended Marquette University Law School in Milwaukee from September 26, 1949 to June 10, 1952 when he received his LL.B. degree. He was admitted to the Bar of the State of Wisconsin in 1952. He served in the United States Navy from July 1, 1944 to July 12, 1946 when he was honorably discharged as a Seaman, Second Class. Since 1952 he has engaged in the practice of law in Milwaukee with his father and brother and since 1958 he has been a Senator in the Wisconsin State Legislature.

The names of the following appointees as United States Attorneys have been submitted to the Senate:

Ohio, Southern - Joseph P. Kinneary
Oklahoma, Western - B. Andrew Potter
Tennessee, Eastern - John H. Reddy
Vermont - Joseph F. Radigan

As of May 12, 1961, the score on new appointees is: Confirmed - 24, Nominated - 9.

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LAW BOOKS AND CONTINUATION SERVICES

The Supplies and Printing Section of the Administrative Division automatically orders continuation services and pocket parts for existing sets of books in United States Attorneys' offices.

Any books and/or continuation services no longer required should be reported to the Supplies and Printing Section, Department of Justice, Washington 25, D.C., not later than June 15, 1961, so that arrangements may be made to cancel the service, transfer the books and services to a place needed, or other disposition made.

MONTHLY TOTALS

During the month of March, totals in all categories, with the exception of pending civil matters, were reduced below those for the preceding month. The aggregate of all pending cases and matters also declined during the month. The following analysis shows the number of items pending in each category as compared with the totals for the previous month:

	February 28, 1961	March 31, 1961	
Triable Criminal	7,397	7,271	- 126
Civil Cases Inc. Civil Less Tax Lien & Cond.	14,064	14,055	- 9
Total	21,461	21,326	- 135
All Criminal	8,977	8,839	- 138
Civil Cases Inc. Civil Tax & Cond. Less Tax Lien	16,920	16,874	- 46
Criminal Matters	10,445	10,271	- 174
Civil Matters	12,324	12,579	+ 255
Total Cases & Matters	48,666	48,563	- 103

The number of criminal and civil cases filed and terminated during the first nine months of fiscal 1961 was below the total for the same period of the preceding fiscal year. As a result, the number of cases pending at the end of the first nine months of the fiscal year was a substantial 3 per cent above the same date in fiscal 1960. In both filings and terminations the averages were pulled down by reduced activity in the field of civil litigation. Whereas the number of criminal cases filed and terminated was above the number handled in fiscal 1960, the corresponding totals for civil cases fell below those of the preceding year. The breakdown below shows the pending totals on the same date in fiscal 1960 and 1961:

	1st 9 Months F.Y. 1960	1st 9 Months F.Y. 1961	Increase or Decrease Number	%
Filed				
Criminal	23,202	23,260	+ 58	+ 0.25
Civil	18,391	17,587	- 804	- 4.37
Total	41,593	40,847	- 746	- 1.79
Terminated				
Criminal	21,955	22,044	+ 89	+ 0.41
Civil	16,746	16,208	- 538	- 3.21
Total	38,701	38,252	- 449	- 1.16

Pending				
Criminal	8,724	8,839	+ 115	+ 1.32
Civil	19,742	20,498	+ 756	+ 3.83
Total	28,466	29,337	+ 871	+ 3.06

From the standpoint of the number of cases filed and terminated during each of the nine months of the present fiscal year, March was a particularly active month. More criminal cases were filed than in any other month, with the exception of September. Similarly, civil cases filed reached the second highest total for the year, being outdistanced only by the month of August. In terminations, the number of criminal and civil cases disposed of was the highest for any month of the year so far. Should this accelerated activity continue for the remaining three months of the fiscal year, the reduction in the number of cases and matters pending might well establish another record. Set out below is an analysis by months of the number of cases filed and terminated:

	July	Aug.	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.
Filed									
Criminal	1,709	2,346	3,201	2,551	2,479	2,534	2,574	2,883	2,983
Civil	1,863	2,304	1,897	2,990	1,889	1,753	1,914	1,840	2,137
Total	3,572	4,650	5,098	4,541	4,368	4,287	4,488	4,723	5,120
Terminated									
Criminal	1,600	1,772	2,328	2,977	2,832	2,617	2,513	2,346	3,159
Civil	1,463	1,906	1,798	2,005	1,627	1,816	1,797	1,751	2,045
Total	3,063	3,678	4,126	4,982	4,459	4,433	4,310	4,097	5,204

Collections reported by United States Attorneys during the month of March amounted to less than the total for February. The percentage of increase over the same period of the prior fiscal year also took a substantial drop from 26.8 to 16.6 per cent. Total collections of $2,108,714 were reported during March, thus bringing the total for the first nine months of fiscal 1961 to $26,761,651. This represented an increase of $2,812,747, or 16.6 per cent over the $22,948,904 collected during the first nine months of fiscal 1960.

During March $5,855,511 was saved in 121 suits in which the government as defendant was sued for $7,323,744. 66 of them involving $3,441,902 were closed by compromises amounting to $491,974 and 31 of them involving $1,048,291 were closed by judgments against the United States amounting to $976,259. The remaining 29 suits involving $2,833,551 were won by the government thus bringing the total saved for the first nine months of the fiscal year to $25,535,671. This is a decrease of $5,747,503 or 18.4 per cent from the $31,283,174 saved during the first nine months of fiscal year 1960.

JOB WELL DONE

The General Counsel, Selective Service Headquarters, has commended Assistant United States Attorney William O. Bittman, Northern District of Illinois, for the outstanding job he has performed in the handling of Selective Service matters involving the prosecution of delinquents.

Assistant United States Attorney Robert A. Maloney, Northern District of Illinois, has been commended by the District Supervisor, Bureau of Narcotics, for the intelligent and vigorous prosecution of a recent case in which one of the defendants has been a long and persistent violator of the Federal narcotic laws. The District Supervisor stated that Mr. Maloney contributed immeasurably to the successful outcome of the case.

The District Director, IRS, has commended the office of United States Attorney Joseph P. Hoey, Eastern District of New York, for the integral role it played in the accelerated enforcement program against organized crime, and particularly extended appreciation to Assistant United States Attorney William H. Sperling, who spent many hours counseling IRS personnel, obtaining warrants, and questioning defendants. The Director stated that without Mr. Sperling's very able assistance any contribution the IRS may have made towards vigorous enforcement would have been doubly difficult, and that continued and valued association can only result in the vigorous enforcement to which both agencies are dedicated.

The Director, General Regulatory Division, Department of Agriculture, has expressed appreciation for the capable handling by Assistant United States Attorney George F. Roberts, Southern District of New York, of a recent case in which the defendants pleaded guilty and were fined on various counts for violation of the Poultry Inspection Act. The letter stated that the Department of Agriculture is most pleased with the results obtained in the case.

Assistant United States Attorney Edward R. Cunniffe, Southern District of New York, has been congratulated by the Assistant Commissioner of Inspection, IRS, for his outstanding and successful effort in the prosecution of a recent attempted bribery case. The letter noted the excellent relationship that exists between the United States Attorney's office and the Inspection Service, and stated that the latter's investigative responsibilities have frequently been made lighter by the able counsel given by the United States Attorney's staff.

The Chief Postal Inspector has expressed appreciation to United States Attorney Roy W. Meadows, Southern District of Iowa, for the fine cooperation extended to the Postal Inspectors with regard to alleged violations of postal criminal statutes. The Inspector noted that Mr. Meadows has successfully prosecuted --with speed and dispatch -- cases in which the Service was interested, and stated that the excellent relationship existing between the two offices has been a great contribution to law enforcement.

Assistant United States Attorney Harold D. Rhynedance, Jr., District of Columbia, has been commended by the New Orleans District Director, Commodity Stabilization Service, for the high degree of cooperation he rendered in connection with the taking of depositions in a recent case. Mr. Rhynedance has also been complimented by the senior corporation attorney of a leading air line on a job well done in opposing a temporary restraining order in a labor dispute case. A third commendation was received by Mr. Rhynedance from private counsel in a recent case who wrote to the presiding judge stating that Mr. Rhynedance was a perfect gentleman throughout the proceeding and that he was a credit to the United States Attorney's office.

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OFFICE OF ALIEN PROPERTY

Paul V. Myron, Acting Director

Suit Under Sec. 17 of Trading With Enemy Act for Accounting and Judgment for Royalties Due Under Patent License Contract and for Damages Because of Failure to Exploit Alleged Exclusive License. Kennedy v. Engelhardt Industries, Inc., (C.A.3, April 5, 1961). The rights and interests of certain German inventors in two patent license contracts made with the defendant's predecessor and the General Electric Company were seized by the Alien Property Custodian under the Trading with the Enemy Act. Royalties were thereafter paid to the Office of Alien Property until September 30, 1949, when defendant refused to make further payments, claiming that the effect of a decision in a suit between it and Westinghouse Electric, was so to limit and narrow the scope of the licensed patents, as to evict the defendant from the license and to deprive it of the patent protection for which it had contracted. It notified the Office of Alien Property that not only would it no longer pay royalties but also that it would not manufacture any of the licensed inventions. However, it did not offer to surrender the license and for about five years thereafter it continued to affix patent notices to some of its products invoking the protection of some of the licensed patents.

The Attorney General sued under Sec. 17 of the Trading with the Enemy Act in two counts: (1) for an accounting and judgment for royalties due on the contracts, and (2) damages for failure to exploit fully the licensed inventions.

Defendant, claiming expiration of and eviction from the license, and denying any duty to exploit, moved for summary judgment on both counts. Additionally it contended that damages being speculative were not available to plaintiff as a remedy for breach but that plaintiff was limited to a suit for recision of the license. Plaintiff cross-moved on both counts for summary judgment under F.R.C.P. 56(c) on the issue of liability only.

The district court granted plaintiff's motion on both counts, finding that the contract had not expired, that defendant had not been evicted by reason of the decision in the Westinghouse suit and that defendant, as an exclusive licensee, had breached its obligation to exploit the licensed inventions. (Rogers v. Engelhardt Industries, Inc., D.N.J., May 11, 1960).

Permission to appeal was granted (28 U.S.C. 1292(b), and on appeal, the Court of Appeals affirmed the first count, finding that there was no eviction and pointing out that the defendant's action in affixing patent notices to some of its products, after claiming expiration of or eviction from the license, was inconsistent with a claim of eviction; and that defendant could not be heard to deny the license at the very moment that it was claiming its protection by affixing such notices to some of its products.

The Court reversed on the second count, holding that in the circumstances and by reason of the express language of the contract, the defendant, although initially such, had ceased to be an exclusive licensee, and could not therefore be held to the same duty of exploitation of the inventions as an exclusive licensee. However, the Court flatly rejected defendant's contention that damages were not a proper remedy for breach of the implied obligation to exploit an exclusive patent license, citing Stentor Electric Mfg. Co. v. Klaxon Co., 115 F.2d 268 (C.A.3, 1940), one of the cases upon which plaintiff had relied for such relief.

Staff: David Moses (Office of Alien Property)

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ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

CLAYTON ACT

Mergers - Aluminum Fabricators; Complaints Filed Under Section 7. United States v. Kaiser Aluminum & Chemical Corporation and Kawneer Company, (E.D. Mo.); United States v. Aluminum Company of America and Cupples Products Corporation, (E.D. Mo.). On April 27, 1961 separate complaints were filed charging Kaiser Aluminum & Chemical and Aluminum Company of America with violating Section 7 of the Clayton Act as a result of their respective stock acquisitions of Kawneer Company and Cupples Products Corporation. The Kaiser acquisition of Kawneer was scheduled to take place in early May upon the voting of approval by the stockholders of each company. The Alcoa-Cupples merger was consummated in early 1960.

The complaints allege that domestic production of primary aluminum is concentrated in the hands of only six companies. Alcoa, the largest of these six, is said to control about 39% of domestic primary aluminum capacity, and Kaiser, the third largest, about 23%. Alcoa's sales in 1959 exceeded $858,500,000 and its assets as of the end of that year were greater than $1,350,335,000. Kaiser's total assets in 1960 were over $785,000,000 and its sales for the year exceeded $406,000,000.

Kawneer is an independent, non-integrated manufacturer of aluminum architectural products, including curtain wall, windows, store fronts, entrances and doors. Kawneer's total sales in 1960 were $39,420,059, and its total assets as of December 31, 1960 were $24,597,636. Prior to its acquisition by Alcoa, Cupples, like Kawneer, was an independent, non-integrated fabricator of aluminum architectural products, including windows and curtain wall. Its total sales for 1959 were $14,861,589 and its total assets for that year were $5,855,586.

According to the complaints the production of aluminum architectural products, in contrast to the concentration in the primary aluminum industry, has historically been distributed among a number of small, non-integrated fabricators. However, in about 1955 Reynolds Metals Company, the second largest primary producer, through internal expansion, began producing aluminum windows and curtain wall, and is now one of the largest domestic fabricators of these products. In January 1960 Alcoa acquired Cupples Products Corporation and recently Kaiser has agreed to acquire Kawneer. It is alleged that the entry of Reynolds, Alcoa and Kaiser into the fabrication of these architectural aluminum products threatens to transform these industries from a composition of many small non-integrated fabricators to a composition dominated by the three large, fully integrated primary producers.

The prayers for relief seek to have Alcoa divest itself of its stock interest in Cupples, to have Cupples and Kawneer enjoined from selling any of their stock or assets to integrated aluminum producers, and to have Alcoa and Kaiser enjoined from acquiring the stock or assets of any manufacturer of aluminum architectural products. In furtherance of its prayer for relief, the Government obtained a temporary restraining order against a consummation of the Kaiser-Kawneer merger. A hearing on a preliminary injunction in that case is to take place on June 7, 1961.

Staff: Eugene J. Metzger, J. E. Waters and Francis A. Kareken (Antitrust Division)

Mergers - Wire and Cable Fabricating; Complaint Filed Under Section 7. United States v. Kaiser Aluminum & Chemical Corporation, (D. R.I.). On April 28, 1961 a complaint was filed challenging the 1957 acquisition by Kaiser Aluminum & Chemical of the wire and cable fabricating facilities of the United States Rubber Company. The complaint alleges that the acquisition may have the effect of substantially lessening competition in the production and sale of insulated aluminum wire and cable and in various other categories of electrical conductor.

The complaint alleges that Kaiser, the largest domestic fabricator of insulated and covered aluminum wire and cable with approximately 25 per cent of total industry shipments, purchased the wire and cable business, including the Bristol, Rhode Island, production facilities, of United States Rubber in February, 1957. At that time United States Rubber was one of the nation's largest independent fabricators of insulated and covered aluminum wire and cable and also produced substantial amounts of insulated and covered copper wire and cable.

The production and sale of aluminum wire and cable has become highly concentrated in the hands of five integrated aluminum producers, Kaiser Aluminum & Chemical Corporation, Aluminum Company of America, Reynolds Metals Company, Anaconda Aluminum Company, and Olin Mathieson Chemical Corporation. In insulated and covered aluminum wire and cable, especially, the increase in concentration since 1956 has been dramatic, in part, as a result of the acquisition by the integrated producers of the leading independent fabricators of insulated aluminum wire and cable. In addition to Kaiser's acquisition of the Bristol, Rhode Island, facilities of United States Rubber in 1957, Olin Mathieson acquired Southern Electrical Corporation in 1957, and Aluminum Company of America acquired Rome Cable Corporation in 1959. During this time, 1956-1959, the share of the total domestic shipments of insulated and covered aluminum wire and cable accounted for by the integrated producers increased from approximately 45 per cent to almost 70 per cent.

Among the effects listed by the complaint as flowing from the acquisition is the elimination of actual and potential competition in the production and sale of insulated and covered aluminum wire and cable as a consequence of the elimination of United States Rubber as a leading

independent producer and the further enhancement of Kaiser's already dominant position as the leading domestic producer. The acquisition is also said to have stimulated similar acquisitions by other integrated aluminum producers, further increasing the difficulty of entry and intensifying the price squeeze to which the remaining independents have been subjected.

The complaint seeks the divestiture by Kaiser of the physical assets, business, and good will acquired from the United States Rubber Company.

Staff: A. H. Kahn (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General William H. Orrick, Jr.

SUBSTANTIATION OF SETTLEMENT OFFERS

In submitting compromise offers requiring the consideration of the Civil Division it is requested that such offers be accompanied by the following:

1. A statement as to whether the offer is the product of negotiations or is the first figure proposed by opposing counsel.

2. A statement by the United States Attorney of his candid personal opinion concerning the offer.

3. The name, reputation and legal ability of opposing counsel who will personally try the case.

4. The name of the Assistant United States Attorney who will try the case for the Government and the extent of his trial experience in connection with the type of case involved.

5. The name of the judge who will actually try the case.

TORTS SECTION

Accomplishing more expeditious consideration and more accurate evaluation of settlement offers in Federal Tort Claims Act cases.

The Civil Division is most anxious to expedite consideration and at the same time secure more accurate evaluation of compromise offers in tort cases. These twin objectives can best be accomplished through the cooperative efforts of the staff attorneys of this office and the United States Attorneys and their Assistants. The Torts Section of the Civil Division has initiated several procedures to aid in the accomplishment of these objectives. These are listed below:

I. To aid in the earlier evaluation of tort cases for settlement purposes, attorneys of the Torts Section are under instructions to mail searching damage interrogatories to United States Attorneys, automatically in all personal injury cases involving more than $10,000, and in other personal injury cases upon request. Equally comprehensive interrogatories are being prepared for use in death cases, and similar service will be provided upon their completion.

II. Attorneys of the Torts Section are under instructions to note trial dates for cases involving more than $10,000 when reported by United States Attorneys and to take the following steps:

A. Request such additional information as may be necessary to properly evaluate the case for settlement purposes.

B. Complete an evaluation check sheet and arrive at a tentative evaluation of the case for settlement purposes.

C. Hold the Departmental files on such cases on their desks to expedite consideration and disposition of last minute settlement offers.

III. Attorneys of the Torts Section are under instructions to deadline all requests for agency views on settlement offers, and proceed to prepare compromise memoranda whether agency recommendations have been received by the deadline date or not.

IV. Attorneys of the Torts Section are instructed to indicate their last names in the upper right hand corner of memoranda directed to the United States Attorneys thus making it possible for Assistants in the field to talk long distance with the person most familiar with the case, when long distance calls are necessary.

While the steps and procedures outlined above will aid in effecting expeditious consideration and more accurate evaluation of settlement offers in tort cases, these procedures cannot be fully effective unless the Department receives corresponding assistance from the United States Attorneys and their Assistants. Accordingly, the Civil Division requests that the United States Attorneys take the following steps to aid in accomplishing the objectives indicated above.

1. Arrange for early completion of investigations and discovery. While the Torts Section will forward damage interrogatories for use in many cases (See Point I above), discovery on the issue of liability can generally be more satisfactorily accomplished by the use of depositions.

2. All data bearing on the value of tort cases, settlement of which will require the concurrence of the Department, should be made available to the Torts Section as it is developed. Thus, we should be provided with copies of admissions, answers to interrogatories, medical reports, an opportunity to review depositions, etc.

3. We should be promptly advised when trial dates are set in order that we may take the steps outlined in Point II above. Early advice as to probable trial dates will give us an even more adequate opportunity for proper evaluation.

4. We should be advised when the United States Attorney believes that the Government should itself initiate

settlement negotiations (as in some cases where liability is clear) in order that we may have more time for maneuver in such negotiations.

5. In submitting compromise offers United States Attorneys should provide the information detailed in the instructions regarding "Substantiation of Settlement Offers" applicable to all Civil Division cases, which are set forth above.

6. Offers should be submitted at the earliest practicable date in order to permit our obtaining agency views, etc. Citing other judgments and settlements in like cases in your jurisdiction and state will also be of material assistance.

It is believed that if the foregoing steps and procedures are followed early, adequate and proper evaluation of tort cases can be had and the best interests of the Government will be protected.

COURTS OF APPEALS

ADMIRALTY

Government Not Liable Either on Theory of Unseaworthiness or Negligence for Injury to Longshoreman Caused by Fall on Government Vessel. Oblatore v. United States (C.A. 2, April 28, 1961). Libellant, a longshoreman employed by an independent stevedoring contractor, brought suit against the United States for injuries sustained while replacing a hatch cover in the trunk hatch of a Government vessel. He sought recovery under two theories: (1) breach of the warranty of seaworthiness due to the allegedly defective design and construction of the trunk hatch in which the injury occurred, and (2) negligence for failing to provide him with a safe place in which to work. The district court dismissed both counts of the libel. 181 F. Supp. 825. With regard to the issue of seaworthiness, the court specifically found, inter alia, that the design and construction of the vessel and her hatch conformed in all respects to the accepted standards of the stevedoring industry and that there were alternative means available for replacing the covers. The alternative claim for negligence was dismissed on the ground that the Government did not supervise the operation in question and played no part in selecting the particular method which libellant and his fellow workers chose to replace the hatch cover.

The Court of Appeals affirmed. It ruled that the trial court's findings were not clearly erroneous, and that, in view of these findings the vessel was not unseaworthy as a matter of law and the Government had not breached any duty owing to libellant. In addition, the Court held that the trial court did not err in excluding certain testimony that the hatch cover was wet and slippery on the day of the injury. The excluded testimony was merely cumulative since there was

other evidence in the record to the same effect. Moreover, the Government could not be held liable for unseaworthiness due to that condition in these circumstances because the district court's findings clearly indicate that the accident was due to another cause.

Staff: Ronald A. Jacks (Civil Division)

Barges Rarely Employed for Seagoing Voyages Must Have Certificate of Inspection Required of Seagoing Barges. United States v. Gahagan Dredging Corp. (C.A. 2, April 27, 1961). The United States brought suit pursuant to 46 U.S.C. 398 to collect penalties assessed against defendant for navigating its barges on the high seas without having secured from the Coast Guard the certificate of inspection required of all seagoing barges. The parties stipulated that the barges were rarely operated as seagoing barges and that they were not designed for sea duty. Defendant argued that the Coast Guard's construction of the statutory phrase "seagoing barge" to include any barge that goes to sea was erroneous. The district court agreed with the Government, and entered judgment for $1,500 in penalties.

The Court of Appeals affirmed. It reasoned that the Coast Guard's broad construction of "seagoing barge" "was a reasonable interpretation of the somewhat ambiguous language in a statute designed for the protection of life and property by the agency charged with the enforcement of the policy of the statute. The agency interpretation should not be casually disregarded."

Staff: Benjamin H. Berman (Civil Division)

United States Not Liable for Failing to Insure Safe Conditions for Working on Its Vessel When Unaware of Dangerous Condition on Vessel and Vessel Was Under Control of Ship Repair Contractor. Nasta v. United States (C.A. 2, March 27, 1961). Ten libelants sought recovery for personal injuries allegedly suffered by them while working on a public vessel of the United States which was withdrawn from active service and in the custody and control of a ship repair contractor. They alleged that their injuries were attributable to fumes created by the burning of preservatives and paints which were on the vessel prior to its entry into the yard. The libelants proceeded solely on the grounds of negligence, having withdrawn their original allegations of unseaworthiness. They claimed that the United States had a duty to provide them with a safe place to work and to warn them of any prior dangerous conditions which existed on the vessel before it entered the shipyard.

The district court dismissed the libel, holding that libelants' employer was solely responsible for providing libelants a safe place to work, and that there was no evidence to show any knowledge of the Government that a dangerous condition existed in the vessel. 181 F. Supp. 906. The Court of Appeals affirmed, concluding that to hold that the

owner had impliedly warranted to those who worked upon her that her condition was such as made it safe for them to do so would be equivalent to implying a warranty of seaworthiness pro tanto.

Staff: Robert D. Klages (Civil Division)

ATOMIC ENERGY ACT

Res Judicata Applied to Judgment on Review of Administrative Determination. Grossman v. Atomic Energy Commission (C.A. D.C., April 13, 1961). Petitioner brought this action under the special judicial review provisions of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2239, and the Administrative Procedure Act, as amended, 5 U.S.C. 1031, et seq., for direct review by the court of appeals of a Commission determination that he was not entitled to an award for an alleged discovery or invention. Earlier, petitioner had filed substantially the same claim with the Commission, and after extensive hearings, it was denied by the Commission's Patent Compensation Board on the ground that the subject matter was not "useful in the production or utilization of special nuclear material or atomic energy" within the meaning of the Act, 42 U.S.C. 2187. On review, the Court of Appeals for the District of Columbia upheld the administrative decision. Grossman v. United States, United States Atomic Energy Commission, 246 F. 2d 709, appeal dismissed, 355 U.S. 285. On petitioner's current application, the Commission held a hearing in a new docket, and denied the claim both on the merits and on the doctrine of res judicata.

The Court of Appeals affirmed. Holding that the questions involved in the case were "practically identical" with those decided in its earlier opinion, the Court, in a per curiam opinion, and without reference either to the existence of two separate dockets in these review actions or any distinction between direct and collateral estoppel, simply affirmed the Commission's order on the principle of res judicata.

Staff: Kathryn H. Baldwin (Civil Division)

COSTS

No Costs Taxable Against United States in Favor of Prevailing Plaintiff When Government Admits Validity of Plaintiff's Claim But Resists Payment Until Adjudication Is Had of Its Counterclaim. Don Cartage Co. v. United States (C.A. 6, April 24, 1961). Plaintiff brought suit against the United States to recover $8,039 for services performed. The Government admitted without reservation the validity of plaintiff's claim, but interposed a counterclaim in the amount of $8,039, representing the Government's claim for damage to an x-ray machine for which the Government claimed plaintiff was liable. The district court held that plaintiff was liable for the damage to the machine, determined the damage to be $5,889.25, and therefore entered judgment in favor of plaintiff for $2,149.75. Thereafter, the district court authorized the taxation of various costs in favor of plaintiff. Plaintiff appealed as

to the decision on the merits, and the Government cross-appealed as to the taxation of costs.

The Court of Appeals affirmed the decision on the merits, holding that the evidence clearly sustained the finding that plaintiff was responsible for the damage, and reversed the order taxing costs. The Court concluded that 28 U.S.C. 2412(b), which was invoked by the court below to authorize its order as to costs, did not provide the requisite express authorization for that order because, by its terms, 28 U.S.C. 2412(b) allows the taxation of certain costs against the United States only when "the United States puts in issue plaintiff's right to recover." The Court held that this condition was not satisfied because the Government had never put in issue plaintiff's claim for services, but had merely sought adjudication of its own claim for damages.

This is the first decision that the United States is not subject to the taxation of any costs in suits brought against it to recover amounts administratively set-off for the purpose of ensuring satisfaction of unrelated claims of the Government. The decision should be invoked to resist the taxation of costs in all such cases, regardless of whether the Government's counterclaim has been successful in whole, in part, or not at all.

Staff: Marvin S. Shapiro (Civil Division)

FEDERAL EMPLOYEES' COMPENSATION ACT

Exclusiveness of Federal Employees' Compensation Act Remedy Bars Suit to Recover for Impotence and Loss of Consortium. Posegate v. United States (C.A. 9, March 27, 1961). Plaintiff, a federal employee, received injuries in the course of his employment which have rendered him permanently impotent. Although he was awarded compensation under the Federal Employees' Compensation Act, he contended that, since the Act only covered loss of wage-earning capacity, he and his wife should be entitled to recover under the Federal Tort Claims Act for his impotence and her loss of consortium. The district court dismissed plaintiff's action.

The Court of Appeals affirmed. The Court held that the liability of the United States to pay compensation was exclusive, regardless of whether the kind of injury for which suit was being brought was compensable.

Staff: Leavenworth Colby (Civil Division)

FEDERAL RULES OF CIVIL PROCEDURE

Errors of District Court Deemed Harmless Where Appellants Had No Defense on Merits to Government's Suit. York v. United States (C.A. 5, April 17, 1961). Suit was brought by the United States on a promissory note signed by appellants. On May 23, the case was called for trial.

Appellants did not appear, and judgment was entered for the Government. Appellants claimed that they did not receive notice that the case would be called for trial until May 24. The district court denied their motion for a new trial, and they appealed.

The Court of Appeals affirmed. The Court concluded that whatever error may have been committed in the district court was harmless because it appeared that appellants had no real defense on the merits to the Government's action.

Staff: United States Attorney William B. Butler and Assistant United States Attorney Jack Shepherd (S.D. Tex.)

FEDERAL TORT CLAIMS ACT

Claims Based on Injury Sustained by Serviceman While Driving in Privately-Owned Automobile to Temporary Duty Station Held Barred by Rule of Feres v. United States. Callaway v. Garber and United States (C.A. 9, April 21, 1961). Garber, a Navy recruiting officer, while operating his car on Navy business, negligently collided with another auto, which was owned and operated by an Air Force sergeant. Riding with latter were two other Air Force sergeants, one of whom, Robert Callaway, was killed in the collision. At the time, the airmen were traveling, pursuant to orders, from Ellsworth Air Force Base to Seattle, Washington, to attend a special school at the Boeing Aircraft Plant in Seattle. Under their orders, they were free to travel to Seattle by any mode of transportation they desired. Suits were brought by Callaway's widow and administrator against the United States under the Tort Claims Act to recover for decedent's death. The district court dismissed the suits on the ground that decedent's death arose out of an activity incident to his military service, and that recovery was therefore precluded under the doctrine of Feres v. United States, 340 U.S. 135.

The Court of Appeals affirmed, holding that the Feres case was controlling because decedent's "travel at the time of the injury was incident to service." The Court emphasized that the "incident to service" standard, relevant for purposes of the Feres rule, is a much broader concept than that of "scope of employment" relevant for respondeat superior purposes.

Staff: Mark R. Joelson (Civil Division)

GOVERNMENT CONTRACTS

Decision of Board of Contract Appeals as to Meaning of Contract Drawings Held Decision as to Question of Fact Entitled to Finality Under Wunderlich Act. United States v. McKinnon (C.A. 9, April 3, 1961). The Government contracted with plaintiff for the excavation of a channel. The contract drawings showed that the completed embankments were to be of equal height. One of the relevant drawings specified a

height of 18 feet, but the other failed to specify any height. When the contracting officer instructed plaintiff to build 18 foot embankments on that portion of the channel for which the applicable drawing specified no height, plaintiff protested that he had no contractual obligation to do so. Plaintiff complied with the direction of the contracting officer, but subsequently he filed a formal protest. Both the contracting officer and the Board of Contract Appeals rejected plaintiff's claim. It was determined that, even though the drawing in issue had failed to specify a height of 18 feet for the embankments, plaintiff should have realized from the fact that the other drawing did contain that specification that the requirement was applicable for the entire dredging operation.

Plaintiff then brought suit in the district court to recover for the alleged extra work. The Government contended that under the disputes clause of the contract the Board's decision was entitled to finality unless it was "fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or * * * not supported by substantial evidence." 41 U.S.C. 321. The district court rendered judgment for the contractor, holding that construction of the contract drawings was a question of law, that decisions of the Board on questions of law were not conclusive, and that there was no contract requirement for the 18 foot embankment.

On appeal, the Government argued relying on Lowell O. West Lumber Sales v. United States, 270 F. 2d 12 (C.A. 9), that even though the construction of a contract normally presents a question of law for the court, the resolution of that question in this case turned on the factual question of the intention of the parties which had been resolved in favor of the Government by the Board. The Court of Appeals reversed, indicating that it agreed with the Government's analysis.

Staff: John G. Laughlin and Arnold R. Petralia (Civil Division)

Regulation of Secretary of Labor Blacklisting Wilful Violators of Wage and Hour Laws from Government Financed Construction Valid; Blacklisted Persons Had Standing to Challenge Blacklisting Regulations. Copper Plumbing & Heating Co. v. Campbell (C.A. D.C., April 20, 1961). Copper Plumbing was a subcontractor on construction work, principally on projects for or financed by the Government. While engaged in work upon a project for the Army, it intentionally failed to pay its employees time and a half for overtime work in violation of the Eight Hour Laws. Upon discovery of this fact by the Department of the Army, the company paid the United States the statutory penalty, and also paid its employees the amount due for the overtime work. Thereafter, upon recommendation of the Department of the Army, the Department of Labor, pursuant to a regulation, 29 C.F.R. 5.6(b), requested the Comptroller General to place the name of Copper Plumbing and its two principal officers on the list of contractors barred for a period of three years from doing work on construction contracts for or financed by the United States. The regulation had been adopted by the Secretary of Labor pursuant to Reorganization Plan No. 14 of 1950, which had given the Secretary of Labor authority to "prescribe appropriate standards,

regulations, and procedures" with respect to several statutes governing wages and hours on federally financed or assisted construction work, including the Eight Hour Laws. Although he placed the names on the list as requested, the Comptroller General gave his opinion that the regulation was unauthorized and invalid. Copper Plumbing and its officers brought suit against the Comptroller General, the Secretary of Labor, and the Secretary of the Army for a judgment declaring the regulation unlawful, and for an injunction restraining enforcement of the debarment. The district court held that the plaintiffs lacked standing and that the debarment was authorized.

The Court of Appeals affirmed on the latter ground. First, it held that plaintiffs had standing to challenge the validity of the debarment, which it characterized as a sanction in addition to the penalties imposed by the statute. The Court distinguished Perkins v. Lukens Steel Co., 310 U.S. 113, on the ground that the sanction was specifically directed against plaintiffs, whereas in Lukens Steel the plaintiffs could not show a particular right of their own, as distinguished from the public's interest generally.

Then, on the merits, the Court expressly disagreed with the opinion of the Comptroller General and held that the regulation was authorized. The Court concluded that the debarment was relevant to the maintenance of responsible bidding in compliance with the labor standards statutes. It therefore held that, although the withholding of Government business for three years may be "a serious blow" to an enterprise engaged primarily in Government business, the sanction was not a penalty which must be prescribed by Congress. It ruled further that the authority to debar a contractor from further business had resided in the contracting agencies of the Government prior to 1950, and the regulation therefore did not violate the proscription of the Reorganization Act against the exercise of new authority.

Staff: David L. Rose (Civil Division)

SBA "Guaranty" Form 148 Held Contract of Guaranty, Not Suretyship, Under Georgia Law. McCallum v. Griffin (C.A. 6, April 18, 1961). As a part of the security on a Small Business Administration loan to a closed corporation, Mrs. Griffin, a large stockholder and vice-president of the corporation, executed an SBA "Guaranty" Form 148. In addition, she delivered a security deed on her real property. When the corporation failed to pay its indebtedness, the SBA took steps to sell the real property. Mrs. Griffin brought suit against the SBA Administrator to enjoin the sale. The district court held that the "Guaranty" form and the security deed were null and void on the ground that the "Guaranty" form, under Georgia law, was in fact not a contract of guaranty but one of suretyship, and, as such, was null and void under Georgia law, which provides that a married woman "may not bind her separate estate by any contract of suretyship."

The Government appealed, arguing that (1) federal and not state law should be used to construe and test the validity of SBA Form 148, (2) under federal law there should be no distinction between contracts of suretyship and those of guaranty, but, in any event, there should be no invalidation of either type of contract when entered into by a married woman, and (3) even under Georgia law SBA Form 148 should be construed as one of guaranty.

The Court of Appeals reversed. While noting that the Government's argument on the applicability of federal law was "persuasive," the court declared that it would not decide that issue, but that it would base its decision upon Georgia law, which it ruled had been erroneously interpreted in the district court. The Court of Appeals concluded that Form 148 was a contract of guaranty under Georgia law because it was "a separate and distinct contract entered into to induce the creditor to extend credit," and "a separate undertaking from the primary undertaking of the principal debtor to pay the debt."

Staff: Sherman L. Cohn (Civil Division)

GOVERNMENT EMPLOYEES

Government Employee Must Account for All Profits Derived Pursuant to Breach of Duty of Fidelity; Person on Terminal Leave Not Subject to Duty of Fidelity. United States v. Bowen (C.A. 5, May 2, 1961). The United States brought suit against a former civilian engineer employed by the United States Engineers in Western Germany. The Government alleged that defendant, while he was in the employ of the United States, used his influence to have contracts awarded to certain German corporations in which he had a financial interest. The district court dismissed the Government's complaint on the ground that the United States had not been damaged because West German and not American funds were expended pursuant to the tainted contracts.

The Court of Appeals reversed, holding that the Government need not show damage to itself in order to recover. The Court ruled that the measure of recovery was the amount of profit derived by the allegedly unfaithful servant attributable in any way to acts committed while he was in the active employ of the Government. The Court noted, however, that defendant was not subject to the duty of fidelity of a servant during the period when he was on terminal leave, the period to which the lump sum payment for accumulated annual leave on separation from service is referable.

Staff: Former United States Attorney E. Coleman Madsen and Assistant United States Attorney Lavinia L. Redd (S.D. Fla.)

INDISPENSABLE PARTIES

Secretary of Labor Is Indispensable Party in Suit to Enjoin Enforcement of Minimum Wage Scale for Migrant Mexican Workers. Johnson v. Kirkland

(C.A. 5, April 12, 1961). Plaintiffs brought suit in the United States District Court for the Southern District of Texas against the District Director of the Labor Department for the Rio Grande area and the manager of the local "Bracero" Center. They sought to enjoin defendants from requiring compliance with a Labor Department ruling requiring the payment of a minimum wage to Mexican workers admitted into the United States pursuant to the Migratory Labor Act, 7 U.S.C. 1461-1468. The District Court granted a temporary injunction, and defendants appealed.

The Court of Appeals reversed, holding that the Secretary of Labor was an indispensable party to the proceeding. It concluded that a decree against defendants could not provide plaintiffs with effective relief because affirmative action by the Secretary was required in order for Mexican workers to be employed under any circumstances. The Act provides that the Secretary must make certain determinations regarding local economic conditions before any Mexican workers are available for employment. 7 U.S.C. 1463.

Staff: United States Attorney William B. Butler; Assistant United States Attorneys Robert C. Maley, Jr., and Scott T. Cook (S.D. Tex.)

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

District Court May Not Consider Issue Which Not Pressed in Administrative Hearing. Britton v. Great American Indemnity Co. (C.A. D.C., May 4, 1961). Suit was brought against defendant Deputy Commissioner to set aside a compensation order directing payment of benefits to the dependents of two musicians fatally wounded by two disgruntled customers, who returned to plaintiff's premises after having been ejected. The district court affirmed the findings of defendant which had been challenged in plaintiffs' complaint. However, the court, sua sponte set aside the finding that the deaths arose out of and in the course of employment. 186 F. Supp. 938.

The Court of Appeals reversed, one judge dissenting. It held that the district court should not have considered the correctness of the finding that the deaths occurred in the course of employment because plaintiffs had not made an issue of that finding at the administrative hearing and it had not been contested in plaintiffs' complaint.

The dissenting judge concluded that the issue had been presented to the Commissioner because the employer had, in its answer to the claim for compensation, denied the allegation that the deaths were incidental to employment, and had thereafter repeated the denial in a communication to the Deputy Commissioner, and because testimony on that issue had been heard at the administrative hearing.

Staff: Herbert P. Miller (Department of Labor); Former United States Attorney Oliver Gasch and Assistant United States Attorney Carl Belcher (D. D.C.)

SOCIAL SECURITY ACT

Surgeon Held Employee of Former Partner; Right of Control Not Actual Control Over Activities of Alleged Employee Is Major Factor in Determining Existence of Employment Relationship. Cody v. Ribicoff (C.A. 8, April 25, 1961). Plaintiff, a surgeon, filed an application for social security benefits, based on his claim that from June 1, 1955 to August 1, 1957, he had been an employee of two other surgeons, one of whom had formerly been his partner. Plaintiff's application was denied after a hearing at which conflicting evidence was adduced regarding the kind of control that was actually or could have been exercised over plaintiff by his alleged employers. The district court affirmed the denial of benefits. 187 F. Supp. 749.

The Court of Appeals reversed. Although it noted with approval the accepted rule that findings of the Secretary must be affirmed if supported by substantial evidence, it concluded that the Secretary's ultimate finding that plaintiff was not an employee within the meaning of 42 U.S.C. 410(k)(2) was induced by an erroneous view of the law. In the Court's view, the administrative agency had erroneously considered the actual exercise of control by the alleged employers as crucial, whereas the proper inquiry was whether there was a right of control. The Court found that the evidence had established a right of control, which, along with other factors, compelled the conclusion that an employment relationship existed.

Staff: Donald H. Green (Civil Division)

TEXTILE FIBER PRODUCTS IDENTIFICATION ACT

Procedure and Result of FTC Rule Making Proceeding Adopting Definition of Rayon Held Valid. Courtaulds (Alabama) Inc. v. Kintner (C.A. D. C., April 27, 1961). Plaintiff brought suit in the district court to challenge the validity of a Federal Trade Commission rule promulgated under the Textile Fiber Products Identification Act, 15 U.S.C. 70-70k, which required plaintiff's cross-linked cellulosic fiber to be designated as rayon fiber, and to review the Commission's refusal to establish a distinct generic name for plaintiff's fiber. The district court entered summary judgment against plaintiff, holding that the Commission's acts were not arbitrary or capricious.

The Court of Appeals affirmed. Rejecting plaintiff's argument that the definition of rayon was too broad, the Court declared "that the choice was one for the Commission to make" and that the Commission's decision was not unreasonable or arbitrary. The Court also rejected plaintiff's suggestion that Section 4(b) of the Administrative Procedure Act, 5 U.S.C. 1003(b), had not been followed because the Commission had failed to incorporate in its rules "a concise general statement of their basis and general purpose." The Act, as well as the rules, were found to have stated both the purpose of the latter, to prevent misrepresentation of fiber products, and the basic for carrying out the purpose, fiber identification.

Plaintiff's argument that the Commission's acts should be invalidated because the Commission had received "ex parte" material from plaintiff's competitors was likewise rejected. The Court noted that all interested parties, including plaintiff, were invited to present suggestions, that there was no evidence that the Commission had improperly done anything in secret or was in any way persuaded by ex parte data, and that there was nothing to indicate that any competitors had been advantaged by the adoption of the broad definition of rayon. In addition, the Court stated that a rule making proceeding "was not subject to all the restrictions applicable to a quasi-judicial hearing."

Staff: Former United States Attorney Oliver Gasch and Assistant United States Attorney Frank Q. Nebeker (D. D.C.)

TRANSPORTATION

Car Service Order Limiting Free Time Applies to Cars Held for Unloading by Carrier; A Defense Based on Carrier's Failure to Unload Cars Promptly Is Not "Claim" Within Meaning of Section 2(b) of Uniform Commercial Bill of Lading. Reading Company v. Commodity Credit Corporation (C.A. 3, April 25, 1961). Between August and November 1955, the Commodity Credit Corporation shipped grain to the Reading Railroad's Port Richmond elevator for export. Each shipment to the elevator was expressly authorized by the railroad. The Port Richmond Yard, however, was congested and the grain was held in cars for periods between 10 and 65 days. Under the applicable tariff, grain shipped to Port Richmond was entitled to 20 days free time, whether held in cars or unloaded into the elevator. The Reading had complete control of the unloading of the grain. Commodity was billed by the Reading on the basis of 20 days free time, and Commodity paid the bills as presented to it. Under ICC Car Service Order No. 905, however, free time under all tariffs was reduced to 7 days. Thereafter, Reading filed this suit in the district court to recover the difference between 20 and 7 days free time, claiming allowable free time had been reduced to 7 days on grain held in cars, under the provisions of Car Service Order No. 905. Commodity moved for summary judgment, contending that Car Service Order No. 905 did not apply to storage but only to demurrage. The district court rejected this contention. Then, Reading moved for summary judgment. In defense, Commodity argued that the carrier was responsible for any delay in unloading the cars, and that it therefore could not claim additional charges resulting from its own failure to unload within the allowed free time. The district court held that this defense was barred by Section 2(b) of the Uniform Commercial Bill of Lading, which governed these shipments, because Commodity's defense was a claim which had not been asserted against the carrier within nine months, and entered summary judgment in favor of Reading.

The Court of Appeals reversed, holding that Commodity's defense that the delay in unloading was the fault of the carrier was not a "claim" within the meaning of Section 2(b), and, therefore, was not barred. The Court also held, however, that Car Service Order No. 905 applied both to storage and demurrage, and that the Order should be applied in this case,

even though the Reading had exclusive control of the unloading, because Commodity could have caused its grain to be shipped out of the yard into vessels by bringing up vessels promptly.

Staff: Howard E. Shapiro (Civil Division)

COURT OF CLAIMS

GOVERNMENT CONTRACTS

Government Not Liable for Increased Costs of Contractor Incurred Because of Delay Caused by Railroad Strike; Contracting Officer Correctly Declined to Suspend Work Where It Was Not in Government's Interest to Do So. Ozark Dam Constructors v. United States (C. Cls., April 7, 1961). Plaintiffs, a group of contractors, brought suit to recover as damages the amount of increased cost they incurred because of a substantial delay in the delivery by the Government of cement which was necessary to maintain their progress in constructing a dam for the Government. They claimed that when a railroad strike prevented delivery of the cement by that means, the Government was liable for not employing trucks, notwithstanding a clause in the contract which provided that the Government would not be liable for increased expense caused by delayed deliveries. In addition, they urged that they were entitled to the issuance of an order suspending work on the contract "for the convenience of the Government," which have had the effect of shifting the expense incident to the delay in construction to the Government.

A commissioner of the Court concluded that the Government representatives had been negligent in not employing other methods of transportation, and that it was an "arbitrary and capricious abuse of discretion" not to suspend work on the contract. The Court of Claims disagreed, two judges dissenting, and dismissed plaintiffs' petition. It held that the Government representatives had not been negligent, that the Government would not have been liable for the increased costs even in the absence of the exculpatory clause, and that the refusal to suspend work was proper because it would not have been "for the convenience of the Government" voluntarily to assume the expenses incurred by plaintiffs.

Staff: David Orlikoff (Civil Division)

DISTRICT COURT

MITIGATION OF DAMAGES

Tort Judgment Against Government Diminished by Amount of Gratuitous Benefits Libellants, Dependents of Deceased Veteran, Have Received and Will Receive from United States. DeVane v. United States (N.D. Fla., April 12, 1961). The District Court entered judgment against the United States under the Death on the High Seas Act and the Federal Tort Claims Act in favor of the dependents of decedent individual whose death was allegedly caused by the negligence of the Coast Guard. Thereafter, the

Court entered a decree diminishing the amount of the previously entered judgment by the amount of gratuitous benefits which had been paid to libellants as the dependents of a deceased veteran, and providing that if libellants received further benefits from the Veterans Administration they would be required to reimburse the United States up to the amount of the recovery had by each libellant under the court's decree. Cf. Brooks v. United States, 337 U.S. 49, 54 (1949); Decision of the Administrator of Veterans Affairs, Decision No. 9342, A.D.V.A. 935.

Staff: Robert D. Klages (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

FEDERAL FOOD, DRUG, AND COSMETIC ACT

Misbranded Products Which Had Not Moved in Commerce But Which Consisted of Vegetable Oil Components of Out-of-State Origin Held Subject to Seizure. United States v. 40 Cases . . . Pinocchio Brand . . . Oil (C.A. 2). The Government instituted a seizure action against a product labeled "Pinocchio Brand 75% Corn, Peanut Oil and Soya Bean Oil Blended with 25% Pure Olive Oil." It was alleged that the product contained little or no olive oil, and that all the ingredients had been shipped in interstate commerce. There was no allegation that any of the component oils were violative in any way prior to their being made a part of the product. The components were mixed and the product labeled in the State of New York. The seizure was made while the product was held for sale in New York. The District Court dismissed the libel, holding that the product was a new one which had not been in commerce and was therefore beyond the scope of the Federal Act.

The Court of Appeals, on April 19, 1961, reversed the judgment of dismissal and held the product to be within the Act. The Court noted a possible distinction between the product under seizure -- which consisted entirely of oils shipped interstate and sold as a mixture of oils - and a product made of several ingredients, only one of which had moved interstate, which finished product in no way resembled the interstate ingredient. (A decision similar to that of the Court of Appeals was recently made in the Eastern District of Michigan in a case involving a drug, the most important ingredient of which had moved in commerce; United States v. 39 Cases (Korleen.))

Staff: William W. Goodrich, Assistant General Counsel
Department of Health, Education, and Welfare,
argued the case.
Sydney Brodie and Duane L. Nelson,
Criminal Division, were on the brief.

BANK ROBBERY

Theft of Money from Night Depository of Bank Insured by FDIC. United States v. Jeff Collins (N.D. Ga., April 7, 1961). Defendant, who stole a deposit from the night depository of a bank insured by the FDIC, was indicted for violation of 18 U.S.C. 2113(b). The District Court denied defendant's motion to dismiss the indictment, holding that the indictment sufficiently charged an offense against the United States. Thus, the instant case is precedent for the proposition that deposits in a night depository of a bank are in the "possession" of the bank within the meaning of 18 U.S.C. 2113(b).

Staff: United States Attorney Charles D. Read;
Assistant United States Attorney J. Robert Sparks
(N.D. Ga.)

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Country to Which Alien Is to Be Deported - Hong Kong; Designation of Country in Warrant of Deportation. Ying and Wong v. Kennedy (C.A. D.C., April 27, 1961). This is an appeal from a decision of the District Court in Ying and Wong v. Rogers, 180 F. Supp. 618 (See: Bulletin, Vol. 8, No. 5, p. 144).

The Court of Appeals, in affirming, concluded that Hong Kong is a "country" within the meaning of sec. 243(a) of the I & N Act (8 U.S.C. 1253(a)).

It also said that neither the Act nor the regulations expressly or impliedly require an order or a warrant of deportation to designate the country to which the alien is to be deported.

This is so because the determination of such a country depends upon facts to be ascertained, conclusions to be reached, and decisions to be made by the Attorney General after the final order of deportation has been entered and the warrant of deportation issued.

* * *

LANDS DIVISION

Assistant Attorney General Ramsey Clark

Ejectment Action Authorized Against Federal Officer in Possession of Government Lands. Bowdoin v. Malone, 284 F.2d 95 (C.A. 5, 1960), and 287 F.2d 282 (C.A. 5, 1961). This action, in the fictitious form of ejectment, was brought in a court of the State of Georgia against the United States and Buford Malone, Jr., alleging ouster from certain lands with resulting damages to the plaintiffs. Defendants removed the action to the federal court on the grounds that the land involved is in a national forest and that Malone was acting only in his official capacity as a Forest Service Officer. Following removal, the district court granted defendants' motion to dismiss for lack of jurisdiction, under the name Doe v. Roe, 186 F.Supp. 407. The district court said that while the complaint did not show Malone was being sued as an agent and employee of the United States, this was admitted by plaintiffs at the pre-trial conference, and that plaintiffs also conceded they could not maintain the action against the United States itself. The absence of any allegation that Malone was acting beyond a statutory limitation on his authority was emphasized.

Plaintiffs appealed (as to the federal officer only), relying upon Land v. Dollar, 330 U.S. 731 (1947), and United States v. Lee, 106 U.S. 196 (1882). On behalf of the federal officer, it was contended that dismissal was proper under Larson v. Domestic & Foreign Corp., 337 U.S. 682 (1949), because (1) a proceeding to eject a federal officer in his official capacity from land to which the United States claims title is a suit against the United States over which the court has no jurisdiction in the absence of congressional consent; (2) the plaintiffs do not allege that the federal officer is acting individually, rather than for the sovereign, or beyond constitutional or statutory authority; and (3) the denial of a plaintiff's title puts the question of title in issue and converts ejectment into a suit to try title.

The Court of Appeals reversed, one judge dissenting. The majority decided that the action could be maintained against the federal officer (citing Lee and Dollar), and that the judgment sought was possession as against the officer only and did not involve title, under Georgia statutes. Interference with governmental operations, showing the action to be against the United States under Larson principles, was the ground for the dissent. A petition for rehearing en banc was denied, an additional opinion being written and the same judge again dissenting. 287 F.2d 282.

A petition for certiorari will be filed, founded upon the conflict of the majority's decision with decisions of the Supreme Court, the Fifth Circuit, and other circuits, relating to an important and recurring question, affecting the Government's extensive real estate interests.

Staff: Raymond N. Zagone (Lands Division).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CRIMINAL TAX MATTERS
Appellate Decision

Tax Evasion-- Lesser Included Offenses. Chaifetz v. United States (petition for certiorari to Court of Appeals for District of Columbia, denied May 8, 1961). Appellant was convicted on two counts (III and IV) of a five-count indictment charging wilful evasion of income taxes for 1951-1955. Conviction on the former count was for evasion--a felony. Conviction on the latter was for failure to supply information--a misdemeanor, which the trial judge had instructed was an offense of lesser degree necessarily included in that count. On appeal as to Count III, the Court of Appeals for the District of Columbia sustained the trial court's refusal to instruct the jury that appellant could be convicted of a lesser included offense of failure to supply information, as the statute had run on that offense. Because the sentence on each count ran concurrently, the court refused to consider both parties' objections to conviction under Count IV. Upon petition for certiorari, the parties renewed their objections to conviction on this count should be set aside, as a failure to supply information (Sec. 7203, 26 U.S.C.) is not an offense necessarily included within attempted evasion (Sec. 7201, 26 U.S.C.). The Supreme Court denied certiorari on Count III, but granted it on Count IV and directed, per curiam, that conviction under Count IV be set aside. In view of this, prosecutors may now find some Supreme Court support, albeit inferred, for the Department's position that there are no lesser included offenses in tax evasion cases.

Staff: Assistant United States Attorney John D. Lane (D. C.); Meyer Rothwacks and Richard B. Buhrman (Tax Division).

District Court Decision

Sentencing policy: United States v. Dr. Roy R. Bowes (M. D. Tenn., February 16, 1961). Defendant, a physician, after pleading guilty to the first count of a five count indictment charging him with evading $36,362.37 in income taxes was sentenced to sixty days imprisonment and $1,000 fine. District Judge William E. Miller gave consideration to the mitigating circumstances that the defendant (1) had cooperated with the investigating agents and (2) by entering a guilty plea had avoided the necessity of putting the Government to a lengthy trial. While also taking into account the defendant's previous unblemished reputation and position of outstanding leadership in the community, the district judge nevertheless felt compelled to assess a prison sentence rather than grant probation in order to dispense equal justice to all defendants in tax evasion cases. The court's verbatim statement is as follows:

THE COURT: Of course, what I am confronted with in this case, as you can very well see, is the perennial problem in cases of this nature, these income tax cases, of making a proper adjustment between the individual and the interests of society. It is a hard accommodation to make in many instances, particularly so in cases of this type, because of the fact which I have repeatedly pointed out, that nine times out of ten the defendant comes into court with an unblemished reputation and with a high standing in his community, many times occupying a position of outstanding leadership in the community as this defendant does. And the difficult thing, as far as the Court is concerned, in granting probation to a defendant in such cases, is in setting a pattern which would govern substantially all of the cases which come before the Court. It would almost have to set a pattern unless the Court simply acted arbitrarily and without consistency.

I can see the tragedy to this family. I think it is a very sad, tragic thing, indeed. Nobody appreciates that more than I do, because I have seen so many of these cases in court. And a person never gets to the point where he is hardened to a situation of this kind. It is always tragic to see. You never get accustomed to it or used to it.

This man has many commendable things in his record. He has brought himself from very poor circumstances into an outstanding man and physician in the community; he has done many good things for many people; and I think I would be callous indeed if I did not take that into account, his background and his entire record, in arriving at a proper disposition of the case.

I do not feel that I could fairly and consistently, in this case however, grant probation. I do think that I can mitigate the sentence to be imposed because of the circumstances which have been so eloquently and so forcefully presented to the Court by the defendant's attorney. I think it would be a mistake to impose a sentence on the defendant which would destroy him and make it impossible for him to return to his community and to occupy a place of usefulness as he has done heretofore. I don't believe the interests of society would be subserved by a type of sentence which would succeed in destroying him completely.

In view of all the circumstances which have been presented--even though there is a rather serious violation involving a substantial amount and committed under such circumstances as to indicate deliberation--I think that there are so many other circumstances that I should mitigate the sentence. Not only does the defendant have an exceptionally fine record as a physician and a citizen in his

community, but the evidence shows that he gave the investigating agents full cooperation at all times. In addition, he has entered a plea of guilty and avoided the necessity of a lengthy trial.

I will impose a sentence in this case of sixty days' confinement and a fine of $1,000 under this first count of the indictment.

Staff: United States Attorney Fred Elledge, Jr. (M. D. Tenn.).

CIVIL TAX MATTERS
Appellate Decisions

Assessment and Collection - Jurisdiction to Enjoin Collection of Penalty. Michael Botta, et al. v. Thomas E. Scanlon, District Director (C.A. 2, March 6, 1961.) Thru-County Plumbing & Heating Co., Inc., as employer, filed withholding and social security tax returns for the fourth quarter of 1956, all four quarters of 1957, and the first quarter of 1958, but did not pay to the District Director the amounts reported as deducted and withheld from wages of employees. Thru-County was adjudicated a bankrupt in February, 1958, and the Director filed a claim with the trustee for such unpaid taxes. Later he assessed a 100% penalty under Section 6672 of the 1954 Code against each of four individuals as the persons liable for failure to pay over such withheld taxes to the District Director. Three of those individuals brought suit in the District Court (E.D. N.Y.) to enjoin the collection of such penalties. The fourth individual, who was not made a party to the injunction suit, apparently was the party really responsible for withholding and payment of the taxes.

The District Court dismissed the complaint as prohibited by Section 7421 of the 1954 Code. The complaint contained only general allegations of hardship and non-liability of the plaintiffs. The Court of Appeals ordered the case remanded to the District Court so the plaintiffs may plead over, and in so doing they seem to have enlarged the scope of the judicially-recognized exception to the prohibition of Section 7421 in cases where the exaction is not only shown to be illegal, but other exceptional and extraordinary circumstances are shown. There is even some suggestion in the appellate court's opinion that a showing of non-liability--as distinguished from conclusory allegation of non-liability--might be sufficient.

Staff: Fred E. Youngman (Tax Division).

District Court Decision

Evidence - Summaries of Destroyed Original Records Not Admissible Under Shop Book Rule. United States v. Pliscoe, et al. (D.C., March 13, 1961; 61-1 U.S.T.C., par. 9322.) The decision was in three cases,

consolidated for trial. Defendants were partners in a gambling enterprise, admittedly illegal. Deficiency income taxes were assessed against them for the years 1948, 1949, and 1950. The Government rested on the prima facie case based on the assessment itself. The assessment had been based on amounts shown as receipts by the taxpayers on certain one line summaries for each day. The Commissioner had not accepted summaries which showed net losses. One of the partners testified to identify certain documents which represented the one line summary for each day showing either a net gain or a net loss and allegedly based on business records destroyed at the end of the day. On objection, the Court found such summaries were inadmissible as they did not come within the shop book exception to the hearsay rule as provided in 28, U.S.C. 1732(a). The Court held that the Government was entitled to judgment.

Staff: United States Attorney Oliver Gasch (Dist. Col.)
James H. Falloon (Tax Division)

District Court Decisions

Liens; Whether Subcontractor's Rights to Sums Retained by Property Owner Under Construction Contract Are Superior to Tax Liens Against Taxpayer Contractor. Paul R. Van Etten v. New York State Natural Gas Corp., et al. (M.D. Pa, March 27, 1961.) A property owner entered into a contract with a contractor for the construction of certain buildings. A subcontractor, who was not paid in full by the contractor, filed this action to recover the balance due him from the sums that had been retained by the property owner and which the latter subsequently paid into the registry of the court. The United States intervened to assert its tax liens which arose from assessments made against the contractor on tax liabilities arising during the period of the contract. The contractor encountered financial difficulties and became unable to complete the contract and to pay his subcontractors in accordance with the terms of the contract. An arrangement was worked out among the parties whereby the work was completed but the contractor was not able to submit to the owner a certificate that all the subcontractors had been paid. The contract was along the general lines of a standard A. I. A. construction contract. It provided that the owner should make progress payments each month to the contractor of 90% of value of work done and upon substantial completion of entire work payments should total 95% of the contract price. Final payment was due upon completion and acceptance of the work, and before issuance of final certificate of acceptance the contractor was required to submit evidence that all payrolls and material bills had been paid. The contract, however, provided that neither the contractor, a subcontractor or materialman could file a mechanic's lien.

The issue is not a strict priority question of first in time is first in right, but whether the contractor had any rights to the fund involved to which the tax liens could attach. The Court held that the contractor had no rights to property in the withheld balances and there was, therefore, nothing to which the tax liens could attach. It was recognized that the issue involved a question of property rights which are determined by

state law. Aquilino v. United States, 363 U. S. 509. The Court here relied heavily on the decision in Atlantic Refining Co. v. Continental Casualty Co., 183 F. Supp. 478 (W. D. Pa.) which was very similar to the instant case except that a surety was involved in that case.

The Subcontractor contended that the contractor had failed to complete the contract and was therefore not entitled to the retained funds. He further argued that the owner denied liability to the contractor for the withheld balances, that the owner did not claim a right to such sums, and that the subcontractor had an equitable right to such funds. The Government asserted that if there had been a breach of the contract it was only a nominal breach, that there had been substantial performance, that since there could be no liens on the property, the owner could suffer no liability because of non-payment to the sub-contractor, and that the owner by paying the money into court had waived any rights to assert against the contractor's claim to the money. The Government asserted a distinction should be made between the instant case and the holding in the Atlantic Refining Company case where the court held that the surety was subrogated to the rights of the owner and that the owner could not waive the surety's rights to look to the withheld balances. It was pointed out that in the instant case, since there was no surety, no question is presented as to the owner not being able to waive the surety's rights and that the owner was free to waive his own rights, if any, to the withheld balances.

Decision has not been reached with respect to appeal.

Staff: United States Attorney Daniel H. Jenkins (M. D. Pa.); Paul T. O'Donoghue (Tax Division)

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