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

July 28, 1961

United States

DEPARTMENT OF JUSTICE

Vol. 9 No. 15

UNITED STATES ATTORNEYS

BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 9 July 28, 1961 No. 15

NEW APPOINTEES

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

New Jersey - David M. Satz, Jr.

Mr. Satz was born January 14, 1926 at New York, New York, is married and has two children. He attended Harvard University from July 1943 to May 30, 1944 and again from February 1, 1945 to June 10, 1948 when he received his A.B. degree. He attended the University of Pennsylvania Law School from September 1948 to June 15, 1951 when he received his LL.B. degree. He was admitted to the Bar of the State of New Jersey in 1952. He served in the United States Army Air Force from June 13, 1944 to November 13, 1945 when he was honorably discharged as a Corporal. From May 28, 1951 to March 5, 1954 he was a law clerk and attorney in the firm of Lum, Biunno and Tompkins in Newark. He also taught evening classes in business law at Rutgers University from 1953 to 1954. In February 1954 he was appointed a Deputy Attorney General of the State of New Jersey and in March 1958 he was made Assistant Attorney General, which post he still holds.

Pennsylvania, Middle - Bernard J. Brown

Mr. Brown was born May 19, 1919 at Carbondale, Pennsylvania, is married and has five children. He attended Providence College at Providence, Rhode Island from September 23, 1940 to January 24, 1942. He served in the United States Army from April 9, 1942 to October 31, 1945 when he was honorably discharged as a Second Lieutenant. He entered Dickinson College at Carlisle, Pennsylvania on October 8, 1945 and received his LL.B. degree on September 29, 1947. He was admitted to the Bar of the District of Columbia and the State of Pennsylvania in 1948. In 1947-48 he was an associate attorney for James G. McDonough in Scranton and since that time he has been in law partnership with T. Robert Martin in Carbondale. He also served as City Assessor for Carbondale from May 17, 1954 to November 19, 1956; Solicitor for the City and Township of Carbondale since January 8, 1960; and Special Deputy Attorney General for the Commonwealth of Pennsylvania since September 7, 1955.

As of July 21, 1961, the score on new appointees is: Confirmed - 53; Nominated - 3.

JOB WELL DONE

The Chief Postal Inspector has commended the work of former Assistant United States Attorney Kevin T. Duffy and Assistant United States Attorney Alfred Donati, Jr., Southern District of New York, in a case involving theft from interstate shipment, in which the trial lasted three weeks and resulted in the conviction of seven defendants. The letter stated that Mr. Duffy kept in close personal touch with the investigation and interrogated approximately one hundred witnesses, most of them before a grand jury; that after he resigned he spent considerable time acquainting Mr. Donati with the facts; that Mr. Donati spent long hours in preparing the case for trial; that his zeal so impressed defense counsel that it influenced them in suggesting that their clients plead guilty; that the orderly manner in which Mr. Donati presented the case brought praise from the presiding judge; and, that his familiarity with the most intimate details of the scheme made examination of the witnesses so impressive that the jury had little to decide as to guilt.

Assistant United States Attorney Patrick H. Shelledy, Eastern District of Washington, has been commended by the Field Solicitor, Bureau of Reclamation, on the vary favorable verdicts he obtained in the recent trials of two tracts of land condemned for the Columbia Basin Project. In one case the verdict was less than the amount deposited in the registry of the court, and in the other the verdict was for the exact amount on the deposit. In expressing his appreciation for the excellent job done and congratulating Mr. Shelledy on his victories, the Field Solicitor stated the verdicts will be of considerable help to the Bureau of Reclamation in the vast drainage program which lies ahead on this project.

Assistant United States Attorney David Klingsberg, Southern District of New York, has been commended by the presiding judge for the excellent professional services he rendered in a recent trial. The letter stated that because of the many thousands of dispersed accounting entries which had to be tied together and related to other proof in the case, the problems of preparation and presentation were not only difficult but a challenge to the ability and fortitude of trial counsel; and that Mr. Klingsberg displayed a thorough preparation, and excellent knowledge of all the details of this difficult case, and performed his duties in a most courteous, forthright and able manner.

The Chief Postal Inspector has commended United States Attorney Hugh E. Monteith, Western District of North Carolina, for his work in obtaining convictions of a number of defendants in a recent case involving violations of the mail fraud and conspiracy statutes. The letter stated that shortly before the case was to come to trial the postal inspector who made the investigation was stricken with a heart attack; that, consequently, Mr. Monteith was required to prepare the case for trial without the assistance he otherwise would have received from the inspector; and that his expert handling of the case and particularly his study of the basic scheme of the fraud resulted in the defendants' entering pleas of guilty.

Assistant United States Attorney Oscar D. Kennerly, Southern District of Texas, has been commended by the Special Agent in Charge, Secret Service, for the unusual cooperation he rendered in a recent counterfeit case. The letter stated that the investigating agents worked almost continuously for a three-day period, during which time Mr. Kennerly was contacted at his residence at late hours, as well as at his office, and briefly advised of the developments of the case; that decisions were needed immediately, and that Mr. Kennerly responded in every instance rapidly, effectively, and intelligently, thus greatly aiding the investigation; and, that his ability to grasp developments in this case from very brief verbal reports, plus his intelligent decisions, enabled the investigating agents to take decisive action leading to a speedy and successful conclusion of the case.

The Chief Postal Inspector has commended Assistant United States Attorney Robert E. DeMascio, Eastern District of Michigan, for his work in a recent case involving fraudulent promotions in which the defendants had defrauded the public of millions of dollars over the years. The letter stated that Mr. DeMascio devoted a great amount of time to the prosecution during the last two and a half years; that the difficulties encountered were tremendous; and that his outstanding efforts, fine work, and competent method of handling this extremely important and difficult case were highly commendable.

Assistant United States Attorney William Hitz, District of Columbia has been commended for his work in a recent case involving Contempt of Congress. The letter stated that at the trial, Mr. Hitz answered with great patience, persuasiveness and skill each and every problem posed by the judge in the oral presentation; that he literally stood on his feet for hours at a time responding to the judge's questions on all phases of the case; that his performance could only be described as brilliant; and that without it the Government would not have won the case.

The District Director, Internal Revenue Service, has commended Assistant United States Attorney Daniel R. Minnick, Middle District of Pennsylvania, on his contribution to the successful conclusion of a recent tax evasion case. The letter stated that Mr. Minnick's work and trial planning, the research and technical knowledge of the participating Tax Division attorney, and the forceful arguments put forth in the judge's chambers resulted in a plea of guilty to one count of the indictment on the second day of trial. The letter pointed out that the prosecution was the first tax evasion case to go to trial in that locality; that this fact, together with the local reputation and prominence of opposing counsel made the conviction an outstanding accomplishment; and that the outcome will aid greatly in enforcement efforts to obtain compliance with the tax laws, particularly in that area.

Assistant United States Attorney Joseph J. Marcheso, Eastern District of New York, has been commended by the Director, FBI for the outstanding manner in which he handled the prosecution of six defendants in a recent case. The letter stated that Mr. Marcheso's excellent presentation of the Government's case under difficult conditions and the adroitness with which he overcame the obstacles encountered are indicative of his ability and

knowledge in legal matters, and expressed warm thanks for his splendid contribution to the successful conclusion reached in the matter.

United States Attorney M. Hepburn Many and Assistant United States Attorney Nicholas J. Gagliano, Eastern District of Louisiana, have been commended by the Chief Postal Inspector for their work in a recent mail fraud case involving the sale of worthless distributorships. Mr. Gagliano's aggressive and positive handling of the matter, which was assigned to him in August, 1960, resulted in its being brought to trial in May, 1961. He made the opening statement, examined the witnesses, and summed up the case for the jury. Mr. Many personally guided the court proceedings. The letter stated that the brief time required by the jury to arrive at a decision is indicative of the excellent preparations Mr. Many and Mr. Gagliano made for the trial.

The Chief Postal Inspector has commended United States Attorney F. Russell Millin and Assistant United States Attorney J. Whitfield Moody, Western District of Missouri, on their handling of a recent mail fraud case, involving a membership and buyers guide scheme, which resulted in substantial sentences being imposed upon all of the defendants. The letter stated that the prompt and capable manner in which the case was handled no doubt prompted the defendants to enter pleas of guilty, thus obviating the need for trial; that as a result of the prompt handling afforded the case only two business firms were victimized; and that this feature in itself is, indeed, deserving of praise.

Assistant United States Attorney Robert S. Atkins, Northern District of Illinois, has been commended by the Acting District Supervisor, Bureau of Narcotics, for the successful prosecution of a recent case in which after trial, one defendant was found guilty on all counts and sentenced to fifteen years, while the other defendant entered a plea of guilty and received a sentence of seven years. The letter stated that both defendants were notorious narcotic violators whose convictions will have a marked effect on narcotic trafficking in the Chicago area; that Mr. Atkins overcame considerable difficulty when one of the principal Government witnesses refused to testify; and that it was an extreme pleasure to work with a man of his ability.

An Agent of the District Internal Revenue office has written to Assistant United States Attorney Robert E. Scher, Southern District of New York, stating that the agency is most gratified with the prompt results of a recent letter and summons sent by Mr. Scher to a delinquent taxpayer. The offender, who not only appeared with the required completed forms but completely liquidated his tax liability at that time, stated that the letter had scared him. The Agent observed that perhaps these reactions may aid Mr. Scher in the handling of future cases of this type.

Assistant United States Attorney Donald L. Giacomini, District of Colorado, has been commended by the District Supervisor, Bureau of Narcotics, for his work in a number of difficult cases which he handled in an efficient and capable manner. The District Supervisor stated that

the Bureau's task was made easier by Mr. Giacomini's detailed pre-trial preparation of these cases which covered the interviewing of witnesses, checking the evidence available, and covering all legal aspects that might arise during the course of the trials.

The Director, FBI, has expressed his appreciation to Assistant United States Attorney Frederick H. Mayer, Eastern District of Missouri, for the excellent manner in which he handled the prosecution of a recent case. The Director observed that the interest and attention manifested by Mr. Mayer toward the many difficult problems he was able to overcome were a tribute to his outstanding legal ability.

Assistant United States Attorney Gerald E. Paley, Southern District of New York, has been commended by the Security Manager of a large steamship line on his handling of a recent case involving theft from Customs custody and theft from foreign commerce. The thefts in question were committed by a port watchman employed by the company who illegally bottles whiskey from one of the piers. The Security Manager stated that, having attended the pre-trial conferences and the trial, he believed that in all of his experiences as an enforcement officer he had never seen a case more thoroughly prepared or better presented, and that it was a pleasure to commend the work of Mr. Paley who had applied himself so diligently and intelligently to the successful prosecution of the case.

The Chief Postal Inspector has commended the excellent work of Assistant United States Attorneys Daniel A. Becco and Stuart J. Templeton, Northern District of Illinois, in a recent mail fraud case in which the defendant, who is believed to have defrauded his victims of millions of dollars over the years, was found guilty, fined $3,000, and placed on one year's probation. The letter stated that Assistants Becco and Templeton thoroughly prepared the case for trial, and their efficient presentation of the evidence provided the court with a clear understanding of the scheme.

* * *

ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

SHERMAN ACT

Labor Union Must Terminate Membership of Self Employed Individuals. United States v. Los Angeles Meat and Provision Drivers Union, Local 626 (S.D. Calif.) The complaint, filed on May 27, 1959, charged defendants with a combination and conspiracy to organize grease peddlers in the defendant Union and to limit the number of peddlers who could engage in the business; to fix the prices to be paid by peddlers for restaurant grease and the prices to be charged for restaurant grease sold by peddlers to processing plants; from buying restaurant grease from peddlers who are not members of said Union, and to cause processors to boycott non-Union peddlers; to allocate among peddlers the sources from which restaurant grease is purchased, to allocate among processing plants the peddlers from whom they can purchase restaurant grease, and to allocate among processing plants the quantities of restaurant grease gathered and sold by peddlers; to eliminate certain processing plants from business, and to use strikes and picketing and threats of strikes and picketing to compel processing plants to adhere to the demands of the conspirators.

On March 23, 1961, defendants stipulated that they had combined and conspired in unreasonable restraint of foreign trade and commerce in yellow grease in violation of Section 1 of the Sherman Act.

The stipulation further recited that the sole remaining issue was the scope of relief to be granted. The Government insisted upon a decree terminating the membership of the grease peddlers; defendants urged that simple injunctive relief was sufficient. This one issue was submitted to the Court on briefs and oral argument. On June 30, 1961, Judge William Byrne filed an opinion holding for the Government. A decree will be submitted to the Court requiring the Union to terminate the membership of all grease peddlers and to refuse membership to all grease peddlers in the future, unless they become bona fide employees.

This is the second antitrust case in which a court has ordered a labor union to expel self-employed individuals from its membership. In 1960, Chief Judge Sylvester Ryan, in United States v. Fish Smokers Trade Council, ruled that membership of self-employed jobbers in the defendant Union must also be terminated.

Staff: George B. Haddock and Maxwell M. Blecher.
(Antitrust Division)

CLAYTON ACT

Elimination of Competitions - Liquefied Petroleum Gas; Complaint Under Sec. 7. United States v. Suburban Gas. (S.D. Calif.) con

July 11, 1961, a complaint was filed against Suburban Gas alleging three violations of Section 7 of the Clayton Act by reason of numerous acquisitions made by Suburban. It was alleged that Suburban Gas had engaged in a series of about 59 acquisitions since its organization and that, as a result of these acquisitions, it has attained a position of dominance in the retail distribution of liquefied petroleum gas in the States of Washington, Oregon, and Arizona.

The first offense charges a violation of Section 7 by reason of the acquisition by Suburban of the assets and business of Calor Gas Company of Fresno, California in May 1960. It is alleged that Suburban and Calor were in direct, active and substantial competition with each other in the sale of LPG products to industrial consumers located in the States of Washington and Oregon; that in the State of Oregon, Suburban's and Calor's sales of LPG products during 1959 to industrial consumers amounted to 48.3% and 33.9%, respectively, of the total sales of such products to industrial users in that state; that in the State of Washington they amounted to 40.9% and 5.1%, respectively, of the total sales to industrial users in that state; and that the effect of the acquisition of Calor would eliminate actual and potential competition between it and Suburban and generally lessen competition in the sale of LPG products to industrial users in the States of Washington and Oregon.

The second offense sets forth a series of 8 corporate acquisitions beginning in October 1954 in which Suburban acquired a total of 45 LPG plants in Washington and Oregon. The complaint states that with but one exception, each of these locations and Suburban's entire market position in the States of Washington and Oregon, is the result of acquisitions; and that in such states in 1959 Suburban and the LPG retailers acquired by it since January 1, 1959 sold over 35% of the total LPG products sold to domestic and industrial users in those states.

The third offense sets forth 6 corporate acquisitions by Suburban in Arizona beginning in 1953, involving 10 plant locations. It is stated that Suburban's ownership of each of the acquired plants and its entire marketing position in the State of Arizona has been the result of acquisitions; and that in 1959, Suburban sold approximately 28.1% of the total LPG sold to domestic and industrial users in Arizona.

The complaint states that Suburban has announced publicly its intention to continue and will continue its past practice of expansion through additional acquisitions of other sellers of LPG; and that such acquisitions will substantially lessen competition or tend to create a monopoly, in Washington, Oregon, Arizona and other states.

The prayer for relief seeks to have Suburban divest itself of all interest in Calor and establish from the business, properties and assets of Calor a new corporation which will be sold and which will operate as an independent competitive factor in the Western market.

With respect to the second and third offenses charged, the prayer for relief asks the Court to order such divestiture as it deems necessary

to restore effective competition and eliminate the tendency toward monopolization on the part of Suburban. An injunction against future acquisitions, except upon notice to the Department and approval of the Court is also asked.

Staff: James M. McGrath and Maxwell M. Blecher.
(Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General William H. Orrick, Jr.

SUPREME COURT

TREATIES

Under Article II of Convention of 1881 Between U.S. and Serbia for Facilitating and Developing Commercial Relations, 22 Stat. 963, Citizens and Subjects of U.S. and Yugoslavia Are Entitled to Acquire or Succeed by Testament or Inheritance to Property Located in Other Country, Regardless of Residence of Person Asserting Such Right, and Regardless of Monetary Controls Existing in Yugoslavia. Kolovrat v. Oregon, 366 U.S. 187. In December, 1953, Joe Stoich and Murharem Zekich died intestate in Oregon, leaving certain heirs and next-of-kin resident and domiciled in Yugoslavia. Acting under Section 111.070 of the Oregon Revised Statutes, the State of Oregon filed petitions in the Circuit Court of Multnomah County for the escheat of the estate. Section 111.070, supra, requires that reciprocal rights of inheritance exist between the United States and Yugoslavia and that citizens of the United State have the unqualified right to receive payment in the United States of their inheritance. The Circuit Court, holding that the burden of proving the presence of reciprocity required by the Oregon statute had been met, issued orders denying the petitions of the State and directed that distribution be made. The Supreme Court of Oregon reversed. It held (1) that Article II of the Convention Between the United States and Serbia, For Facilitating and Developing Commercial Relations, of 1881, 22 Stat. 963, now in force between the United States and Yugoslavia, does not apply to the estate of a United States citizen who dies intestate in the United States leaving heirs or next-of-kin who are Yugoslav subjects residing in Yugoslavia; and (2) that, regardless of the adherence of the United States and Yugoslavia to the Articles of Agreement of the International Monetary Fund, 60 Stat. 1401, the foreign exchange controls existing in Yugoslavia as of the date of the decedents' death prevented petitioners from meeting the burden of showing the right of an American citizen to receive payment in money from a Yugoslav estate. The Yugoslav heirs, thereafter, filed a petition for a writ of certiorari from the Supreme Court of the United States.

On request of the Yugoslav Government, the United States entered the case as amicus curiae in support of the petition for certiorari and in support of the contentions of the Yugoslav heirs on the merits.

The Supreme Court granted certiorari, and reversed unanimously. That Court, in an opinion by Mr. Justice Black, held that the Convention of 1881 entitled petitioners to inherit personal property located in Oregon on the same basis as American heirs and next-of-kin and that these rights have not been extinguished or impaired by the monetary policies of

Yugoslavia exercised in accordance with subsequent agreements between that country and the United States as well as the terms of the Articles of Agreement of the International Monetary Fund.

Staff: Robert E. Powell (Civil Division)

COURTS OF APPEALS

ADMINISTRATIVE PROCEDURE ACT

Judicial Officer of Post Office Department Can Make Final Agency Decision Under Section 8 of Administrative Procedure Act, Finding Medical Claims Fraudulent Upon Uncontradicted Testimony of Single Physician as to State of Medical Opinion. U.S. Health Club, Inc. v. William Major, (C.A. 3, June 15, 1961). The Post Office Department instituted proceedings against the U.S. Health Club, Inc., charging it with conducting a fraudulent enterprise through the mails by the sale of two products which it asserted would prevent heart diseases and hardening of the arteries. The Government's only witness was a doctor, who testified that the universality of medical opinion was that the products of appellee would not produce the advertised effects. The hearing examiner recommended, and the judicial officer ordered, the issuance of a fraud order pursuant to 39 U.S.C. 259 and 732. Appellee instituted a proceeding in the district court wherein it asserted: (1) the judicial officer who issued the fraud order, under Section 8(a) of the APA, 5 U.S.C. 1007(a) lacked power to do so because he was not authorized to conduct hearings under Sec. 7(a) of the APA, 5 U.S.C. 1006(a); and (2) that the order was not supported by substantial evidence. The district court held for appellee and granted an injunction against enforcement of the order.

On appeal, the Government asserted that the Postmaster can delegate the power to make a final decision under Section 8(a) to a judicial officer, since his function is different from conducting hearings and taking evidence. It further contended that there was more than substantial evidence to support the fraud order, and hence, it should not be enjoined. The Court of Appeals reversed. It held that the judicial officer did not sit as a hearing officer; the Postmaster General, pursuant to Section 1(b) of Reorganization Plan No. 3 of 1949, 63 Stat. 1066, is empowered to delegate authority to make a final decision under Section 8(a) of the APA, and pursuant to such a delegation the judicial officer may make such a decision. It also held that the fraud order was supported by substantial evidence.

Staff: Howard E. Shapiro (Civil Division)

COURTS OF APPEAL

COMMODITY CREDIT CORPORATION CHARTER ACT

Summary Judgment Improperly Granted to Buyer of Government Corn From Converter Where Buyer's Admissions Raised Questions of Good Faith and Knowledge. United States v. United Marketing Ass'n. (C.A. 8, June 29, 1961). For several years prior to 1952 the Commodity Credit Corporation had stored grain with the Burt Grain Company. Early in 1952 it appeared that Burt Grain Company was in bad financial condition and that it was selling Government corn as its own. Burt Grain Company was indicted for this conversion in March, 1952, but its arraignment in June was continued upon protestations that subsequent shipments would vindicate it. Burt Grain Company's defalcations continued, however, and on September 3, 1952, an injunction forbidding Burt to sell corn to anyone other than CCC was obtained. Defendant continued to purchase corn during all this time and for nearly a month subsequent to the injunction. Upon the passage of 15 U.S.C. 714 p. which protects secondary converters of CCC grain, who buy for value in good faith and without knowledge of any defect in the seller's title, defendant moved for summary judgment in the suit previously brought by the Government for conversion of the corn purchased from Burt. The district court granted the motion for summary judgment despite the fact that it was stipulated that one of defendant's partners had read the injunction in a newspaper and admitted to investigators that he felt he had to continue to do business with Burt since it owed the defendant money.

The Court of Appeals reversed and remanded for trial on the merits as to shipments made after the partner read of the injunction. The Court stated that the admissions of the partner raised serious questions of credibility and good faith which could not properly be resolved on a motion for summary judgment; that 15 U.S.C. 714 p. places the burden on the buyer to establish his good faith and lack of knowledge; and that defendant's assertions of good faith and lack of knowledge fell far short in the face of the admitted facts which would indeed support a verdict to the contrary.

Staff: W. Harold Bigham (Civil Division)

LIMITATION OF LIABILITY ACT

As FGAN Was Not Known Prior to Texas City Disaster to Be Inherently Dangerous, Republic of France, Among Others, Was Entitled to Exoneration From All Claims Arising Out of Explosion of Steamship GRANDCAMP Including, inter alia, Claims Assigned to United States Under Texas City Relief Act, 69 Stat. 707-709. Republic of France, et al. v. United States, et al. (C.A. 5, May 5, 1961). This is a case arising on petition of the Republic of France and the French Line for exoneration from, or limitation of liability with respect to claims filed against it arising out of the explosion of the S.S. GRANDCAMP while loading Fertilizer Grade Ammonium Nitrate (FGAN),

which occurrence was known as the Texas City Disaster of April 16, 1947. The proceedings in this case were delayed in order to give precedence to suits under the Federal Tort Claims Act, 28 U.S.C. 6346 and 2674, against the United States as manufacturer of FGAN, which suits were ultimately decided in favor of the United States. In re Texas City Disaster Litigation, 197 F 2d 771 (C.A. 5), affirmed sub nom Dalehite v. United States, 346 U.S. 15. In 1955, Congress enacted the Texas City Relief Act, 69 Stat. 707-709 which provided for payment of uninsured claims in an amount not to exceed $25,000 per claim. Under that Act, the United States paid approximately $16,000,000 to claimants and received assignments of their claims totaling approximately $70,000,000. Thereafter, the United States filed in this proceeding an amended claim for $70,000,000, and a claim for $350,000 as successor to the Reconstruction Finance Corporation, for the loss of goods in the disaster. The district court entered an interlocutory decree denying the petition for exoneration or limitation.

The Court of Appeals reversed. It held that, since all of the claims for personal injury, death, and property damage resulted from the explosion, and as, prior to this disaster, FGAN was not known to be dangerous and the explosion was wholly unprecedented, the Republic of France and the French Line were exonerated from liability for any claim arising out of or consequent upon the explosion of the S.S. GRANDCAMP. In so holding the Court emphasized that under Texas law, which was applicable, it is necessary to show that a person of ordinary intelligence and prudence should have anticipated injury to others as a result of his act before his act can be deemed negligent. Since an explosion of FGAN was unprecedented and that material had previously been considered safe. The Court, relying chiefly on the opinion of the Supreme Court in Dalehite, supra, agreed with appellants that the incident and resultant injuries were unforeseeable.

Judge Hutcheson dissented on the grounds: (1) that the findings and conclusions of the district court were supported by the records, (2) that the majority erred in giving the opinion in Dalehite the effect of res judiciata; and (3) that the majority opinion requires that the particular damage be foreseen, while under the Texas law on foreseeability the particular character of damage does not have to be foreseen, but merely some damage.

On July 11, 1961, the Government's petition for rehearing en banc was denied.

Staff: Carl C. Davis (Civil Division)

COURT OF CUSTOMS AND PATENT APPEALS

TARIFF ACT

Reasonable Public Notice -- Use of Statutory Language Permitting "Modification" of Tariff Restrictions Held Adequate to Inform Public of Tariff Increases, as Well as Decreases, in Spite of Use in Same Notice of Word "Concessions" as Purpose of Tariff Negotiations. United States v. Aris Gloves, Inc., July 7, 1961 (C.A.P.A. (Customs). This case involves

the appeal of the United States from an adverse decision of the United States Custom Court, First Division, which sustained an employer's protest which had been filed against the Collector's assessment of duty at 35% ad valorem on imported gloves. The basis of the protest lay in the asserted invalidity of the increase in duty on such gloves. The rate under Paragraph 1532a of the Tariff Act of 1930 had been 50%. The rate was decreased to 25% by a provision in the General Agreement on Tariffs and Trade (GATT). The increase in question was occasioned by negotiations which took place during the Torquay Protocol of 1951 which raised the rate to 35%.

The sole issue in the case was whether the increase effected by the Torquay Protocol is valid. The Customs Court had determined that it was invalid on the basis that the notice of intention to negotiate the Torquay Protocol, which notice is required, by statute to be given, used the word "concessions" in describing what was to be negotiated. The importer's contention was that the word "concessions" involves duty reductions, but not duty increases; so that the notice given was inadequate to constitute reasonable public notice, under Section 4 of the Trade Agreements Act of 1934, sufficient to support an increase in duty.

The Court of Customs and Patent Appeals reversed the Customs Court and held the notice adequate to support increases in duty. It found that the word "concessions", while ambiguous, did not preclude the possibility of increases, although if used alone, it might not have been sufficiently specific to constitute reasonable notice that increases would be considered. Reading that word in conjunction with the close paraphrase of statutory language, recited in the notice, that the tariff hearings would consider "possible modification of duties and other import restrictions, imposition of additional import restrictions, or specific continuance of existing customs or excise treatment" (see 19 U.S.C. (1958 Ed.) 1351 (a)(1)(B)), the Court held that the notice "when read as a whole, is sufficient to constitute 'reasonable public notice' to interested parties."

Staff: Anthony L. Mondello (Civil Division)

DISTRICT COURTS

FEDERAL RESERVE BOARD

Order Determining Capital Adequacy of Federal Reserve Member Bank, Finding That Said Bank's Capital Was Inadequate, and According Stated Period to Increase Its Capital Held Not Final Order. The Continental Bank and Trust Company v. William McChesney Martin, Jr., et al. (Dist. Col., June 27, 1961). Plaintiff, a state (Utah) member bank of the Federal Reserve System, sought review of an order entered July 18, 1960 by the Federal Reserve Board which determined plaintiff's capital requirement, found that plaintiff's capital was inadequate in the amount of 1.5 million and accorded plaintiff six months in which to increase its capital by the sale of stock. The order was issued as a result of an administrative

proceeding instituted June 29, 1956 pursuant to 12 U.S.C. 327, initiated for the purpose of determining: (a) the adequacy or inadequacy of plaintiff's net capital stock and surplus in relation to the character and condition of its assets and to its present and prospective deposit liabilities and its other corporate responsibilities; (b) the net additional amount, if any, of capital funds needed by plaintiff for an adequate capital structure, and (c) the reasonable period of time required for plaintiff to effect any increase of its capital funds which may be found necessary before being required to surrender its capital stock in the Federal Reserve Bank at San Francisco and to forfeit all rights and privileges of membership in the Federal Reserve System. Plaintiff instituted this action seeking to enjoin the administrative hearing on the ground that the Board had no statutory authority or jurisdiction over the adequacy of the capital of a member state bank in the Federal Reserve System.

Defendants moved to dismiss the action on the ground that the contested order was not final as it was not self-executing nor implemented and on the ground that there was no justiciable controversy as the Board's order did not impose any penalty or liability and does not change plaintiff's existing status as a member of the Federal Reserve System. Defendants contended that plaintiff's membership in the Federal Reserve System could not be forfeited until it failed to comply with the Board's intermediate order of July 18, 1960, a show cause order was issued, and further hearings held.

The District Court granted defendants' motion for lack of jurisdiction.

Staff: Andrew P. Vance (Civil Division)

GOVERNMENTAL IMMUNITY

Commodity Credit Corporation (CCC) Claim May Be Sued Upon in Name of United States; Counterclaims in Such Action Limited by Tucker Act and Tort Claims Act. U.S. v. Anasae International Corp., (S.D. N.Y., June 23, 1961.) Defendant bought surplus beans from CCC for export to Brazil. The United States sued alleging that CCC, in a price adjustment, erroneously overpaid $9,914.03. Defendant answered and made three counterclaims: (1) that CCC's beans were of inferior quality, entitling defendant to $307,359.06 for breach of warranty, (2) that consequent unfavorable publicity in Brazil damaged defendant $250,000, and (3) CCC blacklisted defendant, causing damage of $250,000. Defendant moved to dismiss on the ground that CCC, not the United States, was the proper plaintiff, or, in the alternative, to add CCC as a plaintiff. The Court held that the United States may sue in its own name on a claim of an incorporated agency. A motion by the Government to strike all three counterclaims was granted. The permission to sue CCC granted by 15 U.S.C. 714b(c) does not authorize counterclaims in an action by the United States on a CCC claim; they must come within one of the other "consent statutes." The first counterclaim, sounding in contract, did not come within 28 U.S.C. 1346(a)(2) because it

was for over $10,000. (There is a conflict of authority as to whether any counterclaim can be brought under 28 U.S.C. 1346(a)(2); the instant case was in the Second Circuit, which denies all such counterclaims.) The other two counterclaims were for torts excluded from the Tort Claims Act by 28 U.S.C. 2680(h); and the second counterclaim, arising in a foreign country, was also excluded by 28 U.S.C. 2680(k).

Staff: United States Attorney Robert M. Morgenthau and Assistant United States Attorney Robert E. Scher (S.D. N.Y.) Robert Mandel (Civil Division)

* * *

CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Voting; Civil Rights Act of 1957, as Amended. United States v. Lucky, et al. (W.D. La.) On July 11, 1961, the Department of Justice filed suit under the Civil Rights Act of 1957, as amended, against the registrar of voters of Ouachita Parish, Louisiana, various members of this Citizens Council, and the State of Louisiana.

The suit involves racially discriminatory acts and practices by the defendants directed at Negroes in their efforts to become or remain registered voters. The complaint charges that in 1956 the Citizens' Council and the defendant members filed affidavits challenging the registration status of more than 3,700 Negroes in the Parish and that over 2,700 of these Negroes were subsequently removed from the voter rolls by defendant registrar. It also charges that defendant registrar has engaged in discriminatory acts in the administration of various phases of the registration process, including the requirements that applicants for registration must identify themselves to the registrar, that applicants must fill out application cards without assistance, and that applicants shall be able to read and give a reasonable interpretation of any section of the Constitution.

The suit seeks the reinstatement to the voter rolls of all the Negroes who were unlawfully removed therefrom and an injunction against the Citizens' Council and the defendant members restraining them from engaging in any such acts in the future. It also requests the Court to make a finding of a pattern and practice of discrimination under the provision of Title 6 of the Civil Rights Act of 1960 and an injunction against the registrar and the State of Louisiana.

Staff: United States Attorney T. Fitzhugh Wilson (W.D. La.);
John Doar, Frank M. Dunbaugh (Civil Rights Division)

Voting; Civil Rights Act of 1957 as amended. United States v. Lynd; United States v. Ramsey (S.D. Miss.) These civil actions filed on July 6, 1961 are the first cases alleging violations of the Civil Rights Act of 1957, as amended, brought in Mississippi. The complaints allege that defendants, the Circuit Court Clerk and Registrar of Forrest and Clarke Counties and the State of Mississippi, have engaged in racially discriminatory acts and practices in conducting registration for voting in both counties. These acts and practices include the application of different and more stringent registration standards to Negro than to white applicants and the failure and refusal to afford to Negro applicants the same or equal opportunity to register to vote as is afforded to white applicants. The complaints allege that a substantial majority of white citizens of voting age are registered, while only a few Negroes are registered in Forrest County and none in Clarke County. In each complaint the Court is asked to make a finding that the racially discriminatory acts and practices of

the defendants constitute deprivations of the rights secured by 42 U.S.C. 1971(a) and that such deprivations have been pursuant to a pattern and practice. The Court was also asked to enjoin defendants from continuing to engage in such acts and practices and to order defendants to place on the current registration rolls all qualified Negroes who have applied for registration and who possess qualifications similar to those of white persons already registered.

Staff: United States Attorney Robert E. Hauberg (S.D. Miss.); John Doar, D. Robert Owen (Civil Rights Division)

* * *

CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

BANK ROBBERY
(18 U.S.C. 2113 (a) and 2113 (b))

Supreme Court Ruling in Prince v. United States, 352 U.S. 322, Interpreted as Holding That Offenses of Unlawful Entry and Larceny Do Not Merge but That Court is Limited to Imposing Single Sentence Regardless of Length. Hardy v. United States (C.A. 8, June 30, 1961). In its opinion the Eighth Circuit interpreted the decision in Prince v. United States (1956), 352 U.S. 322, on the vexing problem of sentencing after conviction for the separate offenses of unlawful entry with intent to commit a crime (18 U.S.C. 2113 (a)) and larceny from the bank of an amount exceeding $100 (18 U.S.C. 2113 (b)).

In 1951 defendant and his confederate 1/ were convicted under an indictment separately charging unlawful entry under §2113 (a) and larceny under §2113 (b). Hardy was sentenced to the maximum under each count, 20 years and 10 years respectively, the separate sentences to run concurrently. After serving 10 years, Hardy moved to vacate the longer sentence, arguing that the Prince case interpreted these as a merger of offenses and he could therefore not separately be charged and sentenced under the entry section.

The Court held that the Supreme Court in the Prince case did not intend to consider that the offenses became merged but rather decided merely to limit the pyramiding of penalties. In reaching its decision the Court of Appeals referred to its prior decisions in Kitts v. United States, 243 F. 2d 883, and LaDuke v. United States, 253 F. 2d 387, which cases were decided shortly after the Prince case. The effect of these decisions the Court stated was that the incidents of entering a bank with intent to commit larceny and of engaging in larceny therein are violations of two distinct statutory provisions; and that there is nothing in the language of these provisions to suggest that either incident, where both are present in a situation, was intended to be deprived of its "identity or status as a basis for making violative charges; but that, in respect to the imposing of punishment on them, they are so related in their nature and object that, under the doctrine of the Prince case, sentence may be meted out on only one of them, within the choice which the trial court deems appropriate in the circumstances."

The Eighth Circuit observed that similar cases in other circuits had universally adopted this interpretation of the Prince doctrine, mentioning specifically the Fifth (United States v. Williamson, 255 F. 2d 512, certiorari denied, 358 U.S. 941 and Counts v. United States, 263 F. 2d 603, certiorari denied, 360 U.S. 920), Seventh (United States v.

1/ See: Kitts v. United States (C.A. 8), 243 F. 2d 883.

Leather, 271 F. 2d 80), Ninth (Audett v. United States, 265 F. 2d 837, certiorari denied, 361 U.S. 815) and Tenth (Purdom v. United States, 249 F. 2d 822, certiorari denied, 355 U.S. 913).

This line of cases does not limit the prosecution of multi-count indictments separately charging under 18 U.S.C. 2113 (a) and (b); and a jury may return convictions on both separately. Prince v. United States, supra, only holds that a court imposing sentence is limited to the single sentence regardless of length, which its discretion finds appropriate under the circumstances.

Staff: United States Attorney F. E. Van Alstine (N.D. Iowa).

NATIONAL FIREARMS ACT

Tear Gas Gun Held to Be "Firearm" Within Terms of 26 U.S.C. 5848. United States v. Stoy Decker and Robert Matthew Cox (C.A. 6, June 27, 1961). Decker and Cox, officials of Teamster Local #86, Louisville, Kentucky, assaulted a truck driver in a bar, firing a tear gas gun in the driver's face. They were tried and convicted of conspiracy to possess a firearm required to be registered with the Secretary of the Treasury and of possession of said firearm. On appeal, defendants contended that a tear gas gun is not included in the category "any other weapon" as defined in 26 U.S.C. 5848. Further, they contended that even if it is, they had no knowledge of that fact, therefore could not have an intent to violate the statute.

The Court of Appeals conceded that if the gun were capable of firing only tear gas, it would not be within the purview of the statute. However, the Court referred to a test firing conducted by federal agents which demonstrated the gun's ability to fire an ordinary .410 shotgun shell. Since it could be used to discharge a shot as well as tear gas, it is a firearm within the meaning of the statute. The Court answered the issue of criminal intent by holding that scienter is not an element of the offense. United States v. Wost, 148 F. Supp. 202 (D. Ohio, 1957). As long as defendants possessed a weapon which subsequent tests revealed could be used to discharge a shot, their ignorance of this fact was irrelevant. And they were guilty even though it could not be ascertained from a visual examination that the weapon fit the definition contained in 26 U.S.C. 5848. This decision appears to enlarge the scope of the National Firearms Act to encompass any weapon which can be shown to be capable of fitting the definitions of the Act even though normally not used for such purpose.

Staff: United States Attorney William B. Jones; Assistant United States Attorney Robert D. Simmons (W.D. Ky.).

MAIL FRAUD

Classified Directory Subscription Scheme. United States v. Stanley Oleck (N.D. Ill.). On June 21, 1961, a motion for a new trial was denied.

by the Court and the defendant, who had been found guilty on 15 counts of a 19 count indictment, was sentenced to two years on each count, with the sentence suspended. He was placed on probation for one year, and a fine was imposed on each count, plus costs.

On the trial, it was established that defendant had operated a scheme through the mails, by which businessmen were solicited to remit money for listing in a Chicago classified directory. The solicitation forms and enclosures created the impression that they were sent by the telephone company. Hundreds of persons were defrauded.

The basis of the judge's opinion in finding defendant guilty was the decision of the Fourth Circuit in Linden v. United States, 254 F. 2d 560.

As a result of the conviction, several publishers in the Chicago area, who have been using deceptive means to solicit subscribers, have accepted the suggestion that they go out of business.

Staff: United States Attorney James P. O'Brien; Assistant United States Attorneys Daniel A. Becco, Jr. and Albert Manion (N.D. Ill.).

BANKING AND SEC VIOLATIONS

United States v. Harold Eugene Kistner, Jr. (N.D. Iowa). The defendant, who received more than half of the $2,000,000 Mrs. Burnice Geiger misapplied from her father's bank in Sheldon, Iowa, pleaded guilty on June 2, 1961 to one count of aiding and abetting and one count of fraudulent stock sales. On June 28, 1961, he received a 5-year sentence for the banking violation and a 3-year sentence for the SEC violation, which sentences are to run consecutively. Thus ends one of the largest bank cases in the country.

Staff: United States Attorney Francis E. Van Alstine (N.D. Iowa).

AIRPLANE BOMB HOAX

False Report as to Attempted Destruction of Aircraft (18 U.S.C. 35). United States v. Bruce Wesley Allen (D. Conn., June 13, 1961). Upon his plea of not guilty to an information charging him with violation of 18 U.S.C. 35, and waiver of a jury trial, defendant was found guilty and sentenced to one year suspended after six months; probation for 2 years and a fine of $250 to be paid within six months. The incident occurred as defendant pointed to a piece of luggage belonging to a friend while both were standing at an airline ticket counter and asked ". . . is that the one with the bomb in it?" or stated "that's the one with the bomb in it." Conviction of this defendant in spite of his pretrial statement that he spoke in jest and the lack of any aggravating factor, i.e., delay of the plane, or undue alarm of other passengers, supports the Government's contention that the word "willfully" in the statute means merely the voluntary doing of a conscious act and does not require

a malevolent purpose. Only this construction reaches the prankster who was intended to be covered.

Notice of appeal has been filed.

Staff: United States Attorney Harry W. Hultgren, Jr.; Special Assistant to United States Attorney John P. Diuguid (D. Conn.).

CREDIT CARD CASES

Prosecutions. It has come to our attention that seventeen states now have laws making it a felony to steal, forge or counterfeit credit cards. A number of the states also have enacted laws which make it a crime to possess a falsely made credit card.

While we still advise the use of 18 U.S.C. 2314 in cases involving the unauthorized use of credit cards, and 18 U.S.C. 1341 in situations where there are a large number of transactions and substantial amounts charged on the accounts, it is suggested that, where there are isolated or non-continuing offenses and these are covered by state law, prosecution be left to the local authorities.

GRAND JURY

In Camera Inspection of Grand Jury Minutes; Trial Judge in Second Circuit Required to Inspect Transcript of Testimony of Government Witness Upon Mere Request Without Showing of Possible Inconsistency. United States v. Giampa, 290 F. 2d 83 (C.A. 2, February 3, 1961). In considering the first cases brought to it under the so-called Jencks Act, 18 U.S.C. 3500, which governs the production of statements made to the Government by prosecution witnesses, the Supreme Court expressly held that this statute did not cover demands for inspection of grand jury minutes. Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959). The Supreme Court ruled that the existing practice which safe-guarded the secrecy of grand jury proceedings and which finds its warrant in Rule 6 (e), F. R. Cr. P., continued to be valid. Under that practice the burden is on the defense to show a particularized need which would, in the interests of justice, make it incumbent upon a trial judge to inspect the transcript and possibly to permit the use of such transcript by the defense. Whether the burden of showing such a "particularized need" entailed the necessity of showing a likelihood that a prosecution witness had changed the story he told before the grand jury was a question pointedly left open by the Supreme Court. Pittsburgh Plate Glass Co. v. United States, supra, 360 U.S. at 401. Since then the Court of Appeals for the Second Circuit has consistently taken the lead in narrowing the burden on the defense to show a "particularized need." United States v. McKeever, 271 F. 2d 669 (C.A. 2, 1959); United States v. Zborowski, 271 F. 2d 661 (C.A. 2, 1959); United States v.

Hernandez, 282 F. 2d 71 (C.A. 2, 1960). Now the Second Circuit has held that a particularized need exists per se whenever a Government witness testifies who has also testified before a grand jury. The precept of the Second Circuit is herein set forth for the benefit of United States Attorneys:

> To avoid uncertainty in the future upon trials wherein this problem arises, certain fundamental principles should be observed. If the Government calls a witness who has given testimony before a Grand Jury, it is under a duty to have the transcript of such testimony available upon the trial. If it is then established at the trial that the witness has testified before the Grand Jury and defense counsel requests that the trial court examine the minutes for inconsistencies in testimony given upon the trial and before the Grand Jury, the trial court should read the minutes and if inconsistencies be found should make such portions of the minutes available to defense counsel. ***
>
> In the past, claims have been made that inconsistencies first must be established (the so-called proper foundation) before a court examination of the minutes may be called for. This approach is quite unrealistic and would defeat the very purpose of the inspection. How can court or counsel know whether there is inconsistency or not unless the minutes are first read? (290 F. 2d 85)

This position of the Second Circuit was reiterated in an opinion denying a petition for rehearing in United States v. Hernandez, supra at 290 F. 2d 86. There was a difference in results between Giampa and Hernandez, the former being affirmed and the latter being reversed. Giampa was a non-jury case and the Court of Appeals asked the trial judge to read the transcript and certify that no inconsistencies existed which would have affected the verdict in the case. This certification was affirmed by the appellate panel after they also had read the transcript. In Hernandez, a jury case, the Second Circuit deemed this procedure inappropriate, declaring that the trial court's failure to inspect the grand jury minutes could not be cured by the appellate court's inspection, "at least in a jury case," since the possible effect of cross-examination based on the minutes cannot be as fully appraised as it might be in a non-jury case. Since the error could not be evaluated, it could not be deemed harmless, and a new trial was ordered.

It goes without saying that the trial attorneys ought for other reasons to be familiar with grand jury testimony which may have been given by prosecution witnesses. Certainly where the testimony given at the trial is at variance with the grand jury testimony, the United States is under an obligation to make this fact known to the trial

judge. While it need not be taken as settled that the Government will acquiesce in the position now established by the Second Circuit, the Department urges trial attorneys to be circumspect in the handling of such issues. If the court is not unwilling to take the time to read grand jury testimony, especially where the pertinent passages can be marked out by the prosecution, the wiser course would be to do so and to make a record of it, where a request for inspection is made by the defense.

The question of inspection and possible production of grand jury transcripts presupposes that grand jury testimony was transcribed in the first place. Rule 6 (d), F. R. Cr. P., permits the presence of a court reporter for this purpose in the otherwise sacrosanct grand jury room. The Court Reporter's Act (28 U.S.C. 753 (b)) requires that a verbatim record be made of "all proceedings in criminal cases had in open court" and "such other proceedings *** as may be required by rule or order of court ***." There is nothing in these provisions requiring the recording and transcription of grand jury testimony. See Federal Rules of Criminal Procedure, with Notes and Institute Proceedings, New York University School of Law Institute Proceedings, Vol. VI, p. 180. Local practice outside of New York, where these cases arose, seems to be not to have grand jury testimony transcribed as a matter of course. The present practices need not be changed as a result of the Second Circuit's decision. There is precedent for the proposition that failure to have grand jury testimony transcribed, which deprives a defendant of the possibility of using such transcription for impeachment purposes, is not an infringement of any statutory or constitutional right of the defendant. United States v. Labate, et al., 270 F. 2d 122, 123-124 (C.A. 3, 1959), certiorari denied sub nom. Sussman v. United States, 361 U.S. 900; United States v. Martel, et al., 17 F.R.D. 326, 328-329 (N.D. N.Y., 1954); see Orfield, The Federal Grand Jury, 22 F.R.D. 343, 452.

Staff: Former United States Attorney S. Hazard Gillespie; Assistant United States Attorneys Paul J. Curran and David R. Hyde (S.D. N.Y.).

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Validity of Warrant of Deportation - Failure to Specify Country; Country of Deportation - Country Willing to Accept Deportee. Teo Chai Tiam v. Kennedy (C.A. D.C., June 22, 1961). This was an appeal from a summary judgment in favor of appellee entered by the District Court in a case questioning the validity of appellant's deportation.

The Court of Appeals was faced with two problems. The first was whether the warrant of deportation was void (deportability being conceded) because it did not specify within its own terms the country to which the appellant was to be deported. The Court had previously answered that in the negative in Ying v. Kennedy (C.A. D.C., April 27, 1961; aff. Ying and Wong v. Rogers, 180 F. Supp. 618. See Bulletin, Vol. 9, No. 10, p. 310).

The second problem was whether there was a genuine issue of material fact as to the willingness of The Netherlands to accept appellant as a deportee. He had designated that country as the one to which he wished to be deported, thus exercising the choice given him by 8 U.S.C. 1253(a), but contended that he would not be permitted to remain in The Netherlands but would be sent on from there to Singapore from where he embarked to the United States as a crewman aboard a Netherlands' ship.

The Court of Appeals held this to be a legal rather than a factual issue and found no indication of an agreement between the United States and The Netherlands that appellant was to be sent on to Singapore. It cited U.S. ex rel. Tie Sing Eng. v. Murff, 165 F. Supp. 633; aff'd 266 F. 2d 957; cert. den. 361 U.S. 840:

> "The language of the statute (8 U.S.C. 1253(a))is clear. It provides simply for deportation to a country "willing to accept" the alien. It does not impose upon our Government, as a condition of deportation, an obligation to assure that once accepted the deportee will be granted permanent residence or asylum within the accepting country."

Habeas Corpus; Validity of Warrant of Deportation - Country Not Specified. U.S. ex rel. Yip Cheung Fong v. Esperdy (C.A. 2, July 6, 1961). The relator appealed from the district court's dismissal of his writ of habeas corpus directed against his deportation to Holland.

In a per curiam opinion the Court of Appeals held that where the relator concedes the validity of the order for his deportation to Holland and attacks only the warrant of deportation because it does not specify the country to which he is to be sent, his point is not well taken; there

is no such requirement and no reason for it, the order itself being complete. (Citing: Ying v. Kennedy, C.A. D.C., April 27, 1961, Bulletin: Vol. 9, No. 10, p. 310; Kokkosis v. Esperdy, 191 F. Supp. 765, Bulletin: Vol. 9, No. 6, p. 188.)

Affirmed and the stay of deportation previously granted was dissolved.

Judicial Review of Deportation Proceedings - Crewman; Due Process. Pineiro-Lopez v. Kennedy (C.A. D.C., June 22, 1961). Appellant, an alien crewman, has been in the United States since January 24, 1956, when he was admitted as a crewman for not more than twenty-nine days. In February of that year he was arrested and, following an administrative hearing, was found deportable but was given voluntary departure in lieu of deportation.

His failure to depart resulted in the issuance of a warrant for his deportation but he sought judicial review to set aside the deportation order on the ground (inter alia) that his arrest was made with neither warrant nor probable cause and was invalid. The District Court remanded the case to the Service for a determination of the factual issues raised in his complaint.

A de novo administrative hearing resulted in the same finding of deportability and again he was given voluntary departure. He filed another complaint seeking judicial review which was dismissed and the preliminary injunction dissolved after the court found that any procedural irregularities had been cured by the de novo hearing, and the other points raised by him were either irrelevant or frivolous.

On appeal the Court of Appeals said that appellant asserted at his first hearing in 1956 (and still does) that his only wish was to leave this country; yet, five years and two grants of voluntary departure later, he is still here and has asserted no legal right to remain. Since he failed to sustain his burden of demonstrating lack of due process the Court found that the disposition made in the district court was correct.

Affirmed.

Habeas Corpus - Release Pending Determination of Deportability; Inadmissibility as Alien Because of Conviction While Citizen; Judicial Review of Citizenship Issue During Pendency of Administrative Proceedings. Marks v. Esperdy (S.D. N.Y., 61 Civ. 2017, July 6, 1961). Marks was born in the United States in 1921, and from January 1959 to May 1960 he voluntarily served in the armed forces of Cuba. He came back to this country in July 1960 and was admitted as a citizen.

On January 26, 1961 deportation proceedings were commenced against him which resulted in an order on May 31, 1961 for his deportation since he is an alien (expatriated by military service in Cuba without proper authority - 8 U.S.C. 1481(a)(3), who was excludable at entry (8 U.S.C. 1251(a)(1)) for lack of a valid immigrant visa and by reason of his prior

conviction of carnal knowledge and abuse. His appeal from that order is still pending with the Board of Immigration Appeals.

Since he has been detained by the Service without bond since January he petitioned the Court by order to show cause for an order (a) directing his release from Service custody pursuant to bail or recognizance pending the determination of his deportability, and, in the event he is determined to be deportable, pending his deportation, or, in the alternative (b) directing an immediate judicial hearing on the issue of his American citizenship.

To Marks' argument that he should be enlarged on bail, respondent countered that Marks has no fixed address, has lived in various hotels under an alias since returning to the United States, and has a record of more than thirty arrests with a dozen or more convictions, including escapee, fugitive from justice and violation of parole, and that the deportation proceedings are being conducted with reasonable dispatch considering that much of the delay encountered is attributed to postponements granted at the request of Marks or his counsel.

The Court found the reasons advanced for the continued retention of Marks in custody to be fully sustainable in view of his background and the prevailing circumstances in the case. It also found that, his administrative appeal being still pending, there is no final order of deportation entered against him and held that a judicial review of the citizenship issue at this juncture would be premature on the authority of Florentine v. Landon, 206 F. 2d 870, cert. den 347 U.S. 927.

By dictum, since consideration of the question of whether his conviction while he was a citizen makes him excludable as an alien under 8 U.S.C. 1182(a)(9) is also premature for the same reason, the Court said that that statute makes no distinction with respect to excludability between aliens who were formerly citizens, native-born or naturalized, and those who were not, citing Eichenlaub v. Shaughnessy, 338 U.S. 521, 530.

Petition dismissed and the writ discharged.

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Subversive Activities Control Act of 1950; Communication of Classified Information by Government Officer or Employee. United States v. Irvin C. Scarbeck (Dist. Col.) On July 20, 1961, a grand jury in the District of Columbia returned a superseding indictment against Scarbeck (see U.S. Attorneys Bulletin No. 13, Vol. 9, dated June 30, 1961). The indictment contains four counts. Three of the counts charge Scarbeck with a violation of 50 U.S.C. 783(b) in that he furnished classified information to representatives of a foreign government, without authorization, from Foreign Service Despatches No. 344, 518 and 444 during the period between January 1, 1961 and May 30, 1961. The fourth count charges Scarbeck with a violation of 18 U.S.C. 2071 in that he unlawfully removed a document from the United States Embassy in Warsaw, Poland.

On July 21, 1961, Scarbeck's attorney made a motion for a reduction in the present bail of $50,000. The Government opposed this motion and the motion was denied by Chief Judge David A. Pine.

Staff: Paul C. Vincent (Internal Security Division)

* * *

LANDS DIVISION

Assistant Attorney General Ramsey Clark

CONDEMNATION

Condemnee Held Entitled to Severance Damages for "Loss of Access" to Remaining Timberlands Resulting from Construction of Dam and Reservoir by Government; Condemnee Not Entitled to Such Damages for Increased Fire Hazard Resulting from Increased Recreational Use of Reservoir Area. United States v. Pope & Talbot, Inc. (C.A. 9, June 14, 1961). Condemnee owned 31,254 acres of timberland interspersed in checkerboard fashion with federal forest service lands in the valley and side hills forming the basin of the middle fork of the Willamette River. To construct a dam and reservoir on the middle fork the Government condemned 1,454 acres of this land located in 15 tracts on both sides of the river. Prior to the building of the dam a road system had been built over both the Government's and the condemnee's lands by the condemnee under a permit from the Government. Where the road passed over condemnee's land, it had granted an easement to the Government, so that the road was located entirely either on lands or easements owned by the Government. The reservoir flooded the lands taken from condemnee and the roadway passing over these tracts. Of necessity, new roads had to be built further up on the side hills to circle the lake.

The trial court instructed the jury that the condemnee was using the road as a permittee only and therefore was not entitled to any damages because of the closure of the route and cancellation of the permit. The trial court instructed, however, that the condemnee was entitled to severance damages to its remaining lands by virtue of reduced accessibility due to the barrier which the lake formed. The Court of Appeals held that the condemnee was "entitled to severance damage for loss in market value of its remaining lands due to the use to which the government has put the land taken."

The trial court also instructed the jury that if, by reason of the taking of the defendant's property the risk of fire has been increased, it could take that into consideration in determining the depreciation of defendant's remaining lands. The Court of Appeals noted that the district court had proceeded on the "indisputable thesis" that the lake would attract people and that people bring fire. But, said the Court, it is not the Government's use of the lands taken from the condemnee which creates this hazard, but the use which the Government makes of its own forest lands. Therefore, it was held, there could be no recovery for this element of depreciation.

A petition for rehearing has been filed on the holding that the condemnee is entitled to severance damages because of the creation of the lake. It is also being considered whether to file a petition for a writ of certiorari in the likely event that the petition for rehearing will be denied.

Staff: A. Donald Mileur (Lands Division).

* * *

TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
District Court Decisions

Suit to Enjoin Collection of 100 Per Cent Penalty Dismissed. Heller v. Scanlon (E.D.N.Y., July 7, 1961.) Plaintiff sought to enjoin the collection of 100 per cent of the penalty assessment claiming the assessment was a penalty and not a tax, that during the period involved he was not charged with the duties of preparing, signing, or filing any employment tax returns on behalf of the prime taxpayer, Voltar Electronics, Inc. and that he was not charged with the duties to collect, account for, and/or pay any withheld or other employees taxes on behalf of Voltar. Plaintiff also alleged upon information and belief that the filing of the tax liens impede and/or prevent him from obtaining and holding employment and that they cause irreparable harm by way of damage to his reputation and would result in his being harassed and being requested to pay over any subsequent acquired assets.

In granting defendant's motion to dismiss on the grounds of lack of jurisdiction, the Court did not follow the dicta in the case of Botta v. Scanlon, 288 F. 2d 504 (C.A. 2), to the effect that a mere allegation of non-liability for the assessment constitutes sufficient grounds to obtain a trial on the merits of the assessment in the injunction proceeding. The Court pointed out that whether the assessment here is a penalty or a tax, Section 7421 of the Internal Revenue Code of 1954 would still apply; that the allegations as to exceptional circumstances, some of which were upon information and belief, were in the realm of the conjectural; that there is nothing unusual or necessitious in these claims; and, therefore, they do not constitute special and extraordinary circumstances.

The Court further pointed out that since Steele v. United States, 280 F. 2d 89 (C.A. 8), assessments made pursuant to Section 6672 are divisible and that plaintiff may pay the amount of the penalty applicable to the withheld taxes of any individual employee, then make a claim for refund and institute suit for refund. The Court in so stating in effect held that plaintiff had an adequate remedy at law.

Staff: United States Attorney Joseph P. Hoey and
Assistant United States Attorney Jon H. Hammer (ED N.Y.)
Stanley F. Krysa (Tax Division)

Liens: Laborers and Materialmen Held Entitled to Retained Ten Per Cent of Construction Contract Price and Tax Liens Against Contractor

Held Prior Claim Against Excess Balance Over Ten Per Cent. Community School District of Eldora v. Employers Mutual Casualty Company, et al (June 2, 1961, N.D. Iowa, 61-2 U.S. T.C. Par. 9487). The School District, the property owner, entered into a contract for the furnishing of materials and labor in connection with construction of an auditorium. The contract followed the standard A.I.A. construction contract and provided for payment each month to the contractor of 90 per cent of the work completed and, upon substantial completion of the entire work, payment of a sum sufficient to increase the total payments to 90 per cent of the contract price. The contract further provided that final payment would be due 40 days after substantial completion of the work, provided the work was then fully completed and the contract fully performed. The work had to be accepted by the architect and the contract provided that "Before issuance of final certificate the contractor shall submit evidence satisfactory to the architect that all payrolls, material bills, and other indebtedness connected with the work have been paid." In accordance with state law with respect to contracts for public improvements the contractor furnished a performance, labor, and material bond. Federal tax liens against the contractor arose prior to and during the period of the contract. The contractor did not pay all of his laborers and materialmen.

The School District withheld $6,245.43 from the gross contract price of $53,500. Section 573.12, Code of Iowa, 1958, relating to contracts for public improvements, requires "that at least ten per cent of the contract price will remain unpaid at the date of completion of the contract", Section 573.13 declares the withheld amount to be a "fund for the payment of claims for materials furnished and labor performed". The Court held that under Iowa law the contractor could have "no property" in the retained fund to the extent of $5,350 (ten per cent of the contract price) citing as authority the state law and among other decisions: Aquilino v. United States, 363 U.S. 509 and United States v. Durham Lumber Co., 363 U.S. 522. The Court further held that the $895.43 in excess of the ten per cent is due the United States on its tax liens and that the owner has no claim against either the ten per cent or the excess. The Court found that the owner had presented no evidence to show damage because of failure to complete the contract, that being public property no liens of the subcontractors or laborers could attach to the property, that by paying the money into court the owner waived any requirement that the complete release of all liens was a condition precedent to the owner's liability for such balance. The Court further held that plaintiff was not entitled to attorneys' fees and the owner is free from any liability to any of the parties. With respect to the ten per cent and the excess retained balance the Court stated that "where under state law the unpaid subcontractors of a tax delinquent contractor have a direct claim against the unpaid balance of the contract price due from the owner, a federal tax lien against the contractor only attaches to the residue balance to which the contractor would be entitled except for the lien." As to the excess over the ten per cent the tax liens were thus held to have

priority over the claims of the surety as well as over the claims of the laborers and materialmen. Decision has not been reached as to appeal.

Staff: United States Attorney F.E. Van Alstine and
Assistant United States Attorney William R. Crary (N.D. Iowa);
Paul T. O'Donoghue (Tax Division)

* * *

INDEX