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UNITED STATES ATTORNEYS

BULLETIN

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MONTHLY TOTALS

Totals in all categories of work pending in United States Attorneys' offices rose during the month of August. The rise was especially marked in pending criminal cases and matters. The resulting increase in the aggregate of pending cases and matters amounted to almost five per cent. The following analysis shows the number of items pending in each category as compared with the totals for the previous month:

	July 31, 1961	August 31, 1961	
Triable Criminal	6,873	7,441	+ 568
Civil Cases Inc. Civil Less Tax Lien & Cond.	14,495	14,965	+ 470
Total	21,368	22,406	+ 1,038
All Criminal	8,449	9,038	+ 589
Civil Cases Inc. Civil Tax & Cond. Less Tax Lien	17,383	17,831	+ 448
Criminal Matters	11,197	11,946	+ 749
Civil Matters	13,528	14,040	+ 512
Total Cases & Matters	50,557	52,855	+ 2,298

Both filings and terminations continue to show a decrease from the comparable period of the previous fiscal year. The figures show a very decided drop in civil business, both in new cases received and in cases terminated. The decrease in new cases served to counteract the drop in terminations, so that the increase in the total caseload pending was held to 7.5 per cent. The breakdown below shows the pending totals on the same date in fiscal 1961 and 1962.

	1st 2 Months F.Y. 1961	1st 2 Months F.Y. 1962	Increase or Decrease Number	%
Filed				
Criminal	4,055	3,982	- 73	- 1.80
Civil	4,167	4,012*	- 155	- 3.72
Total	8,222	7,994	- 228	- 2.77
Terminated				
Criminal	3,372	3,361	- 11	- .33
Civil	3,369	3,095*	- 274	- 8.13
Total	6,741	6,456	- 285	- 4.22
Pending				
Criminal	8,420	9,038	+ 618	+ 7.34
Civil	20,119	21,650	+ 1,531	+ 7.61
Total	28,539	30,688	+ 2,149	+ 7.53

* Does not include August 1961 land condemnation cases filed or terminated for Arizona, California Southern, Indiana Southern, Iowa Southern, Louisiana Western, Oregon and Texas Northern because not reported as of September 19, 1961.

Total criminal and civil case filings during August exceeded those for the preceding month. However, a drop of five per cent in criminal case terminations brought total terminations below those for July. Set out below is an analysis by months of the number of cases filed and terminated.

	Filed			Terminated		
	Crim.	Civ.	Total	Crim.	Civ.	Total
July	1,819	1,886	3,705	1,732	1,500	3,232
Aug.	2,163	2,126	4,289	1,629	1,595	3,224

During the month of August 1961, United States Attorneys reported collections of $4,045,548. This brings the total for the first two months of fiscal 1962 to $6,462,251. This is $1,497,856 or 30.2 per cent more than the $4,964,395 collected in July and August of fiscal 1961.

During August $4,659,069 was saved in 57 suits in which the Government as defendant was sued for $6,406,969. 35 of them involving $4,082,743 were closed by compromises amounting to $388,453 and 17 of them involving $1,928,318 were closed by judgments against the United States amounting to $1,359,447. The remaining 5 suits involving $395,908 were won by the Government. The total saved for the first two months of the current fiscal year was $7,958,568 and is an increase of $4,554,881 from the $3,403,687 saved in July and August of fiscal 1961.

DISTRICTS IN CURRENT STATUS

As of August 31, 1961, the districts meeting the standards of currency were:

CASES

Criminal

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

CASES

Civil

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

MATTERS

Criminal

Ala., M.	Ga., S.	La., W.	Ohio, S.	Va., E.
Ala., S.	Hawaii	Maine	Okla., N.	Wash., E.
Ariz.	Idaho	Md.	Okla., E.	W.Va., N.
Ark., E.	Ill., N.	Miss., N.	Okla., W.	W.Va., S.
Ark., W.	Ill., S.	Miss., S.	Pa., W.	Wis., E.
Calif., N.	Ind., N.	Mo., E.	P.R.	Wis., W.
Calif., S.	Ind., S.	Mont.	R.I.	Wyo.
Colo.	Iowa, N.	N.J.	Tenn., W.	C.Z.
Conn.	Iowa, S.	N.M.	Tex., E.	Guam
Fla., N.	Ky., E.	N.C., M.	Tex., S.	
Ga., M.	Ky., W.	N.C., W.	Utah	

MATTERS

Civil

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

JOB WELL DONE

A private banking firm has commended United States Attorney Theodore L. Richling, District of Nebraska, for the expeditious and efficient way in which he concluded a foreclosure action on behalf of the Small Business Administration in which the participating bank had an interest. The letter stated that this particular matter had languished in the District office for a long time without efficient action but that shortly after Mr.Richling entered into office he achieved prompt and efficient results.

Assistant United States Attorney Gerald Walpin, Southern District of New York, has been commended by the foreman of the Federal grand jury for his presentation of an exceptionally complicated tax case. The letter stated that the care and intelligence Mr. Walpin showed in analyzing the involved accounting and finance to make it comprehensible was deeply appreciated, and that the Southern District of New York is most fortunate to have so capable an Assistant.

* * *

CIVIL DIVISION

Assistant Attorney General William H. Orrick, Jr.

COURTS OF APPEALS

ADMINISTRATIVE PROCEDURE ACT

Administrative Agency Cannot Disqualify Majority of Its Membership for Prejudice or Bias; Hearing Examiner Held Not "Selected" by Civil Service Commission as Required by Administrative Procedure Act. Federal Home Loan Bank Board v. Long Beach Federal Savings and Loan Association (C.A. 9, Sept. 5, 1961). This action is another phase in a long series of litigation involving the Federal Home Loan Bank Board ("Board") and the Long Beach Federal Savings and Loan Association ("Association"). The administrative proceeding began on April 19, 1960, when the Board issued an order stating various violations of law and regulations and unsafe or unsound operations as the basis for appointing a conservator for the Association, and further determined that an emergency requiring immediate action existed. Three days later the conservator took possession of the premises, assets and property of the Association. An administrative hearing was ordered for the purpose of determining whether the grounds for the appointment of a conservator existed, and Robert N. Hislop was appointed hearing examiner. Later in June the Association applied to the examiner for subpoenas addressed to the Chairman and members of the Board, and the Director, Assistant Director, and Manager of the Federal Savings and Loan Insurance Corporation. This application contained a statement of general relevance and reasonable scope of the evidence sought, i.e., the three Board members were disqualified by reason of bias, prejudice and personal interest and no grounds existed for the appointment of a conservator. The Board moved to quash four of the subpoenas.

At the administrative hearing, the Association contended that it must be permitted to proceed first with its evidence of bias and prejudice, before the case would be examined on its merits. The examiner, however, made the following findings: (1) absent special circumstances not shown, the question of motivation of the Board in introducing the proceedings was immaterial and irrelevant; (2) no evidence would be permitted with respect to whether an emergency existed justifying the seizure; (3) although the subpoenas issued at the Association's request would not be quashed, they could not be used to produce evidence on the above two questions; and (4) witnesses subpoenaed by the Association were to be called only when the Association presented its case-in-chief. For reasons not clearly stated, a recess was taken, and during such the Association filed in the district court a "Petition to Enforce Administrative Subpoenas and For Other Relief". The court entered an order requiring the Board to show cause;the Board moved to dismiss alleging that the district court had no jurisdiction.

During the court proceeding there was brought out for the first time the contention of the Association that Hislop had not been appointed in the manner required by the Administrative Procedure Act. The Association contended that the examiner, instead of being selected by the Civil Service Commission as required by Section 11 of the APA, 5 U.S.C. 1010, was actually selected by the Board.

On November 18, 1960, the district court: (1) refused to permit the Association to amend its petition with respect to the validity of the appointment of the examiner; (2) refused to enforce the subpoenas on the grounds that they were not properly served; and (3) enjoined further administrative proceedings until the Board should determine questions of bias and prejudice of the Board and qualifications of the examiner.

The Court of Appeals reversed the district court and remanded with directions to dismiss the action in that court. The Court found that a majority of the Board members were without power to disqualify themselves for bias or prejudice, although a minority member could disqualify himself. Therefore, the Board was not required to hear charges of bias and prejudice before the case was presented. However, the Board was required at some time to hear evidence of bias and prejudice because (1) it could thereby determine whether a minority member was disqualified from participation in the final decision; and (2) such evidence would be relevant for court review of the administrative decision.

At the request of both parties, the Court of Appeals then considered the qualifications of the examiner. It determined that the examiner had been selected in the following manner: The General Counsel of the Board telephoned the Civil Service Commission regarding the procedure for obtaining an examiner. The administrative officer of the Civil Service Commission's Hearing Examiner Program sent to the Board a list of examiners experienced in financial matters, including certain examiners permanently employed by the Securities and Exchange Commission. The Board then inquired of the SEC concerning its examiners, and Hislop was recommended to it. The Board requested a loan of Hislop from SEC and such request was granted. The Civil Service Commission then gave its approval.

The Court found that Hislop's selection was governed by the APA supra, and by Civil Service Regulations, Sec. 34.13(b), which provides that agencies having no examiners may arrange with another agency to borrow an examiner and that such agreements must have the prior approval of the Civil Service Commission. The Court doubted that these procedures were followed, and concluded that Hislop was not "selected" by the Civil Service Commission. The Court felt that any doubt as to the legality of the examiner's appointment should be resolved in favor of the Association. Since Hislop was not validly appointed, it followed that he could not issue the subpoenas.

The Court also noted that no evidence on the seizure should be permitted in the administrative proceedings since the seizure was a fait accompli and could not be overturned.

Staff: Marvin C. Taylor (Civil Division)

NATIONAL SERVICE LIFE INSURANCE

Use of Form No. DD 93 Held Sufficient Affirmative Action to Change Beneficiary of National Service Life Insurance Despite Printed Language in Form Itself to Contrary. Josephine De Lovato v. United States and Friedericka De Los Santos (C.A. 10, September 21, 1961). The United States issued a $10,000 National Service Life Insurance policy to Klouterie De Los Santos while he was a member of the armed forces. He named his sister, Josephine Lovato as sole beneficiary in a designation filed with the VA which was never changed. De Los Santos thereafter married and had two children. On June 17, 1956, he executed a Record of Emergency Data form, known as "Form No. DD 93", which is commonly used to designate the beneficiary of a serviceman's indemnity, among other things. The fine print on the form specified that this designation does not affect the NSLI beneficiary designation. On this form, De Los Santos' wife was designated as the beneficiary of the serviceman's indemnity, and in the space provided for the share to be received, the figure $10,000 was inserted. De Los Santos had no serviceman's indemnity because he had in effect an NSLI policy. De Los Santos died in 1957, and the VA awarded the proceeds of the policy to his wife, Friedericka De Los Santos. The sister brought this action to recover the proceeds of the policy and the widow was interpleaded.

Both the district court and the Court of Appeals agreed with the VA that De Los Santos had effected a change of beneficiary to his wife. The Court of Appeals reiterated the general rule that a NSLI beneficiary may be changed if there can be shown an intention to change and some affirmative action to carry out this intention. From the testimony of many witnesses, the Court found such an intention existed. It was then concluded, that, despite the fine print in Form No. DD 93, the manner in which this form was executed was a sufficient affirmative action. The Court reasoned that since the insured had no serviceman's indemnity because he had NSLI, the figure referred to ($10,000) and the concurrent change of beneficiary could only relate to the NSLI policy.

Staff: United States Attorney John Quinn; Assistant United States Attorney Jack L. Love (D. N. Mexico)

PUBLIC CONTRACTS

Reformation of Government Contract Held Question of Law for Independent Judicial Determination. Blake Construction Co., Inc. v. United States; United States v. Aetna Casualty and Surety Co. (C.A.D.C., Aug. 3, 1961). In 1950, the Public Buildings Service of General Services Administration (GSA) entered into negotiations with Blake Construction Co. for renovation of a portion of the Pentagon building. A letter of intent, sent by GSA to Blake to authorize the work before the formal contract was signed indicated that the work was to be done for a lump sum figure based upon a 5% profit, that the formal contract would include a clause providing for renegotiation, and that all disputes of questions of fact under

the contract would be subject to GSA review. Blake accepted these terms. However, the formal contract, made some five months later, did not include a renegotiation clause. When the work was completed, the Government conducted an audit to facilitate renegotiation and the contracting officer ruled that Blake had been overpaid a net amount of $57,281.10.

Blake contested this determination before the GSA Board of Review on the ground that the contract was not subject to renegotiation. The Board, however, concluded that the renegotiation provision had been inadvertently omitted from the formal contract, and, in the alternative, that this modification of the original, informal contract in favor of Blake was not supported by consideration. The Government sued Blake and its surety, Aetna Casualty and Surety Co. in the district court, which granted summary judgment for the Government against Blake and for Aetna against the Government.

The Court of Appeals reversed the judgment in the Government's favor. It first decided that there was consideration for the formal contract and that the contract was not a cost-plus-percentage-of-cost contract forbidden by the Federal Property and Administrative Services Act of 1949, 41 U.S.C. 254(b), since it established a fixed sum subject to fluctuation.

The Government had admitted that reformation of a contract is a function peculiar to the courts, but argued that the GSA Board of Appeals had jurisdiction to determine the facts underlying reformation, which determination could be reversed only if arbitrary or not supported by substantial evidence. The Court, however, decided that the question of grounds for reformation of a contract is one of law which should have properly been decided by the district court instead of by the Board of Appeals. Since the question was not one where the agency had particular expertise nor did it require immediate determination, the Court felt that the district judge was as well, if not better, equipped to handle this matter as the administrative agency. Therefore, summary judgment on the administrative record was not a proper remedy, and the case was remanded for an independent judicial determination on the question of reformation.

The Court affirmed the summary judgment in favor of the surety since the surety bond ran only to the formal contract.

Staff: Former United States Attorney Oliver C. Gasch; Former Assistant United States Attorney Carl Belcher and Assistant United States Attorney Abbott A. LeBan (D.D.C.)

RIVERS AND HARBORS ACT

United States Cannot Sue for Reimbursement for Removing Sunken Vessels from Navigable Waters Under Rivers and Harbors Act of 1899.

United States v. Charles Zubik (C.A. 3, September 27, 1961). On November 10, 1951, Charles Zubik negligently sank two towboats which he owned, the SS Joe Carter and the SS A. B. Sheetz, in the Allegheny River in such manner as to obstruct navigation. He refused to remove them immediately as required by the Rivers and Harbors Act of 1899, as amended, 33 U.S.C. 401 et seq. In March 1952 Zubik dismantled portions of the SS A. B. Sheetz and deposited materials from it on the bank of the Allegheny River in such manner as made them likely to be washed into the river in violation of the Act. In September 1956, five years after the sinkings, the United States removed the wreckage of the sunken ships since Zubik had refused to do so. The Rivers and Harbors Act provides that any craft so removed by the Government shall be forfeited. 33 U.S.C. 414. However, since the wrecks were valueless, the United States brought an action against Zubik for $3,273.83, the cost of removal.

The district court granted Zubik's motion to dismiss the complaint and the Court of Appeals affirmed. The Government contended that while the Rivers and Harbors Act made no specific provision for the type of recovery sought here, it did not preclude it. The Court of Appeals held, however, that the Government could not recover the cost of removal in the absence of a specific provision in the statute permitting it.

Staff: Mark R. Joelson (Civil Division)

SELECTIVE SERVICE AND TRAINING ACT OF 1940

Employee's Position Held Temporary Within Meaning of Reemployment Provisions of Act. Timothy J. Shanahan, Jr. v. Atlantic Refining Co. (C.A. 3, April 3, 1961). Shanahan was employed by the Atlantic Refining Co. on September 25, 1941, as a temporary employee in the packaging department. At that time Atlantic had two classes of employees, designated as "temporary" and "permanent". Atlantic decided when a temporary employee became permanent. When such a change occurred, the seniority of the employee was computed from the date that the employee began to work, as a temporary employee, provided that his employment as such had been fairly continuous. Shanahan continued to work in a "temporary" status, being shifted from one division of the company to the other on three separate occasions and receiving one promotion, until he entered the Army on August 3, 1942. On December 20, 1945, Shanahan completed his military service and resumed his employment with Atlantic on January 9, 1946. He was officially made a permanent employee on January 27, 1947, with a seniority date of January 9, 1946. Thereafter he instituted the present suit in the district court, claiming entitlement to seniority from September 25, 1941, under the provisions of the Universal Military Training and Service Act, as amended, 50 U.S.C. App. 459(a) and (b).

The district court decided that Shanahan was not entitled to the earlier seniority date, and the Court of Appeals affirmed this decision. The Court of Appeals found that the case was governed by the Selective

Service and Training Act of 1940 since Shanahan joined the armed forces before June 24, 1948 (although it is doubtful that the result would have differed under the current act). It was held that Shanahan did not qualify under the 1940 act, since he did not have "other than a temporary position" when he entered service. The Court felt that the nature of a job or position could be determined by what the employer and employee intended it to be and by whether there was an expectation of continuous employment at the time of hiring. The Court found that Shanahan clearly understood his positions to be "temporary". The Court also held that Shanahan's employment was not "continuous", apparently equating that term with the word "permanent".

Staff: Former United States Attorney Walter E. Alessandroni; Assistant United States Attorney James J. Phelan, Jr. (E.D. Pa.)

STATE COURTS

WILLS AND PROBATE

Soviet Citizens Held Not Entitled to Inherit From United States Citizen Under California Probate Code, Which Requires That Soviet Union Give Reciprocal Rights to American Citizens. In the Matter of the Estate of David Gogabashvele; State of California and United States v. Eduard Kapanadze and Elena Georgobiani (Dist. Court of Appeal, Fourth Appellate District, State of Calif., Sept. 12, 1961). Gogabashvele, a citizen of the United States and a veteran of the armed forces, died while a patient in a U. S. Naval Hospital leaving an estate of approximately $68,000 to his sister, Nadia Kapanadze, or if she should predecease him, to his next of kin. The sister, however, had died before the will was made, and Eduard Kapanadze and Elena Georgobiani, citizens and residents of the Soviet Union, filed statements of interest as the only heirs of Nadia. Both the United States and the State of California contested the claim, contending that under California Probate Code, Section 259, Soviet citizens were not entitled to receive the estate since the Soviet Union would not grant reciprocal rights to inherit property to citizens of the United States left property under Russian laws. The United States' claim was based on the Care Contract Law, 38 U.S.C. 5220 et seq., and the State of California claimed the property under its intestate property laws.

The Court of Appeals, reversing the district court, decided that Russia would not grant reciprocal rights to United States citizens enabling them to inherit from Soviet citizens, and that therefore the claimants here could not inherit from a United States citizen under California law. This conclusion was based on the following factors: (1) residents and citizens of the United States have no rights under Soviet law as the term "right" is employed in Probate Code, Sec. 259; (2) because of the existence of secret laws, and unrepealed obsolete laws and the recognition of ex post facto laws, it is impossible to

ascertain with certainty the Soviet law on any issue; (3) under available Soviet law, there appears express discrimination against non-resident alien heirs; (4) the right to inherit under Soviet law cannot be implied; (5) there are no treaties or agreements between the United States and the Soviet Union concerning recriprocal rights of inheritance.

The Court remanded the case in order that the lower court might decide between the conflicting claims of California and the United States.

Staff: Former United States Attorney Laughlin E. Waters; Assistant United States Attorney Donald A. Fareed (S. D. Calif.)

* * *

CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Election Fraud in November 8, 1960, General Election, Telfair County, Georgia. United States v. Seay, et al. (S.D. Ga.). This case, which involved a conspiracy by election officials and poll workers in certain precincts in Telfair County Georgia, to cast and count and to permit others to cast and count forged, fraudulent, and fictitious ballots in the November 1960 Presidential election, has been previously discussed in the Bulletin for August 25, 1961, at p. 527. The case was called for trial on October 2, 1961. Four defendants (including the two poll managers) entered nolo contendere pleas to Count 1 of the indictment (18 U.S.C. 242). The Court imposed a $500 fine on each of the defendants; placed each defendant on probation for five years; and it was stipulated that each defendant would take no part in any election for the period of probation.

Nolle prosequi orders were entered as to the other defendants.

Staff: United States Attorney Donald Fraser and Assistant United States Attorney William T. Morton (S.D. Ga.); Henry Putzel, Jr., Warren S. Radler (Civil Rights Division).

Political Contribution by Labor Union. United States v. Local 543, International Hod Carriers, Builders and Common Laborers, AFL, et al. (S.D. W. Va.) Reference to the indictment in this case appears in the Bulletin of June 19, 1959, at page 385.

The case involved a political contribution by a labor union to a Congressional candidate in the general election of 1956, consent by certain officers of the union to the use of union funds for that purpose, and conspiracy to make such a contribution. A companion case charged a representative of the International Union with counselling and advising the destruction and deletion of written records of the contribution.

Subsequently, an information was filed to replace Count III, which was dismissed. A second information was later filed to replace the first two counts of the indictment and to add a new count to include a conspiracy charge.

At the trial on September 25, 1961, the defendants, Local 543 and its Business Agent, Ray George Fuller, the originator of the scheme, entered pleas of guilty to all charges. The Court deferred the imposition of sentence pending investigation and report by the Probation Officer.

Staff: Assistant United States Attorney Frank Eaton (S.D. W.Va.); John Ossea (Civil Rights Division)

* * *

CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

FRAUD

Consumer Fraud; Mail Fraud; Mexican Radio Programs. Recently the Chief Inspector of the Post Office Department called our attention to the continuing problem arising from the advertising activities of radio stations across the Mexican border. These stations are of course not under the control of the Federal Communications Commission. Commercial enterprises in the United States are utilizing these uncontrolled radio stations to flood the American consumer with all types of blatant advertising. At times the advertising is in connection with fradulent operations which rely on mail order contact after the consumer is reached by the radio advertising. The scope is broad since the stations are powerful enough to reach even beyond our Western and Mid-western states. Too often, the Post Office is informed of the swindle after the damage is done and the "fly by night" enterprise has flown.

In order to meet the problem, we have obtained the cooperation of the Federal Communications Commission which will furnish the Post Office taped recordings of the selected flagrant "ads". The Post Office through the Postal Inspection Service will institute immediate mail fraud investigations and the reports will be submitted to your offices, as usual, for prosecution. It is our desire to pursue vigorously the criminal sanctions of the mail fraud statute (18 U.S.C. 1341), as well as other fraud statutes against these commercial swindlers as part of the Attorney General's Program to combat consumer frauds. It will be appreciated if every assistance is given to the Postal Inspection Service and the Federal Communications Commission in carrying out this cooperative effort. The Fraud Section of the Criminal Division will continue to assist your office in reviewing proposed indictments or consulting on any problems which may arise. Please advise the Fraud Section concerning cases which result from this cooperative effort.

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

Charging Capital Offense Under Rule 7 of Federal Rules of Criminal Procedure; Merger of Offenses Under Section 2113. Poindexter, Carrell and Martin v. United States (C.A. 6, August 1, 1961). Appellants were convicted on pleas of guilty to informations charging them with violations of 18 U.S.C. 2113(a) and 2113(b). They moved to vacate sentence under 28 U.S.C. 2255 contending that (1) the burglary and larceny charged were not crimes within 18 U.S.C. 2113(a) and 2113(b), as the institution was not a bank within the meaning of 2113 and it was unoccupied; and (2) their convictions violated Rule 7 of the Federal Rules of Criminal Procedure requiring an offense punishable by death to be prosecuted by indictment since under the offenses charged they could have been convicted of violating section 2113(e) of 18 U.S.C. 2113.

The Court of Appeals summarily dismissed appellant's first claim citing Prince v. United States, 252 U.S. 322. Less abrupt, but no less definite, was the Court's rejection of appellant's second objection arguing an analogy between 18 U.S.C. 2113 and 18 U.S.C. 1201, the kidnapping statute. Denying the applicability of Smith v. United States, 360 U.S. 1, which held section 1201 to create the single offense of transporting a kidnapping victim across state lines, the Court said 18 U.S.C. 2113 creates several offenses and provides a penalty for each.

The opinion relied mainly on three Supreme Court cases. The Prince case was again cited, both for the general proposition that section 2113 created and defined several crimes and was intended to establish lesser offenses, and for its holding that a count alleging entry with intent to commit a felony merged with a count alleging the consummated robbery. (Both under 2113(a).) The Court next noted the result in Heflin v. United States, 358 U.S. 415, where a count of receiving and concealing property under 2113(c) could not be charged against those who perpetrated an aggravated robbery under 2113(d) on the ground that 2113(c) was a separate offense. The Court last considered a situation where a charge under section 2113(d) arose in conjunction with two other offenses charged under section 2113(a). Green v. United States, 365 U.S. 301. There it found significant the Supreme Court's conclusion that section 2113 (d) did not state merely an alternative means of committing the offense, but rather an aggravated form of the offense.

The sum of the Sixth Circuit's discussion of these cases is that section 2113 contains several offenses each of which carries a punishment, but that some are lesser (2113(a)), some greater ("aggravated" - 2113(d)), and some independent ("separate" - 2113(c)). This of course presented the issue as one of merger of offenses since 2113(e) is obviously an aggravated form of 2113(a) and 2113(b). The Court admitted that none of the cited cases involved the question of whether conviction of an offense under 2113(e) could be had under allegation of an offense under 2113(a). However, it found significant the fact that "in all of them there were separate counts which contained facts sufficient to bring them within the applicable subdivision." The Court thus drew support from the fact that prior cases did not appear to have proceeded upon a theory of merger of offenses, and while it admitted the merger doctrine of the Prince case, ÷ "the greater includes the lesser," it refused to go further, stating: "but the reverse is not true." It therefore held that a simple charge of robbery or entering with intent to rob will be merged into the more aggravated offenses under 2113(d) and 2113(e), but charges under 2113(a) and 2113(b) will not admit of proof to establish 2113(d) and 2113(e).

The holding represents a reversal of the 6th Circuit's opinion in Simunov v. United States, 162 F. 2d 314, 315 (1947), which had indicated that 18 U.S.C. 2113 stated but one offense with varying degrees of aggravation. It is at odds with the Eighth Circuit's more restricted interpretation of the Prince decision, illustrated by Hardy v. United States, 292 F. 2d 192, decided June 30, 1961 (U.S. Attorneys Bulletin Vol. 9, No. 15, p. 474, dated July 28, 1961). The Hardy Court did not read the Prince decision to endorse merger of any of the offenses listed in section 2113, but merely to outlaw

pyramiding punishment for those offenses. Thus, it held the several subsections of section 2113 to have separate substantive identity. Specifically, it denied a merger between unlawful entry under section 2113(a) and a consummated larceny under section 2113(b). Nonetheless, it reached a consistent result on punishment by holding these two offenses so related in nature and object as to merit only one punishment, leaving the choice to the discretion of the particular court.

Staff: United States Attorney Lawrence Gubow;
Assistant United States Attorney Jerome A. Moore (E.D. Mich.).

AUTOMOBILE INFORMATION DISCLOSURE ACT

Unauthorized Removal of Manufacturer's Labels of Information from New Automobiles. United States v. Robert Allen Mael (W.D. Wis.). On September 24, 1961, defendant, a used car dealer, was sentenced, following his plea of guilty, to pay a total fine of $1,200 on four counts of an information charging him with wilfully removing from new automobiles manufacturer's labels of information prior to the time of the delivery of such automobiles to the actual custody and posession of ultimate purchasers.

It was the practice of the defendant to purchase from franchised distributors new automobiles which he titled in his own name, and after removing therefrom the manufacturer's labels of information, to offer such automobiles for sale as "used" cars. The Criminal Division's view is that under the circumstances the mere titling of the new automobiles by defendant to himself did not make him the "ultimate purchaser" of such automobiles within the statutory meaning thereof.

Staff: United States Attorney George E. Rapp;
Assistant United States Attorney Robert J. Kay (W.D. Wis.).

MAIL FRAUD

The mail fraud program aimed at eradication of the white collar racket known as the advance fee swindle achieved added acceleration during September with the following noteworthy developments in three Districts.

Advance Fee Business Loans Scheme. United States v. Lenders Service Company, Inc. (D. N.D.). On September 26, 1961 sentences were imposed on Lenders Service Company, Inc, and twenty individuals associated with the company in a scheme which obtained more than $1,250,000 from businessmen on a basis of false representations that loans would be obtained for their enterprises. Of the 36 individuals indicted 30 went to trial on March 14, 1961. The trial took 4-1/2 months with the Government calling 109 witnesses and defendants being represented by 12 law firms. Of the 20 persons convicted 1 defendant received a sentence of 5 years' imprisonment, 7 received 4 year prison terms, 3 were sentenced to 3-1/2 years, 6 received 3 year

sentences and 1 defendant was sentenced to serve a year and a day. The remaining 2 defendants were sentenced to 5 years' probation. All of the defendants who received jail terms also were placed on probation for 5 years following termination of their sentences.

Staff: Former United States Attorney Robert Vogel (D. N.D.).

MAIL FRAUD

Advance Fee Business Loans Scheme. United States v. Alton T. Milam, et al. (N.D. Ga.). On September 22, 1961, a jury returned verdicts of guilty on all counts submitted to them charging Alton T. Milam and two other persons with fraudulently obtaining large advance fees from businessmen on false representations of services to be rendered them in obtaining loans for their businesses. The defendants, doing business as Metropolitan Investment Service Corporation, among other misrepresentations pretended that their company was a subsidiary of the Metropolitan Life Insurance Company which would make the loans and would issue insurance policies on the lives of the borrowers. This was the first of the advance fee racket cases to reach trial in the Northern District of Georgia where two other large advance fee cases are pending.

Staff: United States Attorney Charles L. Goodson:
Former Assistant United States Attorney John W. Stokes, Jr. (N.D. Ga.).

MAIL FRAUD

Advance Fee Business Brokerage Scheme. United States v. Marshall W. Maupin, et al. (W.D. Mo.). In a third case, a grand jury at Kansas City, Missouri returned an indictment on September 29, 1961 charging three persons with 18 counts of mail fraud in a scheme to defraud owners of motels by obtaining advance fees on false pretenses that they had available, or would obtain, buyers for their businesses.

Staff: United States Attorney F. Millin (W.D. Mo.).

* * *

LANDS DIVISION

Assistant Attorney General Ramsey Clark

Condemnation; Scope of Review of Commissioners' Report; Adequacy of Commissioners' Report; Comparable Sales for Capitalization Rate. United States v. Tampa Bay Garden Apartments, Inc., et al. (C.A. 5, 1961). In this Wherry housing condemnation case (Mac Dill Air Force Base), the Government appealed from the judgment of the district court confirming the condemnation commissioners' award of $2,100,000 for the interest of the sponsors taken subject to the mortgage on several grounds. The Court of Appeals affirmed, ruling as follows:

1. The Government's contentions that the commissioners' report was inadequate and that the district court's supplying of additional findings was erroneous were not sustained. The district court is authorized under Rules 53(e) and 71A, F.R.Civ.P. to "modify" a commission's findings and that was the effect of what was done here. "Our review is of the judicial determination made by the district court. We consider the Commission's findings only to see whether the district court properly accepted and approved them as not being clearly erroneous."

2. The Government's contention that the commissioners erroneously rejected use by its witnesses of the sales of three other Wherry projects for a ratio of selling price to earnings as a basis for a realistic capitalization rate in capitalizing income were rejected. The commissioners rejected the sales as direct evidence of value because they believed the properties not to be comparable. They did not exclude consideration of them as one of the several factors going into selection of a capitalization rate.

3. The Government's contention that the commission erred in considering reproduction cost less depreciation as a measure of value is invalid because the Government agreed at pre-trial to its use. This case was concluded before the decision in United States v. Benning Housing Corporation, 276 F.2d 248 (C.A. 5, 1960), which ruled such evidence improper in a Wherry valuation.

4. Although, as the Government pointed out, there were several conflicts in the evidence basic to valuation as to which the commissioners made no findings, "We do not think it is necessary that we require, in testing the district court's judgment by the clearly erroneous doctrine, a specific finding with respect to each of the evidentiary conflicts."

The Department is considering whether to petition for certiorari, particularly because it believes that the Court of Appeals (in 1 and 4, above) has misconceived the function of the commission and the district court in a condemnation proceeding. On the comparable sales issue, the commissioners excluded them for the only purpose for which they were offered (capitalization rate) and, hence, although the commission did not

expressly exclude the Government's rates, they did so in effect.

Staff: S. Billingsley Hill (Lands Division)

Ejectment Action Authorized Against Federal Officer in Possession of Government Lands. Malone v. Bowdoin. On October 9, 1961, the Supreme Court granted the Government's petition for a writ of certiorari to review the decision of the Court of Appeals for the 5th Circuit in this case. See Vol. 9, United States Attorneys Bulletin No. 10, page 311.

Staff: Raymond N. Zagone (Lands Division).

Eminent Domain; Measure of Compensation for Taking City's Outfall Sewer; Order Excluding Cost of New Sewage Treatment Plant Not Final or Appealable. Certain Interests in Land in City of Eufaula, Alabama v. United States (C.A. 5, Oct. 10, 1961). As part of a river improvement, the United States sued to condemn part of the outfall sewer through which the city has discharged its raw sewage into the navigable Chattahoochee River. State officials will require any substitute system to include a sewage treatment plant, and the city claims as part of its compensation the cost of building such a plant and operating it for thirty years. The district court, at a preliminary hearing, ruled against the claim (9 U.S. Atty. Bull. 533) and the city, fearing the order was a final one, took a precautionary appeal. On motion of the United States, the Court of Appeals dismissed the appeal. It held that the order merely excluded a particular element from the compensation to be awarded for the sewer, and therefore "is not such a final decision as will support an appeal." Authorities cited include Town of Clarksville v. United States, 198 F.2d 238 (C.A. 4, 1952); but in that case an appeal from a similar order was entertained as being from a judgment on a "separate claim," after the district court made the findings required in such case by Rule 54(b), F.R.Civ.P. The court's language in the Eufaula case seems to indicate that it would not consider the order a proper subject for such findings.

Staff: Hartwell Davis, United States Attorney (M.D. Ala.)
George S. Swarth (Lands Division).

TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CRIMINAL TAX MATTERS
District Court Decision

Rejection of Psychiatrists' Opinions as to Willfulness. United States v. Bemus (E.D. Pa., August 31, 1961). Defendant, a dentist, was charged with failure to file income tax returns for five years. On a finding of guilt in a trial to the Court without a jury, the defendant was sentenced to four months imprisonment and a fine. In denying motions for judgment of acquittal and new trial based inter alia on the asserted insufficiency of the evidence as to willfulness, Judge Kraft stated that he was not compelled to accept the opinions of two psychiatrists (one appointed by the Court on the Government's motion) that defendant's mental condition was so impaired at the time the tax returns were required to be filed that he was incapable of willful conduct and that therefore his failure to file was not willful. The Court stated that these questions are for the fact-finder's determination, that while the fact-finder may not arbitrarily disregard relevant evidence it is his duty to reject opinion when he is convinced that the fact is contrary to the opinion.

Judge Kraft commented that it was not satisfactorily explained on what basis the psychiatrists, conducting their examination after defendant's trial was imminent, were able to form opinions with respect to the defendant's capacity during these earlier periods of time when the offenses were alleged to have been committed. The Court also stated that the psychiatrists had to form their opinions on the basis of defendant's present manner and what defendant told them, and "the defendant, to say the least, was an interested and educated narrator of his case history."

We believe that where trial is before a jury in cases of this kind the psychiatrist should be confined to testimony with respect to the mental condition of the defendant as it relates to responsibility for the crime, and objection should be made to any opinion testimony by him as to whether the tax offense charged was willful, since this issue is for the ultimate determination of the jury based on all of the facts before it.

Defendant has filed a notice of appeal.

Staff: Former United States Attorney Joseph S. Lord, III, and Assistant United States Attorney Sullivan Cistone (E.D. Pa.)

CIVIL TAX MATTERS
District Court Decisions

Liens; Community Property Subject to Seizure and Sale to Satisfy Tax Liability of One Spouse Even Though Application of Proceeds to Tax Liability Would Leave Nothing For Other Spouse. Emilie Furnish Funk v. Richard D. Furnish, Sr., and Robert Riddle, District Director, (S.D. Calif.)

Plaintiff was divorced from defendant Furnish in 1945. They were residents of California at the time of their divorce. At the time of the property settlement defendant Furnish told plaintiff that they had community property worth approximately $50,000. Plaintiff alleged in the present action that her husband had over a period of years concealed their true worth from her and that they actually had accumulated community property worth $850,000. The first occasion plaintiff knew of the deception was in 1953 when she was advised by the Internal Revenue Service that some of the joint income tax returns filed during their marriage were incorrect and fraudulent. In 1956 in a trial in the Tax Court, deficiencies and additional liability of $433,000 were assessed against plaintiff and her former husband. On appeal the Court of Appeals held that plaintiff had been defrauded by Furnish and the Court relieved her of any further liability. In August 1944 plaintiff brought an action in the Superior Court of Los Angeles County to set aside the property settlement in the divorce action and to declare a constructive trust on the community property belonging to her and Furnish on October 27, 1944, the date of the property settlement. The Internal Revenue Service levied upon Furnish's property and seized, among other things, 100 shares of stock which plaintiff alleged that the District Director was about to sell at auction.

Plaintiff brought this action to enjoin the District Director from the sale of the stock or, alternatively, to impound the proceeds of sale until final judgment in her action in the state court to impose a constructive trust on her former husband's property. On May 2, 1961, the District Court issued a temporary restraining order restraining the District Director from selling or disposing of the stock belonging to defendant Furnish. The United States filed a motion to dismiss the action on the grounds that: (1) the Court lacked jurisdiction because the action was brought to enjoin the collection of federal taxes; (2) the Court lacked jurisdiction of the action to impose a constructive trust because there was no diversity between the parties; (3) the complaint stated several causes of action but failed to state them separately; (4) the complaint failed to state grounds entitling plaintiff to equitable relief; and (5) the complaint admitted that the property seized by the District Director was community property and therefore it was liable for the taxes owed by the husband.

The Court sustained the Government's motion to dismiss on the grounds that it lacked jurisdiction of the subject matter and the parties, and on the grounds that under California law the community property of plaintiff and her former husband was liable for his taxes, even though the amount of taxes and interest exceeded the value of the stock and would leave nothing for the plaintiff.

Staff: United States Attorney Francis C. Whelan, and Assistant United States Attorney Lillian W. Wyshak (S.D. Calif.)

Equitable Lien for Taxes; United States Not Entitled to Equitable Lien as Beneficiary of Trust Fund Where Withholding and Social Security Taxes Have Accrued Prior to Bankruptcy But Been Comingled With Other

Funds of Debtor. In re: Allied Electric Products, Inc. (D. N.J., May 12, 1961.) In a corporate reorganization proceeding initiated under Chapter X of the Bankruptcy Act, the United States contended that funds in the general account of the debtor constituted a trust fund for the United States because of withholding taxes which had accrued but had not been collected or set aside prior to bankruptcy.

The United States' position was based on 26 U.S.C. 7501. The Court construed this section as establishing the status of the United States as the beneficiary of a trust fund and accorded it a right to assess and collect the fund "in the same manner and subject to the same limitations *** as are applicable with respect to the taxes from which such fund arose." However, in this case the referee in bankruptcy found that the debtor paid net wages and did not set aside withholding and Social Security taxes in a special trust fund. The referee concluded that the debtor neither collected nor withheld the taxes for the period in question. Under these circumstances the Court held that there was no trust fund to which the legal right of the United States could attach. And in the absence of such a trust fund, the United States could not possibly have an equitable lien on the bank account of the debtor or any other asset.

Staff: United States Attorney David M. Satz, Jr.; Assistant United States Attorney Barbara A. Morris (D. New Jersey)

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