File

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

May 3, 1963

United States

DEPARTMENT OF JUSTICE

Vol. 11 No. 8

UNITED STATES ATTORNEYS

BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 11 May 3, 1963 No. 8

NEW APPOINTMENTS

The name of the following appointee as United States Attorney has been confirmed by the Senate:

New Hampshire - Louis M. Janelle

IMPORTANT NOTICE

The Table of Cases and Index for Proving Federal Crimes, Third Edition, is available for distribution. All requests should be submitted in duplicate to the Executive Office for United States Attorneys.

LAW BOOKS AND CONTINUATION SERVICES

The Administrative Division maintains a mailing list for continuation services and pocket parts for existing sets of books in the United States Attorneys' offices and automatically orders these continuations from year to year.

Some offices have more than two sets of books. In the past few years there have been a number of changes in the places where United States Attorneys maintain permanent personnel, with the result that continuation services are probably being delivered to places where no personnel is stationed.

It will be appreciated if you will review your requirements for these continuation services, and advise the Administrative Division of any changes in your district that should be reflected in our mailing list. It is also requested that where more than one set of books is maintained in a district that you advise whether there is a continuing need for these books.

MONTHLY TOTALS

During the month of March, the totals in all categories of work increased, with the exception of criminal and civil matters pending. The sharp reduction in civil matters resulted in a corresponding decrease in the aggregate of cases and matters pending. Triable criminal cases continued their upward trend and reached the highest total for the past nine years. The following analysis shows the number of items pending in each category as compared to the total of the previous month.

	February 28, 1963	March 31, 1963	
Triable Criminal	9,265	9,276	+ 11
Civil Cases Inc. Civil Less Tax Lien & Cond.	15,959	16,020	+ 61
Total	25,224	25,296	+ 72
All Criminal	10,822	10,850	+ 28
Civil Cases Inc. Civil Tax & Cond. Less Tax Lien	18,822	18,836	+ 14
Criminal Matters	12,734	12,640	- 94
Civil Matters	16,385	14,708	- 1,677
Total Cases & Matters	58,763	57,034	- 1,729

As the figures below show the pending caseload has increased over 5% since the same date in fiscal 1962. Most of this increase has been in criminal cases. The substantial increase in terminations, particularly in civil cases, has narrowed the gap between filings and terminations slightly - from 6.6 in February to 6.3 in March.

	First 9 Mos. F.Y. 1962	First 9 Mos. F.Y. 1963	Increase or Decrease Number	%
Filed				
Criminal	23,506	24,899	+ 1,393	+ 5.92
Civil	18,700	19,714	+ 1,014	+ 5.42
Total	42,206	44,613	+ 2,407	+ 5.70
Terminated				
Criminal	21,922	23,347	+ 1,425	+ 6.50
Civil	16,140	18,433	+ 2,293	+ 14.21
Total	38,062	41,780	+ 3,718	+ 9.77
Pending				
Criminal	9,865	10,850	+ 985	+ 9.98
Civil	22,987	23,660	+ 673	+ 2.93
Total	32,852	34,510	+ 1,658	+ 5.05

The following figures show that more cases were filed in March than in any previous month of the fiscal year. Terminations were not far behind with the second highest total for the year. There was an increase of almost 25% in terminations over the previous month, and civil terminations decreased 20.7%. The total decrease in filings during February was 19.2%. The number of criminal cases filed during February was the highest since last September.

	Filed			Terminated		
	Crim.	Civ.	Total	Crim.	Civ.	Total
July	2,143	2,145	4,288	2,041	1,793	3,834
Aug.	2,454	2,354	4,808	1,964	2,040	4,004
Sept.	3,324	1,887	5,211	2,456	1,740	4,196
Oct.	2,973	2,393	5,366	3,199	2,338	5,537
Nov.	2,783	2,238	5,021	3,073	2,157	5,230
Dec.	2,179	1,795	3,974	2,273	1,764	4,037
Jan.	2,864	2,351	5,215	2,897	2,413	5,310
Feb.	3,073	2,102	5,175	2,375	1,912	4,287
March	3,106	2,449	5,555	3,069	2,276	5,345

For the month of March, 1963 United States Attorneys reported collections of $2,492,221. This brings the total for the first nine months of fiscal year 1963 to $41,020,520. Compared with the first nine months of the previous fiscal year this is an increase of $743,367 or 1.85 per cent over the $40,277,153 collected during that period.

During March $4,124,391 was saved in 160 suits in which the government as defendant was sued for $5,893,517. 112 of them involving $3,348,731 were closed by compromises amounting to $1,026,827 and 25 of them involving $1,088,375 were closed by judgments amounting to $742,299. The remaining 23 suits involving $1,456,411 were won by the government. The total saved for the first nine months of the current fiscal year aggregated $36,625,725 and is a decrease of $7,041,019 from the $43,666,744 saved in the first nine months of fiscal year 1962.

DISTRICTS IN CURRENT STATUS

As of March 31, 1963, the districts meeting standards of currency were:

CASES

Criminal

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

CASES

Civil

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

MATTERS

Criminal

Ala., N.
Ala., M.
Alaska
Ariz.
Ark., E.
Ark., W.
Calif., S.
Colo.
Ga., M.
Ga., S.
Hawaii
Idaho
Ill., N.
Ill., E.
Ind., N.
Ind., S.
Iowa, N.
Iowa, S.
Ky., E.
Ky., W.
La., W.
Me.
Md.
Mich., W.
Miss., S.
Mo., W.
Mont.
Neb.
N.C., M.
N.C., W.
Ohio, S.
Okla., N.
Okla., E.
Okla., W.
Pa., M.
Pa., W.
R.I.
S.C., E.
S.D.
Tenn., M.
Tenn., W.
Tex., N.
Tex., E.
Tex., S.
Tex., W.
Utah
Va., W.
Wash., E.
Wash., W.
W. Va., S.
Wyo.
C.Z.
V.I.

MATTERS

Civil

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

* * *

ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

Individual Dismissed on Ground of Immunity Because of Appearance Before Congressional Committee. United States v. H. P. Hood & Sons, Inc., Et Al. (D. Mass.). In a Memorandum and Order filed March 27, 1963, Judge Andrew A. Caffrey disposed of all motions pending in this case. The Court denied defendants' motions for bills of particulars and motions to strike certain allegations of the indictment. The Court also denied defendants' motions to dismiss the second count of the indictment which charges a conspiracy to defraud the United States in violation of 18 U.S.C. 371 and defendants' motions to dismiss the indictment on the ground that the grand jury was unlawfully arrayed and that the indictment was irregularly and unlawfully procured.

The Court dismissed the indictment as to individual defendant William C. Weldon on the ground that he had obtained immunity under 15 U.S.C. 32 during the course of his appearance before the Special Subcommittee of the Select Committee on Small Business of the House of Representatives, 86th Congress, 2nd Session.

Judge Caffrey rejected the Government's contention that the Congressional hearings were not conducted under the antitrust laws as required by 15 U.S.C. 32, holding that "The hearings were clearly within the ambit of the immunity statute." He stated, "The word 'proceeding" in 15 U.S.C. § 32 should not be given the narrow technical scope argued for by the Government where to do so would fly in the face of traditional American notions of fair play . . ." Judge Caffrey also rejected the Government's contentions that 18 U.S.C. 3486 is the exclusive source of immunity to persons testifying before a Congressional Committee and that Weldon could have invoked his Fifth Amendment rights before the Committee.

Ruling that Weldon's testimony was pertinent "to the very heart and substance of the matters charged in the indictment" Judge Caffrey entered judgment of acquittal for defendant William C. Weldon.

Staff: John J. Galgay, John D. Swartz, William J. Elkins and Bertram M. Kantor (Antitrust Division)

Steel Companies' Indictment for Violation of Sherman Act. United States v. United States Steel Corporation, et al. (S.D. N.Y.). On April 2, 1963, a grand jury returned an indictment charging that United States Steel Corporation of Pittsburgh, Pennsylvania, Bethlehem Steel Company of Bethlehem, Pennsylvania, Armco Steel Corporation of Middletown, Ohio, Edgewater Steel Company of Oakmont, Pennsylvania, and Baldwin-Lima-Hamilton Corporation of Philadelphia, Pennsylvania, beginning at least as early as 1948 and continuing to at least 1961, had engaged in a combination and conspiracy to eliminate price competition in the sale of wrought steel wheels, in violation of Section 1 of the Sherman Act. The indictment alleged that wrought steel wheels are used on passenger and freight cars, diesel locomotives, subways and elevated rapid transit lines, electric railways, mine cars, cranes and other industrial equipment, and that industry annual sales

of such wheels averaged approximately $60,000,000 in recent years. The indictment stated that United States Steel was the largest manufacturer of wrought steel wheels, with approximately 35 to 40% of the total business, and that the five defendants, including United States Steel, were the only manufacturers of wrought steel wheels in the United States.

According to the indictment, defendants agreed (a) to establish and maintain identical f.o.b. plant prices for wrought steel wheels; (b) to sell wrought steel wheels on a delivered price basis which would result in identical price quotations among the producers at the same point of delivery, by adding to the f.o.b. plant price the lowest freight cost from any of the producing plants of the five defendants to the particular customer's location; (c) to submit identical prices for wrought steel wheels in sealed bids, including sealed bids submitted to the New York City Transit Authority; (d) to correct "mistakes" in pricing wrought steel wheels where defendants quoted non-identical delivered prices to a customer as a result of a mathematical error, a miscalculation of freight rates, or otherwise; (e) upon extra charges applicable to wrought steel wheels; (f) to exchange by telephone, in advance of quoting particular customers, information helpful to maintaining identical delivered prices, such as freight rates, interpretation of extra charges as applied to particular wheels, and prices for a new or special wheel for which no previous price had been established; (g) to maintain for a number of years the prices for wrought steel wheels for freight cars notwithstanding the lower price competition of cast steel wheels, until recently when this lower price competition from cast wheels is sometimes met on an individual order basis; and (h) held meetings, arranged by telephone, at which no minutes were kept, at the Duquesne Club, the Carleton House, the William Penn Hotel, and the Longview Country Club in Pittsburgh, the Hotel Pennsylvania, the Hotel Statler, the St. Regis, the Waldorf-Astoria Hotel, and the Yale Club in New York City, and the Hotel Hershey in Hershey, Pennsylvania at which price changes, "mistakes" in pricing, the application of extra charges, and other matters involving price or affecting price were discussed.

Staff: Allen A. Dobey, Louis Perlmutter and S. Robert Mitchell (Antitrust Division)

United States v. Taylor Forge and Pipe Works, et al. (S.D. N.Y.). On April 2, 1963, a grand jury returned an indictment charging that Taylor Forge and Pipe Works of Cicero, Illinois, Edgewater Steel Company of Oakmont, Pennsylvania, Alco Products, Inc., of New York, New York, and Baldwin-Lima-Hamilton Corporation of Philadelphia, Pennsylvania, beginning at least as early as 1948 and continuing to at least 1961, had engaged in a combination and conspiracy to stabilize the prices of rolled steel pipe flanges and rings, in violation of Section 1 of the Sherman Act. The indictment stated that rolled steel pipe flanges are used to connect two pieces of pipe together, that rolled steel rings are used for a wide variety of industrial applications such as braces for large vats and boilers, races for roller bearings, and components in crushing equipment, ordnance items and missiles, and that defendants' sales of rolled steel pipe flanges and rings collectively averaged over $10,000,000 per year.

According to the indictment, defendants agreed (a) to sell rolled steel pipe flanges in accordance with a price schedule for such flanges published by the defendant Taylor Forge and Pipe Works; (b) to sell rolled steel rings in accordance with a price schedule for such rings employed by each of the defendant manufacturers; (c) upon base price changes in the rolled steel pipe flange price schedule and the rolled steel ring price schedule from time to time; (d) upon changes in charges for extras in the rolled steel pipe flange price schedule and the rolled steel ring price schedule from time to time; and (e) upon the interpretation of, and the application of, the rolled steel pipe flange price schedule and the rolled steel ring price schedule with respect to specific customer inquiries from time to time.

It was also charged that defendants (f) met and discussed previous quotations for rolled steel pipe flanges and rings for the purpose of ironing out differences in the interpretation and application of the price schedules by the defendant manufacturers; (g) on occasion established special prices for rolled steel pipe flanges and rings; and (h) held meetings, at which no minutes were kept, following the termination of formal meetings of the American Tire Manufacturers Export Association, at which domestic prices for rolled steel pipe flanges and rings were discussed and agreed upon. It was alleged that within five years preceding the return of the indictment defendants, acting through their respective officers, agents, and employees, met at the Union League Club in New York City and carried on business in furtherance of the combination and conspiracy charged.

Staff: Allen A. Dobey, Louis Perlmutter and S. Robert Mitchell (Antitrust Division)

General Motors Motion to Have Protective Restrictions Imposed on Grand Jury Investigation by Antitrust Division Denied. In the Matter of the Grand Jury Investigation - General Motors Corporation. (S.D. N.Y.). On February 27, 1963 Judge David N. Edelstein "denied in all respects" a motion of General Motors to have protective restrictions imposed on the conduct of a grand jury investigation by the Antitrust Division into possible violations of the perjury statute (18 U.S.C. 1621) arising from testimony given before the grand jury which returned the indictment charging General Motors with monopolization of the railroad locomotive industry, United States v. General Motors Corporation, 61 CR 340 (N.D. Ill.). Following approval of the proposed investigation by the Deputy Attorney General, subpoenas were issued out of the Southern District of New York on September 21, 1962, to several officials or former officials of General Motors' Electro-Motive Division, calling on them to give evidence in regard to the suspected perjury. General Motors obtained a stay of the proceeding pending the determination of its motion to quash the subpoenas and for a protective order. General Motors asserted that the proposed perjury investigation was an attempt to circumvent the discovery provisions of the Federal Rules of Criminal Procedure by ex parte examination of witnesses for use at the trial of the criminal monopolization case. General Motors further asserted that this was an abuse of the grand jury process and moved for an order directing:

> (1) that grand jury investigation of alleged perjury before the locomotive grand jury be conducted by persons, designated . . . by the Attorney General, who are not members of, employed by, or attached to the Antitrust Division; (2) that the names of persons so designated shall be submitted to this court in writing; (3) that the transcript of proceedings of any such grand jury investigation of alleged perjury, any document obtained in connection therewith and any information contained in said transcript or in any such document shall not be disclosed to any person other than the persons so designated; (4) that no person so designated, or otherwise having knowledge of the contents of said transcript or in any such documents shall thereafter participate in any way in the preparation for or conduct of the trial of United States v. General Motors Corporation, (No. 61 CR 340), now pending in the United States District Court for the Northern District of Illinois; and (5) that said grand jury subpoenas ad testificandum issued at the instance of the Antitrust Division be quashed.

Briefs were filed and oral argument heard on November 14, 1962. In a 27-page opinion filed on February 27, 1963, Judge Edelstein denied the motion for a protective order and, in addition, denied an ancillary motion asking that an affidavit submitted to the court, under seal, by the Government be turned over to General Motors or expunged from the record of the proceedings. The affidavit had been submitted to demonstrate that the grand jury investigation of perjury was in good faith and was not instituted to obtain evidence for use in the pending locomotive monopolization case. The Court first considered General Motors' motion to produce or expunge the affidavit.

Judge Edelstein gave three reasons for denying the production of the affidavit: (1) Since the affidavit disclosed internal communications within the Department of Justice with respect to its prosecuting functions, the information contained there-in was confidential and privileged; (2) The material in the affidavit constituted the work product of the prosecuting attorneys and was therefore privileged under the rule of Hickman v. Taylor, 329 U.S. 495 (1947); and (3) The information set forth in the affidavit disclosed matters occurring before the grand jury which returned the indictment in the locomotive case and was therefore accorded the protective veil of grand jury secrecy pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure.

The Court recognized that under the rule of United States v. Proctor and Gamble, 356 U.S. 677 (1957), disclosure of matters occuring before a grand jury could be ordered upon a showing of particularized need or compelling necessity, but held that General Motors had failed to make such a showing.

The Court also questioned General Motors' standing to complain of any injury since the grand jury investigation had not yet commenced, but held that in the exercise of its supervisory powers over the grand jury the Court could consider the question of abuse. It was of the opinion, however, that such supervisory powers could be exercised without disclosing facts of the investigation to another party which had no standing before the court. Judge Edelstein concluded that he could properly consider the in camera affidavit in deciding the motion for the protective order:

> . . . In camera inspection of secret or confidential information has been an approved procedural method to protect the rights of a party, through judicial control, while at the same time preserving the secret and confidential character of grand jury minutes and Government investigative information....

The Court then went on to consider the motion for the proposed protective order, the essential provisions of which would have prevented any testimony obtained in the perjury grand jury from being used in the pending locomotive case and, in addition, would have prevented any attorneys in the Antitrust Division from participating in the perjury investigation. At the outset, the Court recognized that the real question was whether the investigation had been initiated in good faith or as a guise or cloak for obtaining pre-trial discovery in the locomotive case. Citing with approval In Re Petroleum Industry Investigation, 152 F. Supp. 646 (E.D. Va., 1957) and United States v. General Electric Company, 209 F. Supp. 197 (E.D. Pa., 1962), Judge Edelstein stated that "when a grand jury undertakes a bona fide investigation of suspected crime, facts incidentally brought to light by the grand jury are not tainted and. . . [the] Government's attorneys have the obligation to use such information for any purpose consistent with the public interest." The Court also followed Application of Texas Company, 27 F. Supp. 847 (E.D. Ill., 1939) in holding that so long as the motivating purpose of the grand jury investigation was not the accumulation of evidence for a pending criminal case, the Government could use evidence incidentally acquired in the course of the legitimately instituted grand jury in the pending criminal case.

After an in camera examination of the Government's affidavit and upon hearing the arguments of counsel, the Court was persuaded that the investigation was a bona fide inquiry into possible violations of the perjury statute. Unlike the situation in In Re National Window Glass Workers, 287 Fed. 219 N.D. of Ohio (1922), the Court was of the opinion that the acquisition of evidence for use in the pending case was neither the sole nor the dominant purpose of the grand jury.

General Motors, in seeking to distinguish its proposed protective order from previous cases dealing with abuse, argued that instead of quashing the entire investigation the proposed order would merely insulate the Antitrust Division from the perjury investigation and the investigation itself could proceed unhindered. In rejecting this argument, the Court stated that "no restriction of any kind on grand jury process - mild or severe - will be

imposed absent a showing of good cause of its process." Since the Court concluded that no abuse had been shown, it refused to impose any limitations on the use of testimony obtained during the investigation.

In the final portion of the opinion, the Court suggested that General Motors had alternative remedies should it be able to show at some future time that the investigation was being improperly subverted to obtain pretrial discovery in the locomotive case. In such event, application could be made to the trial court in Chicago for the suppression of any evidence improperly obtained, or petition could be made to the court for disclosure of any grand jury testimony illegally obtained. General Motors contended that such remedies would be illusory, but the Court concluded that even if the remedies were less than satisfactory, their inadequacies did not afford the Court a basis for intruding on a demonstrably proper grand jury investigation.

Staff: Paul A. Owens, Morton M. Maneker, Daniel R. Hunter and Carl W. Schwarz (Antitrust Division)

Right of Appeal From Interlocutory Order of Injunction Against Merger in Section 7 Clayton Proceeding. United States v. Ingersoll-Rand Company, et al. (W.D. Pa.). On April 11, 1963, Judge Louis Rosenberg filed findings of fact, conclusions of law and an opinion in support of the preliminary injunction granted by the Court on March 6, 1963, restraining defendants in this cause from taking any steps to consummate agreements involving the acquisition by Ingersoll-Rand of all or part of the assets of three manufacturers of underground coal mining machinery. Judge Rosenberg at the same time issued a supplemental opinion in support of his denial on March 14, 1963, of defendants' proposed modification of the preliminary injunction.

On April 1, 1963, defendants had filed a petition for a writ authorized by 28 U.S.C. 1651 in the Third Circuit in Philadelphia. Defendants asserted that "the grant of the drastic and extraordinary remedy of a preliminary injunction under the circumstances of this case was such an abuse of judicial power and discretion by respondent [Judge Rosenberg] as to warrant the exercise by this Court of the extraordinary power provided by the All Writs Statute, Title 28 U.S.C. 1651." Previous to filing this petition, defendants had informally suggested a procedure for an appeal from the issuance of the preliminary injunction and the Chief Judge had tentatively scheduled oral argument for April 22, 1963, on any appeal, provided that the parties could meet such a schedule after the submission of findings of fact and an opinion by the District Court.

Filing of the findings and opinion by Judge Rosenberg on April 11 appears to render the mandamus action moot; the parties submitted briefs and oral argument was held before the Third Circuit on April 22. This step in the litigation is novel. In the Court of Appeals, the Government supported issuance of the preliminary injunction by Judge Rosenberg but took the position on the jurisdictional question that 28 U.S.C. 1292 (a)(1) applies to interlocutory injunction orders in cases governed by the Expediting Act and

that, consequently, the Court of Appeals has jurisdiction over the present appeal. This proposed application of 28 U.S.C. 1291 (a)(1) has never been considered by any court.

Judge Rosenberg's lengthy opinion supports the position taken by the Government in its brief at the close of the hearing on the preliminary injunction on March 1, 1963. His opinion is supported by 169 findings of fact drawn from the record made during the hearing. He found that (a) there was a probable violation of Section 7; (b) post-trial divestiture would not be adequate to protect the public interest; and (c) no irreparable injury to defendant companies from a preliminary injunction has been shown.

Among several of the key points in Judge Rosenberg's opinion is the treatment given to the appropriateness of the preliminary injunction in merger cases under Section 7. Defendants had argued that "if the courts adopt the contention of the Department of Justice, the granting of a preliminary injunction in merger cases will become virtually automatic...." In rejecting this argument, Judge Rosenberg stated:

> I find it difficult to understand the defendants' contention that this case be allowed to go to final hearing without injunction, and that if a violation of § 7 has occurred that the remedy of divestiture then be effected. Considering the hardships of divestiture actions with their ramifications and complications and their painful impacts upon all whom they touch, it is hard to understand that such a device can be reasonably considered as the ultimate remedy to be employed here. Since substantial evidence is in the record which moves this Court to act, I have strong authority to do so at what is presently the incipient stage of a threatened violation of § 7. It is as Mr. Chief Justice Warren says in Brown Shoe Co., supra, at page 346, "We cannot avoid the mandate of Congress that tendencies toward concentration in industry are to be curbed in their incipiency. ....."
>
> The ultimate legal issue involved in this action raise such serious and substantial questions as relate to the legality of the defendants' contemplated action as to require that consummation be, at least, postponed until final hearing. Failure to halt consummation of these mergers now may defeat the purpose embodied in § 7.

On the argument urged by defendants that the Government had failed to show any irreparable injury in order to entitle it to a preliminary injunction, Judge Rosenberg held that ".... it would appear from the history of mergers and the efforts by the Government to limit them or to neutralize certain destructive effects to the nation's economy that an impressive showing has been made by the plaintiff of irreparable harm which may or can follow the consummation of these contemplated acquisitions." Because of

the importance of the know-how of the companies sought to be acquired, post-trial divestiture was not considered an adequate alternative. Judge Rosenberg held further that:

> The enactment into law of the proposed amendment [to Section 7 in 1950] was an expression of the public policy of the nation, and the threatened violation of the law here is itself sufficient public injury to justify the requested relief. The Congressional pronouncement in § 7 embodies the irreparable injury of violations of its provisions. No further showing need be made by those directed to enforce that section than that it is being violated or threatened with violation...."

The District Court, however, did carefully consider the irreparable injury to the companies as alleged by defendants, including claimed or threatened critical financial difficulties, loss of business, deterioration in morale and efficiency, loss of key personnel, and complete frustration of consummation of the acquisition agreements. Judge Rosenberg, after analyzing the defendants' showing of such alleged irreparable injury and finding it to be unconvincing, concluded that if the acquisitions are found to be legal and are to be permitted after a final hearing, "...the only real loss which may be suffered by the parties is that of delay."

Staff: Arthur J. Murphy, Jr., Lionel Kestenbaum, Joel E. Hoffman, Donald F. Melchior, John M. O'Donnell, P. Jay Flocken, Michael Freed and Josef Futoran (Antitrust Division)

Court Denies Defendants' Motion for Pre-Trial Production of Grand Jury Transcript. United States v. The H.E. Koontz Creamery, Inc., et al. (D. Md.) On Monday, April 15, Judge R. Dorsey Watkins, in oral opinions, denied a defense motion for pre-trial production of grand jury transcripts of eleven key witnesses and substantially denied a defense motion for particulars.

The motions arose in the following context. Certain of the defendants had previously been charged with participation in one or both of two conspiracies to rig bids for the supply of milk to Baltimore area schools. Pleas of nolo contendere had terminated that case. When subsequently indicted for fixing prices for milk sold to retail and wholesale customers pursuant to price lists, those defendants involved in the earlier bid rigging case began to take steps designed to attempt to set up a double jeopardy defense.

Most of the requested particulars went to matters extrinsic to the indictment. One "particular" rejected by the Court, typical of the others, requested:

> ". . .[s]tate what grounds there are for treating and prosecuting the alleged conspiracy herein . . . as a separate conspiracy from the alleged conspiracy or conspiracies. . . charged in the prior proceeding."

Judge Watkins ordered only such a few particulars as went to particularize the words of the indictment.

The transcripts were desired in the hope they would show that the first grand jury investigated a single all-encompassing conspiracy and that the Government was deliberately fragmenting a unitary offense. Judge Watkins' denial of access to the transcripts was apparently primarily based upon the argument that even if the transcripts were to show that the witnesses before the grand jury unanimously viewed their wrong doing as all part of the same conspiracy, that would not be proof of the fact whether there were separate conspiracies or all one conspiracy. Therefore there was no showing of a particularized need for the transcripts.

By implication Judge Watkins rejected as irrelevant a defense offer to produce written authorization from the eleven witnesses for their testimony to be made public.

Staff: Lewis A. Rivlin, Sinclair Gearing (Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General John W. Douglas

AGRICULTURE MARKETING QUOTA PENALTY CASES

Justice Department Memorandum No. 119, dated December 8, 1954, delegates authority to the United States Attorneys to compromise and close Marketing Quota Penalty claims arising under the Agricultural Adjustment Act of 1938, as amended, 7 U.S.C. 1311-1376, where the gross amount due the United States does not exceed $5,000. Paragraph E of that Memorandum provides that these claims shall not be compromised or closed without first obtaining the views of the Department of Agriculture. The enforcement of these penalties is a matter of concern to the Department of Agriculture and it has asked that the requirements of Memorandum No. 119 with respect to obtaining their views before a matter is compromised and closed be brought to your attention again. The general supervision of these penalty matters has been transferred from the Antitrust Division to the Civil Division of the Department of Justice.

COURT OF APPEALS

COSTS

Five-Day Period Provided For in Rule 54(d) to Seek District Court Review of Clerk's Taxation of Costs Not Jurisdictional; In Action at Law, Taxation of Particular Items of Costs Depends Upon Statutory Authorization; Expert Witness Fees Not Taxable as Costs; Deposition Expenses May Be Allowed as Costs in District Court's Discretion. United States v. Kolesar (C.A. 5, February 27, 1963). Plaintiffs in this action under the Federal Tort Claims Act recovered a judgment against the United States and the Government determined not to appeal. However, after the entry of judgment, the district court clerk taxed costs against the Government, including: 1. fees for expert witnesses and 2. plaintiffs' experses in purchasing extra copies of depositions which had been noted by the Government.

The Government objected to these two items. Although the Government's motion seeking review of the clerk's taxation of these two items was not brought within the five days provided by Rule 54(d), F.R. Civ. P., the district court entertained the motion, but, on the merits, rejected the Government's contentions.

The Court of Appeals reversed in part and affirmed in part. The Court preliminarily held, in accordance with the Government's argument, that the five-day period provided by Rule 54(d) for seeking review of the clerk's taxation of costs was not jurisdictional and that the district court in its discretion could entertain a tardy motion. The Court also assumed the correctness of the Government's contention that in actions at law, as distinguished from equitable actions, a particular

type of expense is allowable as costs only if authorized by statute. With respect to extra fees for expert witnesses, the Court of Appeals held that expert witness fees in excess of the $4.00 per day provided for in 28 U.S.C. 1821 are not taxable as costs in cases in the federal courts. However, as to deposition expenses, the Court decided that their allowability was a matter for the district court's discretion. The Court held that deposition expenses could be taxed as costs under the authority of 28 U.S.C. 1920(2), which permits the taxation of reporter's fees for transcripts; and that the allowability of expenses for extra copies depends upon the circumstances of the particular case. As to this last point only, the Fifth Circuit went into conflict with several district court decisions holding that the expenses of extra copies of depositions were not, as a matter of law, taxable as costs, for they were not "necessarily obtained for use in the case" within the meaning of 28 U.S.C. 1920(2). See, e.g., Perlman v. Feldmann, 116 F. Supp. 102 (D. Conn.).

Staff: John C. Eldridge (Civil Division)

FEDERAL TORT CLAIMS ACT

Air Force Officer Flying Airplane as Member of Air Force Aero Club Held Not to Be Federal Employee Acting Within Scope of Employment. United States v. Hainline (C.A. 10, March 26, 1963). A first lieutenant pilot at McConnell Air Force Base joined the SAC Aero Club of that base in order to fly the light, civilian-type, airplanes of that Club, which was a nonappropriated fund activity of the United States. While flying a Club airplane during off-duty hours, he negligently injured plaintiff by landing his airplane in a manner that caused its landing gear to strike the top of plaintiff's truck. Membership in the Club was voluntary, and its activities were limited to off-duty hours. The members paid initiation fees and dues, and an hourly rate for the privilege of flying the airplanes. The Club's stated purpose was to promote aeronautical skills and interest by providing facilities for recreational flying. The district court entered judgment against the United States on the basis of an Air Force Regulation (AFR 176-8) which defines employees to include members and other users of nonappropriated fund airplanes, boats and other facilities. The Court of Appeals reversed, holding that the pilot was not acting within the scope of his duties as an officer of the United States, because the United States had no right to direct and control his activities in piloting such an airplane during off-duty hours, and any increase in piloting skills from Aero Club activities was only an incidental furtherance of the business of the United States. Although the Aero Club was an instrumentality of the United States, and an employee of the Club, as distinguished from a member, would be an employee of the United States for purposes of the Tort Claims Act, the Court ruled that the regulation did not purport to, and could not, impose liability on the United States for the activities of persons acting as club members.

This decision is a significant precedent concerning the tort liability of the Government for actions of personnel engaging in non-appropriated fund activities and should prove helpful in fending off all such actions.

Staff: David L. Rose (Civil Division)

Member of Armed Services, Negligently Injured During Physical Examination Given for Purpose of Determining Fitness for Active Duty, Ineligible to Sue Under Tort Claims Act. Knoch v. United States (C.A. 9, April 1, 1963). Appellant, who had been in the Naval Reserve, was injured as the result of alleged malpractice by Navy doctors in the course of undergoing a physical examination after receiving orders to active duty. The purpose of this physical was to determine his fitness for active duty. The district court held that the injury was incident to his military service and thus, did not furnish a basis for suit under the Federal Tort Claims Act under the rule of Feres v. United States, 340 U.S. 135.

On appeal, appellant argued that the Feres rule was inapplicable because, as he asserted, he was not on active duty in any substantial sense at the time of the physical examination, the examination really occurred prior to his military service, and he was not entitled to the administrative benefits to which other military personnel injured on active duty would be entitled. The Court of Appeals, however, rejected all of his contentions and affirmed. The Court pointed out that the Feres rule was not predicated upon the length or type of active military duty but upon the claimant's military status, and here appellant was on active duty status when he was injured. The Court further held that he would appear to be entitled to the same administrative benefits as any other soldier or sailor injured on active duty and with a comparable amount of service; and that, alternatively, the existence of administrative compensation was not the principal basis for the Feres rule. Rather, the basis was because of the relationship of the soldier or sailor to his superiors and the exigencies of military discipline.

Staff: John C. Eldridge (Civil Division)

Releases Are Governed by State And Not Federal Law; Finding of Government Negligence in Air Crash Upheld. Maureen A. Montellier, etc. v. United States (C.A. 2, March 22, 1963). In this suit, the district court had held the Government liable for the death of Norman J. Montellier, a correspondent for United Press International, in the 1958 crash of an Air Force plane at Westover Air Force Base in Massachusetts. The district court found that the crash resulted from the negligence of the Air Force personnel in charge of the flight. The court also rejected the Government's contention that suit by Montellier's widow was barred by release signed by Montellier prior to take-off.

The Court of Appeals affirmed. The Court held that the finding of negligence was not clearly erroneous. The Court also rejected our argument that the release barred this action. The release, we admitted, would not bar the suit under the law of Massachusetts, where the accident occurred. We contended, however, that Massachusetts law should not apply because (1) a release is a federal contract which must be governed by federal law, and (2) the Massachusetts rule invalidating the release was an incident of its statute providing for punitive damages in wrongful death cases, a provision which may not apply against the United States, 28 U.S.C. 2674. The Court of Appeals rejected our first argument, holding that the Tort Act provides that the United States be liable "in accordance with the law of the place where the act of omission occurred," and that rule applies to releases for liability as well as to the creation of liability. The Court rejected our second argument on the ground that the proscription of 28 U.S.C. 2674 precludes only the assessing of punitive damages, and not the application of any other rule of law although that rule might be tied to the punitive damages provision. The decision in this case will govern the disposition of at least five other cases brought on behalf of other newsmen aboard the flight.

Staff: Sherman L. Cohn (Civil Division)

INTERSTATE COMMERCE COMMISSION

Given Stated Transportation Considerations Which Moved ICC To Hold Certain Freight Charges To Be Unreasonable as Applied to Specific Shipments, Courts Will Not Interfere With Such Determination. The Pennsylvania Railroad Co. v. United States and Interstate Commerce Commission (C.A. 3, April 5, 1963). This case was commenced by the Railroad in the Court of Claims to recover freight charges allegedly due for the transportation of 75 carloads of iron and steel articles from interior points to the port of New York. Two sets of rates were in effect, the "domestic" rates, and the lower "export" rates for shipments which moved for export and which, under the tariff, were applicable if the shipments did not leave the possession of the carrier before exportation. The shipments were intended for export and moved on prepaid export rates. On 62 of the carloads, vessel space had been arranged prior to shipment, but, because of war conditions, it was not possible to export any of the shipments from the port of New York as intended.

On referral to the Interstate Commerce Commission under its primary jurisdiction, the Commission held with respect to the 62 shipments that since the Government by reserving vessel space had used due diligence to avoid non-compliance with the export tariff, and exportation was "frustrated" through no fault of its own, charges based on the domestic rates would, in the circumstances, be unjust and unreasonable to the extent that they exceeded charges based on the export rates. Domestic rate charges on the remaining 13 shipments were held reasonable.

The district court set aside the Commission's determination of the grounds that the domestic rates were applicable and that the Commission

had not found such rates to be inherently unreasonable on transportation considerations. The Court of Appeals reversed. It held, inter alia, that the issue of reasonableness was entrusted by Congress solely to the Commission, that the Commission weighed all pertinent factors, that its stated considerations were in support of national transportation policy, and that, accordingly, the issue of reasonableness was not open to the Court.

The Railroad has indicated that it will seek certiorari.

Staff: Kathryn H. Baldwin (Civil Division)

MILITARY RETIREMENT PAY

District Court Suit to Recover Retirement Pay, Withheld by Disbursing Officer Because of Erroneous Overpayment, Barred by 28 U.S. C. 1346(d); De Minimis Rule Bars Suit to Enjoin Threatened Withholding of Small Balance Remaining. Gordon v. Shoup (C.A. D.C., March 21, 1963). In 1943 Gordon retired from the Marine Corps as a major. In 1956 the Court of Claims held he was entitled to an increase in retirement pay, but, because of its six-year jurisdictional statute of limitations, awarded him judgments only back to 1949. The General Accounting Office paid him the balance due back to 1944, but refused to pay him for the year 1943-1944 because of the ten-year statute of limitations in 31 U.S.C. 71(a). Gordon then applied to the Board for the Correction of Naval Records, which delcared him entitled to an increase dating from 1943. The Marine Corps paid him the balance due, $809.93, but, on the basis of a subsequent opinion of the Comptroller General, determined that this payment was erroneous because his claim for the period prior to 1944 was conclusively barred by 31 U.S.C. 71(a). The Corps began collection of the erroneous payment by deducting sums from Gordon's monthly retirement pay. When all but $59.93, the last installment, had been collected, Gordon filed this action in the district court for an injunction to restrain withholding of the balance and for a declaration that the withholding was illegal.

The district court dismissed the complaint; on appeal its ruling was affirmed. The Court of Appeals ruled that the sums already withheld could not be recovered, because 28 U.S.C. 1346(d) expressly excludes from the district court's jurisdiction suits to recover pensions and compensation. As for the threatened withholding of the balance, this was said to be de minimus; and, in such circumstances, the district court may in its discretion decline to exercise whatever jurisdiction it has. Gordon's remedy is to sue for the entire amount in the Court of Claims, which has jurisdiction of pay claims.

Staff: Howard E. Shapiro (Civil Division)

SOCIAL SECURITY ACT

Administrative Decision That Claimant Not So Disabled as to Be Entitled to Social Security Disability Benefits Held Unsupported by

Substantial Evidence. Ora P. Hall v. Celebrezze (C.A. 6, March 11, 1963). Appellant had filed an application for disability benefits under the Social Security Act, claiming that he was disabled from engaging in employment because of a kidney ailment and arthritis of the spine. While finding that these conditions in fact existed and that they would prevent claimant from engaging in the type of heavy physical work which he had formerly been doing, the Social Security Administration nevertheless denied the claim. The agency found that the kidney and arthritic impairments would not preclude claimant from engaging in light or sedentary work and that he possessed sufficient skills to engage in such light work. The district court sustained the administrative determination, but, on appeal, the Sixth Circuit reversed with directions that claimant be awarded disability benefits. The Court of Appeals hald that there was no evidence to support the administrative finding that claimant was a skilled worker, able to engage in sedentary employment.

Staff: Alan S. Rosenthal (Civil Division)

Farm Landlord Activity Held to Constitute Material Participation Under Social Security Act. Anthony J. Celebrezze v. Benson (C.A. 8, March 7, 1963). This was an action for old-age insurance benefits under the Social Security Act. The Act provides such benefits are only to be paid to claimants who have had creditable self-employment income. Under 42 U.S.C. 411(a)(1), farm rental income is creditable under the Act only if the landlord has an arrangement with his tenant contemplating "material participation" by the landlord in the production of agricultural commodities and such "material participation" does, in fact, take place. The Secretary denied appellee's claim on the ground that she made no significant contribution to the production on her farm other than making out a farm plan at the beginning of the growing season. The district court held that the Secretary had misapplied the applicable law in reaching this decision and that the making of a farm plan was sufficient to constitute material participation.

The Court of Appeals affirmed. While not adopting the district court's reasoning to the effect that the making of a farm plan is in itself sufficient, the Court held that the Secretary's conclusion that appellee's activities were insignificant was not supported by substantial evidence.

Staff: Jerry C. Straus (Civil Division)

Scope of Review in Court of Appeals of Social Security Cases; Administrative Denial of Claim for Social Security Disability Benefits Reversed. Farley v. Celebrezze (C.A. 3, March 26, 1963). This case arose out of a claim for disability benefits under the Social Security Act. The Secretary of Health, Education and Welfare denied such benefits on the ground that claimant had failed to establish an inability to engage in substantial gainful employment. The evidence showed that claimant was, at the time of the claim, 57 years of age; his work experience involved hard labor exclusively; his education was limited to a 7th grade education; and three fingers of his left hand lacked one or more digits. The impairment principally relied on by claimant arose out of an industrial accident which crushed his right arm and rendered it occupationally useless. In addition,

a psychiatric examination revealed a traumatic neurosis which conditioned claimant against ever becoming useful to himself again. The district court, in affirming the Secretary's decision, held that the administrative finding of non-disability was supported by substantial evidence.

The Court of Appeals, however, reversed. Initially, the Court rejected the Government's argument that the scope of review in this type of case was more limited in the Court of Appeals than in the district court. The Government had argued that in cases under the Social Security Act, where judicial review of administrative action is initially by the district court, instead of by the Court of Appeals as under some other acts, the Court of Appeals should not completely duplicate the review of the administrative decision afforded in the district court. Rather, the Government maintained, the Court of Appeals should only determine whether the district court misapprehended or grossly misapplied the substantial evidence standard. Otherwise, a social security claimant would have two full scale judicial reviews of the administrative decision. While the Third Circuit pointed out that the Government's argument was not totally devoid of merit, the Court of Appeals nevertheless refused to accept the position. Thus, the Third Circuit has now followed the Fifth and Sixth in holding that the scope of review in the Court of Appeals in social security cases is identical to that in the district court.

On the merits of the case, the Court of Appeals concluded that claimant's physical and mental impairments rendered him unable to engage in any substantial gainful employment, and that there was no substantial evidence to support the administrative determination to the contrary. Certain studies relied on by the Secretary of Health, Education and Welfare, showing that orthopedically disabled persons had obtained employment, were rejected by the Court as not constituting substantial evidence to show that claimant, considering his education and background, his useless right arm, damaged left hand, and traumatic neurosis, had any reasonable possibility of obtaining gainful employment.

Staff: Pauline B. Heller (Civil Division)

Secretary's Determination That Appellee Had Not Satisfied Requirements of 42 U.S.C. 411(a) Held Supported by Substantial Evidence. Celebrezze v. Maxwell (C.A. 5, April 4, 1963). Appellee applied for old-age insurance benefits, under the Social Security Act, on the basis of certain farm land income she received from leasing her farm out on crop shares. Under 42 U.S.C. 411(a)(1) such income is creditable under the Act if the landlord has an arrangement with his tenant contemplating "material participation" by the landlord in the production of agricultural commodities on the land and such "material participation" does, in fact, take place. The Secretary held that appellee did not materially participate in the management of her farm either through her own activities or through those of her son, and also held that she made no substantial financial contributions to production which could qualify as "material participation." Finally, the Secretary held that there was no evidence of an "arrangement" for material

participation by appellee. The district court reversed the decision of the Secretary holding that appellee had made a material participation both through management activities performed, on her behalf, by her son and also by furnishing $27 in 1958 and $44 in 1959 towards the farm expenses.

On appeal, the Court of Appeals reversed. The Court first noted that the question before it "for determination * * * and the one which should have been paramount in the district court, is whether the findings of the Secretary as to any fact (her, appellee's participation in the production or management of production) were supported by substantial evidence, for if they were they 'shall be conclusive'." The Court held that the Secretary's conclusion that the appellee had not materially participated in the production of agricultural activities during the years in question was supported by substantial evidence. With respect to the "arrangement" between appellee and her tenants the Court agreed with the Government's contention that she had failed to meet her burden of establishing this requisite element of her claim and that the Secretary was justified in rejecting her claim on this alternative ground.

In rendering its decision, the Fifth Circuit, speaking through Chief Judge Tuttle, used language on the scope of review that should be very helpful in all social security cases:

> Neither this court, nor the district court in the first instance, is free to substitute its findings of fact for those of the Secretary, if there is substantial evidence to support those findings and inferences. Hoffman v. Ribicoff, 305 F. 2d 1, 6 (8th Cir., 1962), Gainey v. Flemming, 279 F. 2d 56, 58 (10th Cir., 1960). Furthermore, where two inferences may reasonably be drawn from undisputed facts, the inference given to the facts by the Secretary may not be disturbed. Hoffman v. Ribicoff, Gainey v. Flemming, Carqueville v. Flemming, supra. Also where the evidence presents conflicts, it is for the Secretary to draw the inference from these conflicts, and this inference should not be disturbed. Gainey v. Flemming, supra. It is only where there is no substantial evidence from which the Secretary could have made his findings that the district court, and this court, may modify or reverse the decision of the Secretary.

Staff: Jerry C. Straus (Civil Division)

SOIL BANK ACT

Federal Law Governs Meaning and Effect of Soil Bank Conservation Reserve Contract; Whether Conservation Contract Is To Be Terminated for Breach Is Matter for State Agricultural and Conservation Committee. Reimann v. United States (C.A. 9, April 5, 1963). Appellant sought to avoid the consequences of his breach of a soil bank conservation reserve

contract which he had executed pursuant to 7 U.S.C. 1831. The contract was to run for ten years (1959-1968) and in terms prohibited the harvesting of any soil bank base crops (including wheat) on the covered realty. Notwithstanding this provision, appellant harvested wheat in 1959. Thereafter, the Idaho Agricultural and Conservation State Committee determined that the harvesting constituted a knowing and willful violation of the contract and that appellant should forfeit the payments that would have been due him thereunder; the Committee assessed a civil penalty pursuant to 7 U.S.C. 1811, but did not choose to terminate the contract.

In the district court appellant challenged the assessment of the penalty, contending that the conservation reserve contract was a conveyance or encumbrance of community real estate and was -- under the Idaho community property statute -- void for lack of his wife's acknowledgment or assent. In the alternative he prayed for termination of the contract. The Government counterclaimed for the penalty and prevailed on all issues. The Ninth Circuit affirmed. In so doing, it agreed with our contention that the meaning and effect of the contract, which was entered into as part of the nationwide soil conservation program, is to be determined by federal law. The Court declined, however, to decide whether in fashioning the governing law, it should adopt the law of Idaho as being the federal law with respect to what constitutes an encumbrance on property within that State. It held that even under Idaho law, on which appellant relied, the contract did not constitute an encumbrance of the covered realty. The Court also upheld the imposition of the statutory penalty, stating that the district court's finding that the breach was knowing and willful was not clearly erroneous. Additionally, the Court accepted our contention that, inasmuch as the district court's jurisdiction was limited to review of agency action, it properly refused to terminate the contract where the state ASC Committee had declined to do so.

Staff: Sherman L. Cohn and Edward Berlin (Civil Division)

TRADING WITH THE ENEMY ACT

Receipts Evidencing Dollar Purchase of Yen Deposits Could Only Be Redeemed in Dollars as Agreed by Japanese Bank American Branches After Termination of Hostilities; Hence Claims Based on Receipts Are Computed at Postwar Yen-Dollar Exchange Rate. Aratani v. Kennedy (C.A. D.C., March 28, 1963). The 1,144 claimants of whom appellants were representative had for many years before December 7, 1941, presented to American branches of Japanese banks dollars for conversion into yen deposits in Japanese banks at the yen-dollar rate of exchange prevailing at the time of each transaction. The branch banks issued receipts therefor. The American branches were closed by the Government on December 8, 1941. Appellants, under Section 34(f) of the Trading With the Enemy Act, sought district court review of the Final Schedule of the Office of Alien Property dated October 24, 1958, which allowed their claims with the dollar amount computed at the postwar exchange rate of 361.55 yen per dollar.

The basic issue in controversy was the exchange rate to be utilized in computing appellants' claims for payment. Appellants contended that an Alien Property Office examiner had correctly concluded that there existed a business practice, understood by both the banks and the American Japanese community, that the receipts previously purchased with dollars would be repurchased on demand by the American branch banks at the buying rate of exchange, dollars for yen, prevailing at the time of redemption. They argued, as he found, that the December 8, 1941, closing made a demand unnecessary and therefore the dollar-yen exchange ratio in computing the amounts due to claimants should be that of the so-called "breach date," December 8, 1941. This rate, it was asserted, could be determined from evidence of earlier 1941 transactions to be 23.4 cents per yen. The examiner so found.

The Director of the Office of Alien Property and the district court found that no rate of exchange existed on December 8, 1941, and that the claims were to be computed as of the judgment at the first postwar rate, 361.55 yen per dollar.

The Court of Appeals reached the same result by different reasoning. It ruled: (1) whether or not a rate of exchange existed on December 8, 1941, is immaterial; (2) the Japanese banks were not only obligated to redeem the receipts in yen, if presented in Japan, but, through their American branches, were obligated (by virtue of the above-mentioned business understanding) to repurchase the receipts in American dollars at the exchange rate on the day of redemption; (3) while the obligation continued to exist after 1941, its fulfillment was barred by the war and the acts of the sovereign and thus there was an adequate excuse for non-performance of so much of the contract as called for the dollar repurchase; (4) accordingly, during the war, redemption of the receipts could only have been achieved in Japan. When hostilities ceased, and commercial intercourse resumed, the obligations to repurchase the receipts at the dollar-yen exchange rate at the time of redemption could be fulfilled. The exchange rate at the time of redemption -- i.e., the first rate available after the termination of hostilities -- was 361.55 yen per dollar. Thus the claims, based on receipts calling for interest, were to be paid with interest and were to be computed at that rate.

Staff: Armand B. DuBois (Civil Division)

DISTRICT COURT

FALSE CLAIMS ACT

Application for Government Loan Is "Claim"; Liability for Statutory Forfeiture for False Claim Attaches Regardless of Absence of Provable Damage to Government. United States v. Cherokee Implement Co., et al. (N.D. Iowa, March 21, 1963). In a civil suit under the False Claims Act, 31 U.S.C. 231, defendants were alleged to have submitted fraudulent documents to Commodity Credit Corporation as a result of which the latter disbursed to certain borrowers more loan funds than allowed by the program. The loans were not in default and the complaint demanded recovery

only of the statutory forfeitures (of $2,000) for each false loan application presented. Defendants moved to dismiss on the grounds, among others, that a false claim had not been made against the United States and that the United States must suffer actual damage in order to recover the statutory forfeitures for the presentation of false claims. The District Court denied defendants' motion, ruling (1) that an application for the disbursement of Government money, even though in the form of a loan, is a "claim" within the False Claims Act, and (2) that the Government need not suffer actual damages as a condition of recovery of the statutory forfeitures.

Staff: United States Attorney Donald E. O'Brien (N.D. Iowa)

FEDERAL TORT CLAIMS ACT

Erroneous Weather Forecast Not Basis for Action Under Tort Claims Act. Bartie v. United States (W.D. La., April 8, 1963). This action was based upon the alleged negligence of Weather Bureau forecasters in mispredicting the exact time that a hurricane would strike the Louisiana coast on June 27, 1957, and in not giving residents of the area explicit advice with respect to evacuation. More than 400 persons lost their lives in the storm and property damage was estimated at $150,000,000. This was a test case on the question of liability.

The Court found that the forecasters, in predicting that the center of the storm would strike the coast "late Thursday," amended at 1:00 a.m. that day to "before noon today," when in fact the center or eye of the hurricane eventually passed over the coast line at about 9:00 a.m. on Thursday, June 27, were not negligent. The Court held that meteorological prediction is not an exact science, and accepted the opinion of an expert witness on behalf of the Government "that the Weather Bureau forecasters in the New Orleans forecast office made forecasts of the future positions and other characteristics of Hurricane Audrey which were commensurate with the state of hurricane forecasting at that time which were well within the probable errors of such forecasts * * *." The Court also held that the provisions of 28 U.S.C. 2680(a), the "discretionary function" exception, precluded the maintenance of such a suit.

Additionally, the Court held that the suit was barred by the "misrepresentation" exception of 28 U.S.C. 2680(h), relying on such cases as Jones v. United States, 207 F. 2d 563 (C.A. 2); National Mfg. Co. v. United States, 210 F. 2d 263 (C.A. 8); and United States v. Neustadt, 366 U.S. 696. Finally, the Court rejected plaintiff's contention that the "rescue" cases afforded an accurate or helpful analogy. A forecast is not the first step in an active endeavor of rescue, the Court said.

Staff: M. M. Heuser and William A. Gershuny (Civil Division); Assistant United States Attorney Q. L. Stewart (W.D. La.)

Seizure by Customs Service of Smuggled Copper from Purchaser in Good Faith Not Conversion Under Federal Tort Claims Act. Newell Salvage Company v. United States (D. Ariz., March 30, 1963). Plaintiff brought suit

for conversion against the United States under the Federal Tort Claims Act predicated upon the seizure from plaintiff's premises by Customs Service agents on February 8, 1960, and February 15, 1961, of fourteen barrels of smelted copper, most of which bore the stamp of the Cananea Consolidated Copper Company S.A. of Sonora, Mexico. Plaintiff produced evidence of the purchase of the copper from a domestic scrap metals dealer. The Court found this copper to have been stolen from the Cananea Company, imported and brought into the United States from Mexico without having been declared and presented for inspection. It accordingly found title to said copper to be in the Cananea Company. It declared such copper to be contraband and hence legally subject to seizure by the Customs Service pursuant to 18 U.S.C. 545 without liability on part of the United States for conversion.

Staff: United States Attorney C. A. Muecke and Assistant United States Attorney Jo Ann D. Diamos (D. Ariz.); Irvin M. Gottlieb (Civil Division)

STATE COURT

GOVERNMENT CONTRACTS

Federal Law Determines Construction of Contract With Federal Government Agencies; Terms Contained in Contract With Reconstruction Finance Corporation Are All Conditions Precedent Which Must Be Complied With Before Contract Can Be Enforced Against Agency. American Trust Company v. Reconstruction Finance Corporation, et al. (Supreme Court of New York, Appellate Division, February 25, 1963). The American Trust Company and the Reconstruction Finance Corporation entered into a contract whereby the RFC agreed to participate in a loan which the bank was desirous of making to a company. This agreement required the bank to obtain certain chattel mortgages from the borrower and to perform certain other acts. The bank then made the loan, but failed to obtain the type of chattel mortgage set forth in the contract with the RFC and failed to comply with certain other conditions. Subsequently the borrower was adjudicated a bankrupt, and the bank brought this action against the RFC for the portion of the loan covered by the RFC's participation agreement. The trial term of the New York Supreme Court awarded a judgment for the bank, but, on appeal by the Government, the Appellate Division reversed.

The Appellate Division initially pointed out that, as defendant was a federal agency, it is federal law which governed the construction of the contract between the bank and the RFC. The Court then held that as a matter of federal law, all terms contained in an RFC contract are conditions precedent, and that the bank had the burden of proving that it complied with these terms before the contract could be enforced in its favor. Since the evidence established that the bank failed to comply with some of the conditions in the contract, the Court ordered that the complaint be dismissed.

Staff: Assistant United States Attorney John Paul Reiner (S.D. N.Y.)

* * *

CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Involuntary Servitude and Peonage. United States v. David Icchok Shackney, (D. Conn.)

This case, involving the holding of a Mexican family in involuntary servitude and peonage by a Connecticut chicken farmer, was discussed previously in Bulletin, Vol. 11, No. 6, pages 156-157.

On April 1, 1963, the Court heard further argument on defendant's motion for judgment of acquittal which had been made at the end of all the evidence and as to which the Court had deferred his ruling. Also, the Court heard argument on defendant's motion for a new trial. On April 9, 1963, the Court denied both motions.

On April 17, 1963, defendant was sentenced as follows: Count III (involving the father of the Mexican family) - one year sentence with execution suspended after 60 days, two years probation, $2,000 fine; Counts V, VI, VII, VIII, IX (involving the five children) - one year sentence, fully suspended, two years probation. Sentences under all six counts are to run concurrently.

Defendant's $15,000 bond was continued pending an appeal.

Staff: Assistant United States Attorney James D. O'Connor (D. Conn.); Gerald W. Jones (Civil Rights Division)

* * *

CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

IMMUNITY

Procedural Steps in Use of FCC Immunity. In Marcus v. United States, 310 F. 2d 143 (C.A. 3, 1962), the Court affirmed appellant's conviction for contempt. The Supreme Court denied certiorari on March 18, 1963.

Appellant, when appearing as a witness before a grand jury, was ordered to answer all questions propounded to him in exchange for immunity under 47 U.S.C. 409(1). The witness still refused to answer and was found guilty of contempt and sentenced to six months. The appeal and petition for certiorari were from the conviction and sentence.

The use of the Federal Communications Act immunity in racketeering probs can be of significant value when used in carefully selected situations involving possible violations of that Act and of the related provisions of 18 U.S.C. 1084 and 1952.

Thus, in a grand jury proceeding investigating alleged violation of the Federal Communications Act, among others, a witness may be compelled to testify even though his testimony may tend to incriminate him. Immunity obtained under the statute is not confined to the crimes which that statute defines. It is complete as to "any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise" (47 U.S.C. 409(1)). See Reina v. United States, 364 U.S. 507; Brown v. United States, 359 U.S. 41; Ullman v. United States, 350 U.S. 422. It is the "proceeding," not necessarily the indictment or indictments resulting therefrom, which must be based upon the Communications Act. The indictments might deal with income tax violations, conspiracy charges or various other offenses. See Marcus, supra.

In probes involving the Communications Act and 18 U.S.C. 1084 and 1952, the use of the interstate wire communication facility is a necessary element of the crimes and the instrument by which the crimes may be committed. Since the use of the facility is itself subject to regulation, such use may be a violation of the Communications Act as a separate crime.

The possible violation of the Communications Act would be made out under the following statutory and tariff provisions: Under Section 501 of the Act "Any person who wilfully and knowingly . . . causes or suffers to be done any act, matter, or thing . . . prohibited or declared to be unlawful . . ." in the Communications Act commits an offense punishable by fine and imprisonment. In turn, Section 203(c) says no carrier shall provide communication service "except as specified" in its tariff. Most, if not all, telephone companies provide in their tariffs that the service is furnished subject to the condition that it will not be used for an unlawful purpose. Thus, to use the telephone in interstate commerce to unlawfully transmit wagering information, or as the facility by which a gambling

enterprise is promoted or furthered, is to cause the carrier to provide service for an unlawful purpose, in violation of Sections 203 (c) and 501, and the user is himself in violation under the "causes or suffers" clause of Section 501.

Where persons are suspected of violating Section 1084 or Section 1952 in the use of interstate telephone or telegraph facilities it is appropriate for a grand jury to inquire into possible Title 47 violations, to seek out whether there are unlawful discriminations and preferences (Sec. 202), extensions of privileges or facilities not specified in the tariffs (Sec. 203), whether there are more than maximum charges being made because information is being transmitted that is or may be unlawful (Sec. 205), whether reports are being made properly (Secs. 219, 220), because persons engaged in the business of betting and wagering may also be in control of the wire communication facility, and other possible violations. These are not remote possibilities and are all within the purview of Title 47.

It is also the function and duty in such an investigation for the grand jury to inquire into the use of radios to transmit race results from the race tracks to others who in turn disseminate the information to bookmakers and professional gamblers. Use of radio transmitters in this fashion may be in violation of 47 U.S.C. 301, 312 and 503. Messages and transmissions by interstate wire communication facilities of wagering information also may be intercepted and divulged by rivals in violation of 47 U.S.C. 605.

Before the witness may be granted immunity, it is necessary that he claim the privilege against self-incrimination. Where it is believed that certain witnesses may be later immunized because it would seem necessary and expedient to advance the objectives of the grand jury investigation, a foundation should be laid as follows:

The witness should be asked a series of questions dealing with his use or his knowledge of another's use of the wire communication facility in connection with the illicit enterprise under investigation. The questions should generally involve use of the facility for business or personal needs, names of persons contacted, locations of phones called, purpose for which the facility was used, and the conversations. It is only when the witness invokes the privilege against self-incrimination to these questions regarding the use of the wire communication facility that he becomes a candidate for immunity.

At this point, if the witness is to be immunized, the Government should apply to the court for an order compelling testimony. This should be accomplished by verbal petition to the court before a court reporter, in the presence of the witness (and his counsel, if he is represented). The petition should contain a broad general outline of the subjects of the inquiry and a request for the court to permit disclosure of the grand jury minutes so far as is needed to fully acquaint the court with the witness' testimony and the fact that the self-incrimination privilege has been invoked to the questions involving wire communication facilities.

The questions and answers of the witness, when read to the court by the grand jury reporter under oath, will reveal the scope of the inquiry to

the court. When the court orders testimony of the witness in exchange for immunity, the witness should return to the grand jury and again be asked the same questions. If the witness responds, the inquiry can go forward in full scope. If the witness continues to refuse answers to the questions previously put to him, contempt procedures under Rule 42 should be invoked.

Under no circumstance should any witness become the subject of FCC immunity without prior clearance of the Criminal Division.

ARMED FORCES PERSONNEL

Jurisdiction Over Juveniles Under Minimum Statutory Age in Armed Services. Recently the FBI brought to our attention a case involving aggravated assault of a soldier on a military reservation by another soldier 16 years of age, who had enlisted fraudulently. The victim was seriously injured and was still hospitalized more than six weeks after the assault. The Memorandum of Understanding between the Attorney General and the Secretary of Defense provides that where only military personnel are involved, the prosecution should be handled by the military authorities. (U.S. Attorneys' Manual, Title 2, p.32). However, the Staff Judge Advocate of the post held that the military could take no prosecutive action in view of the juvenile status of the person committing the assault.

In United States v. Reece J. Overton, 9 USCMA 684, 26 CMR 464, the court held that under the present statute (10 U.S.C. 3256) establishing seventeen as the minimum eligible age in the armed services, a person under seventeen years of age is incapable of entering into the enlistment contract. If enlistment is effected, the enlistment is void and the enlistee is not subject to trial by court martial under the Uniform Code of Military Justice. See also United States v. Blanton, 7 USCMA 664, 23 CMR 128, in which the court held that a youth under seventeen is incompetent to acquire military status and "Between the ages of 17 and 18 the minor is competent to serve, but his enlistment may be terminated by his parents or guardians, provided they have not consented to it."

It is clear that the military authorities have no jurisdiction to try defendants who have fraudulently enlisted and are under the statutory minimum age.

The United States Attorney authorized the filing of a complaint by an FBI Agent against the juvenile enlistee in the instant case. Defendant was charged under the Federal Juvenile Delinquency Act (18 U.S.C. 5031, et seq.). He signed a form consenting to disposition of the case under that Act and pleaded guilty to the charge of assault with a deadly weapon. He was sentenced under the Juvenile Delinquency Act, to a suspended confinement sentence and placed on probation for the balance of his minority, with a condition that he live with his mother or step-father.

JENCKS ACT

Production of Trial Counsel's Notes of Interview With Complaining Witness. Saunders v. United States (C.A. D.C., January 31, 1963). Defendant appealed from his conviction of robbery on three grounds, two of which were

dismissed. The Court of Appeals remanded on the third ground, which was that the trial court improperly ruled on motions made pursuant to the Jencks Act, 18 U.S.C. 3500, for production of statements.

In the earlier trial of the case, defendant moved for the production of notes made by Government trial counsel at an interview with the complaining witness. The trial court ruled that such notes constituted counsel's "work product." On appeal, the Government argued that the production of Government trial counsel's notes to the defense or even to the court for an in camera inspection would violate the integrity of the "work product" concept. (See Hickman v. Taylor, 329 U.S. 495 (1947).)

The Court of Appeals, in an opinion by Mr. Justice Reed, retired, sitting by designation, refused to accept this argument, except where a Government attorney has recorded only his own thoughts in his interview notes; then the notes would seem both to come within the work product immunity and to fall outside the statutory definition of a statement, under the Jencks Act, 18 U.S.C. 3500. But, the court held, if the attorney has made a substantially verbatim record of his interview, and included no protected material flowing from the attorney's mental processes, his notes then would constitute a statement within the statutory definition of the Jencks Act, 18 U.S.C. 3500, and would have to be produced.

The court further stated that it is the duty of the trial court to ascertain by inspection whether the notes are verbatim remarks of the witness or personal observations of the attorney, and, if both are included, to "excise the protected material if this is possible." The court also advised that if the District Court cannot by reading the notes ascertain whether or not they contain substantially a verbatim description of the witness' remarks, it should conduct a hearing to resolve the matter.

Staff: United States Attorney David C. Acheson; Assistant United States Attorneys William C. Weitzel, Jr.; Frank Q. Nebeker and Victor W. Caputy (C.A. D.C.).

NATIONAL STOLEN PROPERTY ACT

Credit Cards; Interstate Transportation of Thing Used in Falsely Making Securities. United States v. Thomas Hugh Ray (N.D. Miss., March 14, 1963). Defendant was charged in a one count indictment with having transported in interstate commerce "a thing fitted to be used and used in falsely making securities, to wit, a credit card (issued by the Standard Oil Company of Kentucky to J. E. Becker) fabricated from plastic and having raised letters for use in connection with a credit card machine by which an impression is mechanically applied to a document evidencing the receipt of goods and the indebtedness therefor of the lawful holder of said card." Nine credit card purchase receipts were introduced into evidence. The Court ruled that only two of the receipts were securities within the meaning of 18 U.S.C. 2314. The distinction was based on the following statement printed on the face of the two receipts: "Original invoice. This is a credit sale. Customer agrees to pay American Oil Company upon receipt of statement for all purchases, including service charges not exceeding 1½ percent

per month which may be imposed on past due balances." The Court ruled further, that while the other seven receipts were not securities, they were admissible nevertheless to show interstate transportation of the card with which they were made, and to show fraudulent intent.

Defendant was convicted by a jury on March 14, 1963, and was sentenced by the Court on March 29, 1963, to serve 18 months in the custody of the Attorney General. An appeal is anticipated.

Staff: United States Attorney H. M. Ray; Assistant United States Attorney Alfred E. Moreton III (N.D. Miss.).

FEDERAL FOOD, DRUG, AND COSMETIC ACT

Where Drug Previously Adjudicated Misbranded in Seizure Action, United States Entitled to Summary Judgment in Injunction Action Which Seeks to Stop Drug's Distribution; In Rem Judgment May Be Basis For Res Adjudicata in In Personam Action. United States v. Nysco Laboratories, et al. (E.D. N.Y., March 4, 1963). In the instant case the Government instituted an action pursuant to 21 U.S.C. 321 et seq., to enjoin defendants from introducing into interstate commerce an alleged weight reducing drug known as phenylpropanolamine hydrochloride (PPA). The Government had also instituted approximately twelve in rem seizure actions seeking the forfeiture and condemnation of large quantities of this drug. All of the seizure cases were transferred to the District Court of New Jersey for disposition. After trial, Judge Thomas F. Meaney found that the drug was misbranded as alleged and that it "has no significant pharmacological value as a weight-reducing agent and that therefore any representation to the effect that PPA in that dosage is an adequate and effective appetite depressant or that it is adequate and effective in the management or control of obesity, would be a misbranding within the meaning of Title 21 U.S.C. §352(a)."

On the basis of the decision in the in rem action the Government moved for summary judgment in the instant in personam action. In granting the Government's motion, Judge Walter Bruchhausen stated:

> It is apparent that the determination by Judge Meaney is res adjudicata as to the Corporation in the subject action. The latter action is based on the same claim between the same parties or those in privity with them. * * *

The decision is important, not only in Food, Drug and Cosmetic Act cases, but in any case in which the Government seeks judgment in an in personam action on the doctrine of res adjudicata based on an in rem decision.

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorney Martin R. Pollner (E.D. N.Y.).

DENATURALIZATION

Fraud; Concealment of Identity; Materiality. United States v. Antonio Riela (D. N.J., April 8, 1963). Defendant is a native of Italy who filed a petition for naturalization on May 15, 1933 and was admitted to citizenship on August 22, 1933. In his petition for naturalization and in various papers filed in the course of the proceedings, he stated his name was Antonino Pietro Riela; that he was born August 5, 1896 at Terranova, Italy, arrived in the United States on July 8, 1923 on the S.S. Guglielmo Peirce, was unmarried and had no children.

In denaturalization proceedings started in 1959, the Government charged that defendant had obtained his naturalization by concealment of material facts and wilful misrepresentation. The Government proved that defendant's name was really Antonio Riela; that he was born in an entirely different part of Italy than alleged in his naturalization petition and on a different date; that he had arrived in the United States in 1926 as a stowaway, leaving a wife and child behind in Italy; and that the record of arrival which he had claimed actually related to one Pietro Riela, who had used it as the basis for his own naturalization in 1929. The real Pietro Riela testified as a Government witness.

Defendant did not take the witness stand. He had refused, on Fifth Amendment grounds, to answer the Government's pre-trial interrogatories as to his real identity, birth date, arrival in the United States, family status, and execution of the relevant naturalization papers and had furnished this information only under compulsion by the Court.

The Court found for the Government. It held that any false statement made by a petitioner for naturalization in a naturalization proceeding constitutes a fraud upon the Government if it is material to the right of petitioner to be naturalized and is relied upon by the Government. The Court concluded that defendant's use of a name other than his own, failure to disclose his true identity, and concealment of facts relating to his identity were sufficient to vitiate his naturalization.

Staff: United States Attorney David M. Satz, Jr.; Assistant United States Attorney Sanford M. Jaffe (D. N.J.); Maurice A. Roberts (Criminal Division).

Concealment of Arrest Record; Materiality; Evidence. United States v. John Oddo (C.A. 2, February 26, 1963). Defendant was naturalized in 1931 without objection. In 1957 this suit was filed to revoke his naturalization on the ground that it was obtained by concealment of material facts and wilful misrepresentation. The complaint charged that during the course of his naturalization proceedings he falsely swore under oath that he had never been arrested or charged with the violation of any law, when he knew in fact that he had been arrested a number of times. At the trial, the Government proved that he had been arrested for burglary in 1927, disorderly conduct in 1928 and 1929, homicide in 1930, vagrancy in 1931, assault and robbery in 1931, and violation of an illegal occupation statute in 1931. Introduced in evidence was the printed naturalization

application he had signed, containing a negative answer to the question, "Have you ever been arrested or charged with violation of any law of the United States, or any State, or any City ordinance or traffic regulation?", and his certification that all statements made therein were true.

The two naturalization examiners who had interviewed the defendant in 1931 were dead and a former employee of the Immigration and Naturalization Service testified to the customary practices and procedures employed in 1931 at the office which had processed defendant's application. He testified that certain check marks and initials on the printed application form indicated that both examiners had placed the defendant under oath, had orally asked him each question on the form, including the arrest question, and had received the same negative answer he had given in writing. Defendant did not take the stand. The district court found as fact that defendant had deliberately concealed his criminal record, and gave judgment for the Government.

On appeal, defendant contended that the Government's evidence of concealment was inadequate to meet its heavy burden of proof in a denaturalization case. He argued that the evidence of custom and practice was insufficient, citing Cufari v. United States, 217 F. 2d 404 (C.A. 1, 1954). The Court of Appeals held that such evidence is admissible as circumstantial evidence, and distinguished Cufari by pointing out that at the time of that naturalization (1927) no printed form of application was in use and inquiry about arrests was not required by the regulations.

The Court of Appeals also rejected the contention, based on United States v. Kessler, 213 F. 2d 53 (C.A. 3, 1954), that defendant's arrests were either of a trivial nature or the result of arbitrary police action, so that his nondisclosure did not constitute concealment. The Court of Appeals distinguished Kessler, pointing out that the arrests there were for offenses unknown to the law and that the magistrate who discharged defendant in that case had advised her she had committed no crime cognizable at law, whereas Oddo had presented no evidence that he had been arrested for crimes which do not exist.

Defendant also argued that the arrests concealed were not material, citing Chaunt v. United States, 364 U.S. 350 (1960). The Court of Appeals distinguished Chaunt, where the arrests concealed did not involve moral turpitude and occurred long prior to the statutory residence period, stating "Failure to disclose a record of prior arrests, even though none of those arrests by itself would be a sufficient ground for denial of naturalization, closes to the Government an avenue of enquiry which might conceivably lead to collateral information of greater relevance."

Conceding that the decision in Costello v. United States, 365 U.S. 265 (1961), did not close the door to a possible defense of laches, the Court of Appeals held that Oddo had failed to make a showing that he had been prejudiced by the long lapse of time before the Government had started the denaturalization suit.

The judgment was affirmed.

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorney Jerome C. Ditore (E.D. N.Y.).

NATIONAL FIREARMS ACT

Constitutionality of 26 U.S.C. 5851. William Ernest Frye v. United States (C.A. 9, March 27, 1963). Defendant was charged in a one count indictment with a violation of 26 U.S.C. 5851 in that he and one Robert Barr had in their possession a 12 gauge shotgun with an 8 inch barrel, a firearm under 26 U.S.C. 5848, which had not been registered with the Director, Alcohol and Tobacco Tax Division, Washington, D. C. Frye was convicted following a trial by the Court and he appealed, urging as one contention that §5851 is unconstitutional. The Court of Appeals for the Ninth Circuit affirmed the conviction, stating the following with regard to this issue:

> We cannot hold that §5851 is unconstitutional as it was applied in this case. The language to which the constitutional objection is directed reads as follows: "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of such firearm, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such possession to the satisfaction of the jury." The trial court construed this language as not dispensing with proof that the firearm had not been registered and, as we have seen, the government supplied this proof. We think that as so construed, the statute is not open to the attack made upon it. So construed, the quoted sentence does not create a presumption that the gun was not registered, and we need not consider whether the statute would be valid if it did create such a presumption. The statute makes possession of an unregistered firearm an offense. Both elements were proved, and the court construed the statute as requiring that they be proved. The portion of the statute attacked added nothing to the government's case in this instance. * * * Our recent decision in Russell v. United States, 9 Cir., 1962, 306 F. 2d 402, is not in point. The defendant in this case was not charged with failing to register the weapon as was the defendant Russell. He was simply charged with possession of an unregistered weapon. * * *

As a result of the Russell decision, the Criminal Division directed a telegram, dated August 17, 1962, to all United States Attorneys, recommending that no prosecutions be initiated under 26 U.S.C. 5841 and that, in such a fact situation, they proceed under the tax or order form provisions in 26 U.S.C. 5851. In view of the Frye decision, it appears that successful prosecution may also be had under the provision of §5851 prohibiting the possession of an unregistered firearm. Accordingly, our telegram of August 17, 1962 is supplemented to this extent. On April 5, 1963, Frye applied for a writ of certiorari.

Staff: United States Attorney Francis C. Whelan; Assistant United States Attorneys Thomas R. Sheridan and Norman T. Ollestad (S.D. Calif.).

LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT

Post September 14, 1959 Distributions to Paid Employees of Labor Organization of Money and Securities from Trust Established Prior to Effective Date of Labor Management Reporting and Disclosure Act of 1959 Held Violation of 29 U.S.C. 501. United States v. Woxberg, et al. (S.D. Calif., 1963). Paid officers of Teamster Local 224 executed a declaration of trust effective April 1, 1955 naming themselves as trustees of group insurance rating refund payments received annually by the local union. Rating refund checks were deposited in this trust account in the years 1955, 1956, 1957 and 1958. Under the terms of the declaration of trust the beneficiaries would be "covered employees", namely the Secretary-Treasurer, all business agents and the officer manager of the local. It was further provided that "covered employees" must have been employed for at least three years and thereafter be honorably terminated from their employment with the union. On November 2, 1959, the trustees and beneficiaries executed a termination of trust agreement and distributed the trust fund to the beneficiaries. The evidence at trial disclosed that the local's general membership was not told of either the establishment or the termination of the trust. The trustees of the fund were each members of the union's executive board and were also beneficiaries under the trust. The remaining paid employee member of the union executive board was also a beneficiary of the trust although not a trustee. None of the persons to whom the funds were distributed were honorably terminated employees of the union, therefore not "covered employees". The Government urged that the union local had not divested itself of its ownership of the funds held in trust, therefore, such funds were "money, funds, securities, . . . of a labor organization . . ." at the time distributed. Accordingly, such distributions constituted an embezzlement within the meaning of 29 U.S.C. 501. Each of the four named defendants was found guilty after six weeks of jury trial. Defendant Woxberg was fined $13,000 and sentenced to three years' imprisonment; defendant Dykes was fined $11,000 and sentenced to three years' imprisonment; defendants Barnes and Hester were each fined $6,000. In imposing the prison sentences on defendants Woxberg and Dykes the Court stated they are not to be considered for parole until their fines are paid.

Staff: Assistant United States Attorney Richard A. Murphy (S.D. Calif.).

FALSE STATEMENTS

/Departmental Memorandum No. 331, issued November 5, 1962, superseding Memorandum No. 318, dated July 23, 1962./

Situations Where Prior Approval of Department Is Required Before Instituting Criminal Proceedings Under 18 U.S.C. 1001. Last year through the medium of the subject memoranda the Attorney General circulated to all United States Attorneys a notice to the effect that advance approval of the Department would be required before criminal proceedings under 18 U.S.C. 1001 could be instituted in cases where false statements had been made to

Federal investigators. The purpose of that directive was to avoid if possible, adverse restrictive case precedent in this field.

For some time now, we have been receiving inquiries from the field which clearly indicate there is some confusion in the minds of the United States Attorneys as to the scope of the directive. Perhaps this is due in part to the inclusion of the penultimate paragraph in Memorandum No. 318 referring to pp. 68-68.1, Title 2, United States Attorneys' Manual, dealing with false statements in applications for Federal employment. The express purpose in superseding Memorandum No.331 was to delete this reference to the Manual as inapplicable to the question under discussion.

Accordingly, you are advised that Memorandum No. 331 applies only to those situations: (1) where false complaints are filed with an investigative agency, or (2) where false statements are given to Federal investigators during a pending inquiry into substantive violations of the Federal criminal statutes. It was never intended to extend to those situations where false information is furnished in connection with preparation of forms or documents, the proper execution of which is essential to insure the integrity of the administrative responsibilities of various Government departments and agencies. Therefore, advance approval to prosecute is not required in cases such as those involving preparation and submission of personnel, security clearance questionnaires or employment application forms (with the exception of matters referred to at pages 2.1, 16-17 of Title 9 of the United States Attorneys' Manual), or documentation bearing upon efforts to obtain various benefits dispensed through the several Government departments or agencies.

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

EXPATRIATION

Statute Expatriating Citizens for Service in Foreign Armed Forced Held Constitutional. U.S. ex rel. Herman Frederick Marks v. Esperdy (C.A. 2, April 9, 1963.)

Appellant Marks, who was born in the United States, went to Cuba in 1958 and joined Castro's revolutionary forces in the Sierra Maestra Mountains. After the overthrow of Batista, he served as a captain in the Cuban Rebel Army and presided over the execution of numerous prisoners. In May 1960, he lost favor with Castro and returned to the United States. In administrative deportation proceedings it was held that by reason of his service in the Cuban Armed Forces he lost citizenship under Section 349(a)(3) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(3), and that he was subject to deportation for non-possession of immigration documents at the time of his last entry and for having been convicted prior to his entry of a crime involving moral turpitude.

By petition for a writ of habeas corpus in the United States District Court for the Southern District of New York, Marks sought his release from detention by the Immigration and Naturalization Service under the order of deportation. He was discharged under the writ, the Court holding that while he had lost his citizenship by service in the Cuban Armed Forces he was not subject to deportation. The Court reasoned that expatriation under Section 349(a)(3) does not occur until there has been an adjudication by a competent court and that since at time of appellant's entry such an adjudication had not been made he was not an alien subject to the immigration laws.

Marks appealed the ruling of the lower Court as to his loss of citizenship. The Service appealed from the ruling of the lower Court that the appellant was not deportable.

Marks argued that Section 349(a)(3) was unconstitutional in that it imposes a cruel and inhuman punishment in violation of the Eighth Amendment. Although the Court of Appeals found great force in this argument it was constrained by the superior authority of Perez v. Brownell, 356 U.S. 44, to rule the statute constitutional, as did the lower court. It differed, however, with the lower Court as to the time of expatriation and found that Marks' loss of nationality occurred when he served in the Cuban Armed Forces in 1959. In doing so the Court relied on Section 356 of the Immigration and Nationality Act, 8 U.S.C. 1488, which provides that loss of nationality shall result solely from the performance by a national of the acts or fulfillment of the conditions specified.

The Court ruled that Marks was deportable on the documentary ground and sustained the appeal of the Service. It was found unnecessary to determine whether Marks was also deportable on the criminal ground.

Staff: Former United States Attorney Vincent L. Broderick
Special Assistant United States Attorney Roy Babitt (S.D. N.Y.)

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Search Warrant Issued 107 Days After Evidence Observed in Appellant's Home. Schoeneman v. United States; Markham v. United States (C.A. D.C. April 4, 1963). Appellant Schoeneman, while a procurement specialist of the Navy Department, and appellant Markham, formed a consulting firm for small businesses interested in doing business with the Federal Government. In the course of carrying on this business, Schoeneman supplied Markham with classified documents dealing with future purchases by the Navy Department. Markham in an attempt to interest a prospective customer took the customer to his home on February 15, 1961 and showed him classified documents. The customer promptly reported the incident to the Federal Bureau of Investigation.

On June 2, 1961,an F.B.I. agent obtained a warrant to search Markham's home. The search revealed much incriminating evidence.

Schoeneman and Markham were indicted and tried jointly. Markham was convicted of bribing a Government official in violation of 18 U.S.C. 201. Schoeneman was convicted of accepting a bribe in violation of 18 U.S.C. 281 and converting Government property in violation of 18 U.S.C. 641. Both were convicted of conspiracy to commit the three specified offenses in violation of 18 U.S.C. 371.

Appellant's chief contention on appeal was that the fruits of the search of Markham's home should have been suppressed because there was insufficient showing of probable cause to justify the issuance of a search warrant. The search warrant had been issued in reliance upon two affidavits. One affidavit sworn to by an F.B.I. agent stated that an informant had seen classified documents in Markham's home on February 15, 1961 and that the documents could not legally have been in Markham's possession.

The Court of Appeals in reversing the convictions stated that in determining probable cause for the issuance of a search warrant, time alone is not controlling. However, no case could be found which sustained a search warrant issued more than 30 days after finding the evidence which constituted the basis of the search. The Court citing Sgro v. United States, 287 U.S. 206, said that the proof supplied to support a search warrant must speak as of the time the search warrant issues. The Court ruled that in view of the great delay (107 days) between observing the evidence and the issuance of the search warrant, it could not uphold the determination that probable cause existed on the date the warrant issued.

Staff: George B. Searls (Internal Security Division) argued the appeal. With him on the brief were Carol Mary Brennan and Robert S. Brady (Internal Security Division).

Unlawful Exportation of Arms and Ammunition. United States v. Pedro Rosales Pavon. (22 U.S.C. 1934) On April 4, 1963 the grand jury at New Orleans, Louisiana returned a four count indictment against defendant, a merchant seaman and a citizen of Honduras, charging him with attempting to export a sizeable quantity of arms and ammunition without having obtained the necessary export license from the Department of State and without having registered with the Department of State as a person in the business of exporting such material, pursuant to the requirements of 22 CFR 121 et seq. Arraignment was set for April 10, 1963.

Staff: First Assistant United States Attorney Walter F. Gemeinhardt (E.D. La.)

Foreign Agents Registration Act (22 U.S.C. 611, 618); Failure to Register. U.S. v. Elmer Henry Loughlin. On April 17, 1963 a federal grand jury in Washington, D.C., returned a one count indictment charging Loughlin with having acted within the United States as the agent and representative of the Government of the Republic of Haiti, its officials and representatives, and with having been obligated to file a registration statement since November, 1957. Since Loughlin was in Haiti when the indictment was returned, a warrant was issued for his arrest upon his return to this country.

Staff: James C. Hise and Irene A. Bowman (Internal Security Division)

No Declaratory Judgment to Test Applicability of Foreign Agents Registration Act. Kennedy v. Rabinowitz and Boudin (C.A. D.C., April 4, 1963). Plaintiffs, a firm of lawyers in New York City, sued the Attorney General for a declaratory judgment that as counsel for the Cuban Government they are not required to register under the Foreign Agents Registration Act. The District Court denied a motion by the Attorney General for judgment on the pleadings. The Court of Appeals granted leave to take an interlocutory appeal (10 Bull. 348), and the appeal was argued January 23, 1948.

The Court (Circuit Judges William K. Miller, Fahy, and Wright) ordered that the suit should be dismissed on the pleadings as an unconsented suit against the United States. The opinion (Circuit Judge Wright) said that the proceeding was an effort by the appellees to restrain the Attorney General from prosecuting them under the Act, that under Larson v. Domestic & Foreign Corp., 337 U.S. 682, Land v. Dollar, 330 U.S. 731, and Ex parte Young, 209 U.S. 123 an officer of the United States may be sued, absent the consent of the United States to suit, only when he is acting unconstitutionally or outside his statutory powers; that there was no allegation that the Act was unconstitutional or that prosecution of the appellees would be outside the Attorney General's

statutory powers; and that to restrain him from enforcing the criminal laws of the United States would "interfere with the public administration."

Circuit Judge Fahy filed a dissenting opinion.

Staff: George B. Searls (Internal Security Division) argued the appeal. With him on the briefs were Kathleen M. Malone and George L. Fricker (Internal Security Division)

Subversive Activities Control Act of 1950; Registration of Communist Party members. Attorney General v. Irving Potash, et al. On April 11, 1963 the Attorney General filed six additional petitions with the Subversive Activities Control Board at Washington, D. C. pursuant to Section 8(a) of the Subversive Activities Control Act against national leaders of the Communist Party, USA, seeking orders of the Board requiring the respondents to register as members of the Party. The respondents are: Irving Potash, Mildred McAdory Edelman, Mortimer Daniel Rubin, William Wolf Weinstone; all of New York City; and George Meyers, Baltimore, Maryland; and Thomas Nabried, Philadelphia, Pennsylvania.

Staff: Robert A. Crandall, Leo J. Michaloski, Earl Kaplan, Carl H. Miller, Thomas Nugent and John E. Ryan (Internal Security Division)

Striking Direct Testimony When Witness Blocks Cross-Examination by Invocation of Fifth Amendment Privilege. International Union of Mine, Mill and Smelter Workers v. Attorney General. Pursuant to a petition filed July 28, 1955, under Section 13A(a) of the Internal Security Act of 1950, as amended by the Communist Control Act of 1954 (see Bulletin Vol. 3, No. 16, p. 3), the Subversive Activities Control Board, on May 4, 1962, handed down a report and order determining the International Union of Mine, Mill and Smelter Workers to be a Communist-infiltrated organization (see Bulletin Vol. 10, No. 13, p. 381).

On May 31, 1962, the union filed a petition under Section 13A(b) of the Act for a determination that it "no longer is a Communist-infiltrated organization" (ibid.). In a hearing on the petition the union presented thirty of its officers and staff members as witnesses, all of whom testified in substance that the union is not now Communist-infiltrated to their knowledge. On cross-examination, fifteen of the witnesses (including ten previously found by the SACB to have been Communist Party members) invoked their Fifth Amendment privilege against self-incrimination when questioned about their previous Party membership, resignation from the Party, and other related matters. A motion was made to strike the direct testimony of these witnesses.

On April 23, 1963, the Board, in a unanimous decision, held that there had been a substantial denial of cross-examination on matters relevant and material to the issues, and ordered the pertinent direct testimony of the fifteen witnesses stricken. A review of the reported cases and authorities suggests that this may be the first instance in which a federal judicial or quasi-judicial body has stricken direct testimony because cross-examination was blocked by invocation of the Fifth Amendment privilege. Cf. United States v. Toner, 173 F. 2d 140 (3d Cir. 1949); 5 Wigmore, Evidence §§1390-91 (3d ed. 1940).

Staff: F. Kirk Maddrix, James H. Jeffries, III
(Internal Security Division)

* * *

LANDS DIVISION

Assistant Attorney General Ramsey Clark

Federal Reclamation Project; Freedom of Operations from Court Control; Sovereign Immunity from Suit; Limited Nature of Consent to Suit Under 28 U.S.C. 666; Mode of Exercise of Federal Eminent Domain Power; Limited Effect of Section 8 of Reclamation Act of 1902; Authority of Reclamation Officials to Set Price for Water Sold to Municipalities. Dugan v. Rank (S.Ct. Nos. 31, 115); City of Fresno v. State of California, et al. (S. Ct. No. 51). This case has become famous since it was filed in 1947 and various phases have been the subject of several trial and appellate court decisions. It involves the Central Valley project in California which is described in some detail in Ivanhoe Irr. Dist. v. McCracken, 357 U.S. 275. Briefly, suit was brought by plaintiffs in 1947 to enjoin Bureau officials from the impounding of water at Friant Dam on the San Joaquin River in contravention of the rights of plaintiffs to the beneficial use of the waters of the San Joaquin below Friant. Since commencement of this suit by individual water users, the City of Fresno has intervened as a plaintiff also asserting rights to San Joaquin waters.

The jurisdictional issues are presented by the contentions of defendants that the United States is an indispensable party; that it has not consented to suit and has been improperly joined; and that in its absence the district court was without jurisdiction to entertain the dispute with reference to the operation of the Friant Dam by the Bureau.

Upon the merits, the issue is whether it is permissible for these plaintiffs to interfere by injunction with the public use which the Central Valley project represents. More specific issues are presented by the contention of defendants that the water rights of plaintiffs, to the extent to which they claim injury, have been taken by the United States through exercise of its power of eminent domain and that the remedy of the plaintiffs is to seek compensation in the Court of Claims.

The decree entered June 20, 1957, enjoined defendants from "impounding, or diverting, or storing for diversion, or otherwise impeding or obstructing the full natural flow of the San Joaquin River." It was provided that this injunction should not go into effect should the United States or the defendant irrigation districts place in operation, maintain and operate the prescribed physical solution.

The solution as decreed consisted of a series of ten ponds in the natural channel of the river created by ten collapsible check dams to be so operated as to provide releases of water sufficient to flush and scour the aquifers by which river water found its way to the underground reservoirs from which the claimants of overlying rights received their water. By this means it was felt that a flow less than the full natural flow could simulate the full natural flow effectively. It was provided that a sufficient flow of water be released from Friant Dam to provide a minimum flow of five second feet over the last check dam downstream. Thus it was assured

that the quantity of water released would, with a surplus of five second feet, be sufficient to meet the demands of all water users.

On March 31, 1961, this decree was affirmed except that the United States was dismissed as a defendant and the decision was reversed as to certain issues relating to the City of Fresno.

On April 15, 1963, the Supreme Court unanimously reversed with directions to dismiss in two opinions which will have an important effect upon the prompt execution, not only of federal reclamation undertakings, but of all similar projects. The holdings are briefly:

1. The United States had not consented to joinder as a party to this case by the McCarron amendment, 66 Stat. 560, 43 U.S.C. 666. This was because that Act is limited to suits "for the adjudication of rights to the use of water of a river system or other source" and this is not such a case. Here the Supreme Court agreed with the Court of Appeals so it discussed the question summarily.

2. The Court of Appeals correctly held that the reclamation officers were authorized to acquire needed water rights by physical seizure.

3. This is an attempted suit against the United States and not, as the Court of Appeals held, a permitted suit against federal officers under Larson v. Domestic & Foreign Corp., 337 U.S. 682. The project could not operate without impairing the full natural flow of the river. Hence, the decree enjoining such impairment would force abandonment of this authorized project and would prevent fulfillment of contracts with irrigation districts for disposal of the captured water. The physical solution alternative would likewise interfere with the public administration since the project, as authorized by the Secretary of the Interior, the President and Congress, does not provide for any such series of dams. Neither of the exceptions to sovereign immunity, the Court held, apply here. The Court said:

> The power to seize which was granted here had no limitation placed upon it by the Congress, nor did the Court of Appeals bottom its conclusion on a finding of any limitation. Having plenary power to seize the whole of respondents' rights in carrying out the congressional mandate, the federal officers a fortiori had authority to seize less. It follows that if any part of respondents' claimed water rights were invaded it amounted to an interference therewith and a taking thereof--not a trespass.

After discussion, the Court held that there was no such quantitative uncertainty to preclude the award of damages as the Court of Appeals had thought.

In a separate opinion in the City of Fresno case, it held that the Dugan decision controlled. It further pointed out that Section 8 of the

Reclamation Act of 1902 did not permit state law to prevent the United States from exercising its power of eminent domain; that it simply left to state law the definition of property interests for which compensation must be paid. After brief discussion of the county of origin and Watershed Act upon which Fresno relied, it concluded that Fresno had no preferential rights to contract for water from the Project. It then discussed Fresno's complaint as to the rates it was charged and concluded:

> It appears amply clear that the Reclamation Bureau officials were acting entirely within the scope of their authority in operating the Project in this manner and fixing the rates for water in accordance with congressional mandate, all of which has specifically received our approval in Ivanhoe Irrigation District v. McCracken, supra, at 295.

Staff: Archibald Cox (Solicitor General).

Condemnation; Inter-State Highway Program; Authority of State officials to Invoke Federal Assistance when State Law Prevents Acquisition of Land. Eden Memorial Park Association v. United States (S.Ct. Cal., Apr. 16, 1963). The appropriate officials of the State of California sought to condemn cemetery lands for use as part of the Inter-State Highway System under the Federal-Aid Highways Act, 23 U.S.C. 1001. The state court held that authority had not been given for such condemnation. Proceedings were then brought by the United States in the federal court as provided in the Highway Act, 23 U.S.C. 107. A declaration of taking was filed and immediate possession was sought. The landowner answered, challenging the right to take primarily on the ground that, being unable to condemn the property, the state officials were not authorized to secure its condemnation by the United States and to receive it back after condemnation for execution of the project as provided by the Act. The court granted immediate possession and denied motions designed to stay the federal court proceedings.

In the meantime, the landowners had filed suit in the state court against the state officials, alleging lack of authority and seeking an injunction against execution of the project. The state court denied a preliminary injunction, but enjoined construction of permanent facilities upon the land while permitting construction of temporary facilities. Thereupon, the United States moved in the condemnation proceeding to enjoin the landowners and their attorneys from prosecuting the state court action and to take affirmative action to secure vacation of the temporary restraining order. The district court granted the relief sought.

An interlocutory appeal was taken under 28 U.S.C. 1292(a) and a stay was sought of the condemnation proceedings pending disposition of the appeal. The application for a stay was orally argued, at which time both parties asked the Court to consider the matter on the merits without further briefing and argument. The Court did so after having entered a limited stay pending consideration. It reversed the injunction order and

directed vacation because it was not warranted, without passing upon the validity of the taking. The Court of Appeals held, in effect, that there was no sufficient interference with federal rights to justify an injunction and that both proceedings could proceed. See 10 U.S. Attys' Bull. No. 5, pp. 146-147.

The issues thus raised were resolved by an opinion of the Superior Court of the State of California for the County of Los Angeles. Upon an order of the state court, the preliminary injunction was dissolved, and it was found that the state officials acted properly in seeking Federal assistance where they were unable to obtain the necessary interests in the land under state law. Upon appeal, the District Court of Appeal reversed 2 to 1, holding in effect that after condemnation the title of the land in the United States was subject to the same restrictions as to use as it was before condemnation.

The Supreme Court of California granted a hearing and on April 16, 1963, in a 6 to 1 decision, affirmed the trial court judgment. After quoting the Federal-Aid Highway Act and referring to its purposes the Court held:

> In seeking a reasonable balance between local and national needs with respect to the interstate System, section 107 does not put generally applicable local policies governing and condemnation ahead of the needs of the Interstate System. (United States v. Certain Parcels of Land, Etc., 209 F. Supp. 483, affd., United States v. Pleasure Driveway and Park District of Peoria, Illinois, 314 F. 2d _____; United States v. Certain Parcels of Land, Etc., 175 F. Supp. 418.) It does, however, protect local interests by requiring that the state request any action by the Secretary pursuant to its terms.

For a summary of the Pleasure Driveway case, see 11 U.S. Attys' Bull. No. 7, pp. 189-190.

Turning to California law, the Court concluded:

> Thus, the Legislature expressly assented to the provisions of the federal act including section 107, abrogated inconsistent state laws, and authorized the department and its officers to act for the state in planning and constructing federally-assisted state highways.

Staff: Roger P. Marquis (Lands Division).

Condemnation; Rule 71A(h) Commission; Small Tract Program; Ten Year Practice of Use of Commissions Overturned. United States v. 186.82 Acres of Land (W.D. Pa.) Ever since Rule 71A became effective, the Western District of Pennsylvania has routinely used commissioners in condemnation cases. Last year the United States objected to such use in a dam and

reservoir taking but its objections were overruled. See 207 F. Supp. 395 (1962). Rehearing was sought in the cited case and it was consolidated for hearing with other cases subsequently filed for the same project. The Government, as an alternative to its motion to vacate the appointment, asked for a recital so as to permit an interlocutory appeal under 28 U.S.C. 1292(b) as to whether such routine use of commissioners for all cases was permissible under the rule.

By the time the hearing was had in March of this year, the small tract program had been developed. At the hearing, the program was explained, the fact was emphasized that the United States does not insist on a jury trial for each tract when relatively small amounts are involved, and it was urged that the Court itself could try such cases in short order to the extent that the need for contested trials was not eliminated by settlement or default.

This procedure avoids the delay and expense incident to the indiscriminate use of commissions. The District Court agreed and has since vacated its order appointing commissioners and has set 41 tracts for a calendar in June.

The experience in this case indicates a way in which use of commissioners may be conformed to the interest of Rule 71A(h) in other districts. When the mass of cases is thus disposed of, the pressure for commission trial, rather than a jury, of the larger contested cases is greatly lessened.

Staff: Roger P. Marquis (Lands Division);
Robert E. Tucker, Assistant United States Attorney (W.D. Pa.)

Condemnation; Right to Take for Purposes of Stone Supply; Exclusion of Evidence; Comparable Sales; Jury Instructions, Robert Harwell v. United States (C.A. 10, April 11, 1963). Condemnation proceedings were instituted at the request of the Secretary of the Army to acquire certain property necessary for the construction of the Eufaula Dam and Reservoir. The 60 acres condemned were a part of a 190-acre farm situated approximately a mile and a half from the closest property to be flooded by the project and four and a half miles from the dam site. The property taken contained sandstone which was used in the construction of the dam. The Government's testimony was that the land was valuable for agricultural purposes to the extent of $4,000. The landowner valued the property as a potential stone quarry worth $330,000. The cause was tried to a jury which found just compensation for the property taken plus damages to the remaining acreage to be $8,700.

The landowner argued on appeal that the Government had exercised its power to condemn in an arbitrary and capricious manner. The Court of Appeals, in affirming the decision of the district court, held that it was within its power to determine whether the proposed use of the property being condemned was public or private and if the use was public, in the absence of bad faith, that the necessity or expediency of the taking was

not open to judicial determination. The Court then found that there had been no showing of bad faith on the part of the Government. The position taken by this Department is that this exception of "bad faith" from the rule of immunity from review does not exist, as shown in Berman v. Parker, 348 U.S. 26 (1954), and United States v. Mischke, 285 F. 2d 628 (C.A. 8, 1961). This decision perpetuates similar erroneous dictum of earlier cases.

The Court went on to hold that it was harmless error to exclude certain technical reports which related to the quantity and quality of the stone underlying the property taken from which the jury could not reasonably have been expected to have obtained helpful guidance. The Court held that the reports were inadmissible to show the extent or quality of stone separate from the land but were admissible as an element in aiding the jury in fixing the value of the land. The Court went on to hold that, a prima facie showing of comparability in sales having first been made, an expert's testimony as to sale prices is admissible for the purpose of showing the basis on which he predicated his testimony as to value and that, where instructions given the jury were inaccurate but the verdict indicates with crystal clarity that it was not predicated upon the inaccuracy, no prejudice was occasioned. In addition, the Court stated that it was not error to refuse to give instructions containing correct statements of law where the general instructions of the Court fairly and adequately covered the issues in the case.

Staff: George Hyde (Lands Division).

Public Lands; Timber Trespass; Method of Computing Damages Under Oregon Multiple Damage Timber Trespass Statutes. United States v. Firchau (S. Ct. Ore., Apr. 17, 1963). This action involves the method of computing damages under the Oregon multiple damage timber trespass statutes where the landowner's timber is cut in trespass but not removed from its land; and it was filed in the State court to obtain an authoritative decision interpreting the statutes. ORS 105.810 provides that "whenever any person, without lawful authority, wilfully * * * cuts down, girdles or otherwise injures or carries away any tree, timber or shrub on the land of another person, or of the state, county, United States or any public corporation * * * in an action * * * if judgment is given for the plaintiff, it shall be given for treble the amount of damages claimed, or assessed for the trespass." ORS 105.815 provides that if the trespass was casual or involuntary, judgment shall be given for double damages.

The complaint alleged that defendant without authority cut down 86,000 board feet of the Government's timber, thereby damaging the land in the amount of $1,913.50, and thereafter the Government sold the timber for the sum of $2,420.90, representing its reasonable market value. The Government claimed that it was damaged in the amount of $3,827, representing double stumpage pursuant to ORS 105.815, less $2,420.90, or a net balance of $1,406.10. Defendant contended that since the sum realized by plaintiff in mitigation more than equaled the original damages (stumpage value), the net damage to the plaintiff was zero, and since zero when

doubled is still zero, the complaint failed to state a cause of action. Defendant's demurrer was sustained by the circuit court.

The Supreme Court of Oregon on appeal held that the correct formula in assessing damages is to determine the actual damage to the freehold, then double or treble such damages, as the facts of the case may indicate, then allow such sums in mitigation as may be appropriate in a given case, and that to hold otherwise would, in practical effect, repeal most of the statutory scheme. As an illustration the Court pointed out that if defendant's formula were applied to a wilful trespass, a wilful defendant equally could escape liability by leaving some of the trees on the ground, and as long as enough logs were left so that a vigilant owner could sell them for a price equal to the stumpage value of the timber cut, the owner who suffered the involuntary harvest of his timber would have to bear it in silence since "Three times zero is the same as two times zero." The Court held that the legislative purpose expressed in the statutes in awarding multiple damages is to compensate the owner whose land is trespassed upon and to put tree cutters on notice that they cut beyond their boundaries at their peril, both of which purposes would be defeated by defendant's interpretation in most cases where mature timber is severed by a trespasser.

The Court further held that while the principle of mitigation, or of the duty of a plaintiff to avoid loss following a trespass, is not a part of the statutory plan, it is a principle of common law adopted by the courts because justice requires it, and that a plaintiff in a situation where mitigation is appropriate is really under a disability to collect for avoidable losses, rather than under a duty to avoid the losses. Further, the duty of plaintiff to protect himself from enhanced loss should not be confused with the primary legal duty of a trespasser to pay for the wrong as of the time it was done. The Court held that the complaint stated a cause of action and reversed the decision and remanded the case.

Staff: Margaret S. Willick (Lands Division).

Eviction; Power of United States to Evict Lessee of Government Building; Judgment on Pleadings Upheld. United States v. Harvey Blumenthal (C. A. 3, March 20, 1963.) The United States leased a building to appellant on a month-to-month basis for a clothing manufacturing business. On March 2, 1962, the United States ordered appellant to deliver up the demised premises, which he refused to do. The United States sued to obtain the premises and obtained a judgment on the pleadings awarding restitution of the premises and a money judgment for overdue rent. On appeal, appellant contended that judgment on the pleadings was improper because appellant's answer raised factual defenses. The Court of Appeals affirmed. As to appellant's contention that a defense was present because appellant had been evicted and similar lessees had not, the Court noted that the United States had the same absolute right as any other landlord to terminate a monthly lease by giving appropriate notice, without giving any reason.

Appellant's allegation of irreparable damage is no defense because this is a risk he took when he accepted a month-to-month lease.

Staff: Assistant United States Attorney Alexander A. Farrelly (D. of the Virgin Islands).

* * *

TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CRIMINAL TAX MATTERS

IMPORTANT NOTICE

Prosecution under Section 7210 of the Internal Revenue Code of 1954 (26 U.S.C. 7210) for failure to obey a summons issued by the Internal Revenue Service should not be initiated without first securing specific authorization of the Tax Division. These cases should be processed by the Service and referred to the Tax Division just like any other proposed tax prosecution. See United States Attorney's Manual, Title 4, pages 43-44; The Trial of Criminal Income Tax Cases, pages 1-3.

United States Attorney's Manual, Title 4; page 27, is supplemented accordingly.

CIVIL TAX MATTERS

Appellate Decision

Priority of Liens: Pledgee of Collateral Mortgage Note, Pledged Before Government's Tax Lien Recorded, Entitled to Priority Over Tax Lien. Rex Finance Co. v. Martha R. Cary and Walter B. Cary, et al. (September 4, 1962, C.A. 4), 63-1 USTC ¶9319. Defendants executed a negotiable promissory note in the amount of $15,000, payable to bearer on demand and secured by a mortgage on certain realty. The note was placed in a locked drawer at defendants' place of business. One Guedry, defendants' son-in-law, obtained possession of the note without defendants' knowledge or consent, and pledged it with plaintiff as security for a loan in the amount of $12,000, giving plaintiff his personal note for that amount. Subsequent to the pledge of the mortgage note, the United States filed a notice of tax lien. Thereafter, Guedry executed a new note in the sum of $15,000, in consolidation of the original loan of $12,000 and an additional loan of $3,000. Upon Guedry's failure to pay his personal note, plaintiff instituted an action seeking the foreclosure of the mortgaged property. Since the pledge of the collateral mortgage note preceded the recordation of the federal tax lien, the United States contended that the execution of the new note for $15,000 extinguished the original debt by novation, and that the pledge of the mortgage note as security for the new debt created a lien inferior in rank to that of the Government's lien. The Court of Appeals, however, affirmed the District Court's decision in favor of plaintiff on the ground that novation requires the extinguishment of an existing obligation and the substitution of a new obligation in its place. Since Guedry's pre-existing obligation had never been extinguished, no novation ever occurred. Despite the Appellate Court's ruling, however, the Government prevailed to the extent of $3,000, representing the increased portion of the indebtedness, as plaintiff failed to appeal from the trial court's ruling that the pledge to secure such increase was subsequent in time to the filing of the federal tax lien.

Staff: United States Attorney Louis C. La Cour; Assistant United States Attorneys Nicholas J. Gagliano and Kathleen Ruddell (E.D. La.).

District Court Decisions

Examination and Summoning of Corporate Records Upheld Against Claim That Manner in Which Search Was Initiated and Carried Out Was Illegal and Violated Petitioner's Constitutional Rights. Badger Meter Manufacturing Co. v. Brennan (E.D. Wis.), 63-1 USTC ¶9330. In an action seeking the return of certain records and the suppression of evidence in any criminal proceedings of these records, the petitioners, a company official under criminal indictment and his company, alleged that the way in which the investigation of the company records was brought about and conducted deprived petitioners of their constitutional rights and was not authorized under the applicable statutes. It was established that the investigation in question was carried out jointly by a special agent and an internal revenue agent; that the internal revenue agent, from the time that he was dispatched alone to begin the examination, was aware of the purpose of the investigation, which was to uncover evidence of criminal activity by the petitioning company official; and that no notice of the purpose of the investigation was given to petitioners until the special agent came to the company premises at least two weeks after the examination had begun.

The Court held that petitioners' rights under the Fourth Amendment concerning illegal search and seizure and under the Fifth Amendment were not violated by such an investigation, for petitioners had consented to the search, and the mere failure to inform petitioners of their constitutional rights was not in itself a violation of their rights. The petitioning official's contentions that the examination and the summons subsequently issued under 27 U.S.C. 7602 were not authorized by the applicable statutes because they were directed toward the uncovering of criminal violations and against a possible criminal defendant were rejected by the Court, as was his contention that the commencement of the Section 7604 enforcement proceedings amounted to unlawful coercion and compulsion. Motion to suppress denied and appeal dismissed on ground that the order was interlocutory.

Staff: United States Attorney James B. Brennan and Assistant United States Attorney Francis L. McElligot (E.D. Wis.).

Bankruptcy; Assessment Against Responsible Officer of Corporation Although Not Assessed Until After Adjudication of Bankruptcy Is Provable Claim; Assessment Under Section 6672, I.R.C., Is Not Penalty Within Meaning of Section 57(j), Bankruptcy Act. In the Matter of Michael Serignese, Bankrupt. (D.C. Conn. 1963), CCH 63-1 USTC ¶9378. Michael Serignese, an officer of Advance Caterer's Inc., conducted that business following its adjudication as a bankrupt on August 31, 1960 during the third and fourth quarters of 1960 and for the first quarter of 1961. On January 21, 1961, Serignese was adjudicated a bankrupt. Tax liabilities were assessed against Serignese on July 28, 1961 for withheld income tax liabilities and for Federal Insurance Contribution Act tax liabilities for the periods during which he conducted the business. Proof of claim was timely filed in the bankruptcy proceeding. From an order of the Referee disallowing the claims of the United States, the Government filed a petition for review. In the oral argument, the Government abandoned its claim for taxes for the first quarter of 1961.

In its opinion, the Court stated that the tax liabilities assessed under Section 6672 of the Internal Revenue Code were not penalties within the meaning of Section 57(j) of the Bankruptcy Act, citing In re Haynes, 88 F. Supp. 379. The Court distinguished Simonson v. Granquist, 369 U.S. 38 and In the Matter of Tom's Villa Rosa, Inc., 198 F. Supp. 137 on the grounds that both those cases involved penalties in addition to taxes. In the instant case, the Court said the penalty under Section 6672 merely recoups the losses to the United States by non-payment of the taxes by the corporate taxpayer.

The Court also declared that the liabilities under Section 6672 were contingent liabilities, and therefore provable claims under Section 63(a)(8) of the Bankruptcy Act. The Referee had ruled that the tax claims were not provable because they were not fixed liabilities and thus provable under Section 63(a)(1) of that Act. The Court stated that Serignese was inchoately liable for the taxes due from the corporate bankrupt because of his willful evasion of their payment, citing Bloom v. United States, 272 F. 2d 215. The matter was remanded to the Referee to allow the claims for the third and fourth quarters of 1960.

Staff: United States Attorney Robert Zampano; Assistant United States Attorney Irving Perlmutter (D. Conn.); Maurice Adelman, Jr. (Tax Division).

Federal Tax Liens Enforced Against Cash Surrender Value of Insurance Policies Even Though Nontaxpayer May Have Paid Premiums and Had Physical Possession of Policies. William B. Smith v. Hank P. Smith (Feb. 11, 1963, District of Columbia) CCH 63-1 USTC par. 9309. The United States filed motions for judgment of condemnation of two life insurance policies seeking to obtain their cash surrender values to be applied against the judgment previously entered against plaintiff taxpayer. Plaintiff disclaimed any property interest in the policies and his wife maintained the policies belonged to her, that she secured the policies on her husband's life, has physical possession of them, and has paid the premiums thereon with her own funds. She relied primarily on the case of United States v. Burgo, 175 F. 2d 196 (C.A. 3). The Court pointed out the facts in this case differ from the Burgo case. Here the insured, William Smith, the taxpayer, actually changed the beneficiary of one policy from his wife to his grandson in 1961 and borrowed against that policy in 1947. As to the second policy he changed the beneficiary in 1962. In each of the policies, taxpayer reserved the right to change the beneficiary and to obtain a loan against the policy. Each insurance company stated the respective policy was issued to the insured taxpayer. The Court found that while the insured did not have actual physical possession of the policies, it is clear he did procure the policies, that he has the sole power to change the beneficiary, that only he could make a loan against them, and that he also had the sole power to cash them in. Mere physical possession by his wife is not sufficient to defeat these rights. If the policies were lost he alone could require a duplicate to issue. It was also clear to the Court that there had been no legal assignment of either policy under the respective contracts so as to be binding upon the insurance companies.

The Court, in considering the evidence and looking to the legal ownership of the property interests, found that legal title to the policies and therefore to the proceeds of the cash surrender value, lies with the insured taxpayer during his lifetime; and if, as here, a federal tax lien attaches before his death, said lien cannot be defeated by another's allegation of physical possession of them and payment of certain premiums, absent proof of formal assignment as required by the contracts themselves.

Staff: United States Attorney David C. Acheson and Assistant United States Attorney Robert B. Norris (Dist. of Col.); Paul T. O'Donoghue (Tax Division).

Enforcement of Tax Liens on Life Insurance Where Taxpayer-Insured Served by Publication. United States v. Samuel C. Brody and The Equitable Life Assurance Society of the United States. (February 12, 1963, D. Mass.) CCH 63-1 USTC ¶9315. This was an action to enforce tax liens on two policies of insurance on the life of a delinquent taxpayer. Taxpayer had left the United States and his whereabouts were unknown. He was served by publication. The policies had matured as endowments due to the taxpayer-insured and were in possession of his attorney in Florida. The court (Judge Wyzanski) held that it had jurisdiction over the policies by reason of its having jurisdiction over the insurer obligated to pay thereunder and that a physical surrender of the policies was unnecessary, since the insurer would be protected by the judgment of the court from any further liability thereunder. The Court further held that venue was proper in Massachusetts, since the insurer was licensed to do business there, the tax liability had accrued there and the returns had been filed in that District. Accordingly, the Court, granting summary judgment for the Government, held that the Government was entitled to an order directing the insurer to pay the endowment proceeds of the policies to the Government.

Staff: United States Attorney W. Arthur Garrity, Jr., and Assistant United States Attorney Daniel B. Bickford (D. Mass.) and Robert L. Handros (Tax Division).

Priority of Liens; Validity as Against Mortgagees; Federal Tax Liens Attached to After-Acquired Property Acquired by Taxpayer in Name of Straw Party and Had Priority Over Mortgages Given by Straw Where Mortgagee Had Actual Or Implied Knowledge That Taxpayer Was Real Party In Interest. United States v. Code Products Corp., et al. (January 28, 1963, E.D. Pa.), CCH 63-1 USTC ¶9367. Following a default under a Chapter XI arrangement plan, suit was commenced against Code Products Corporation to enforce various tax liens, the first of which had arisen in 1953, with notice filed in 1954. A receiver was appointed under Section 7403, I.R.C., and took possession of various properties, including a large factory building. At the time the first tax lien arose the building was owned by defendant Lix, subject to an option to purchase in favor of taxpayer, which option expired in 1954. Taxpayer was in possession of the building in January, 1955, when title was taken in the name of the wife of taxpayer's president. A mortgage for $100,000 was given to Mutual Insurance Company, $55,000 of which represented purchase money. In December, 1955, title was conveyed to taxpayer. Evidence was introduced to show

that the mortgagee's representative, a real estate and mortgage broker, was aware of taxpayer's interest in the property. The Court held that the wife of taxpayer's president acted solely as a straw or nominee, that taxpayer was the real party in interest in January, 1955, and that except for the portion of the mortgage used to acquire the property, pre-existing federal tax liens attached and took precedence over the mortgage. The Court stated that "a person having statutory notice of the existence of federal tax liens may not, by the device of taking title in the name of a straw party, prevent those liens from attaching to real estate when it is acquired. Nor will the lien be subordinated to a mortgage (other than a purchase money mortgage) given at the time title vests to a mortgagee having knowledge of the fact that the nominal owner is a straw." (Emphasis supplied.) The Court also denied priority over the tax liens to mortgagee's assignee, for claims for attorneys' fees and insurance premiums paid under terms of the mortgage. Relative priority of federal and local real estate tax liens was determined on the first in time, first in right principle of United States v. City of New Britain. However, the portion of local taxes representing water and sewer rent were subordinated to federal tax liens.

Staff: United States Attorney Drew J. T. O'Keefe (E.D. Pa.); James F. Shepherd (Tax Division).

* * *