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

October 18, 1963

United States

DEPARTMENT OF JUSTICE

Vol. 11 No. 20

UNITED STATES ATTORNEYS

BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 11 October 18, 1963 No. 20

CIVIL SERVICE JOURNAL

The United States Attorneys have been placed on the distribution list for the Civil Service Journal, a publication issued quarterly by the Civil Service Commission. The next issue of the Journal is scheduled for publication about October 20. The Purpose of the Journal is to "strengthen communications between the Commission and its working publics." It is believed the United States Attorneys will find much in this Journal to interest them.

MONTHLY TOTALS

	July 31, 1963	August 31, 1963	
Triable Criminal	8,284	8,774	+ 490
Civil Cases Inc. Civil Less Tax Lien & Cond.	15,412	15,684	+ 272
Total	23,696	24,458	+ 762
All Criminal	9,917	10,320	+ 403
Civil Cases Inc. Civil Tax & Cond. Less Tax Lien	18,099	18,331	+ 232
Criminal Matters	13,342	13,952	+ 610
Civil Matters	14,014	13,936	- 78
Total Cases & Matters	55,372	56,539	+ 1,167

	First 2 Months Fiscal Year 1963	First 2 Months Fiscal Year 1964	Increase or Decrease Number	%
Filed				
Criminal	4,597	4,497	- 100	- 2.18
Civil	4,497	4,684	+ 187	+ 4.16
Total	9,094	9,181	+ 87	+ .96
Terminated				
Criminal	4,005	4,076	+ 71	+ 1.77
Civil	3,841	3,981	+ 140	+ 3.64
Total	7,846	8,057	+ 211	+ 2.69
Pending				
Criminal	9,910	10,309	+ 399	+ 4.03
Civil	23,547	23,228	- 319	- 1.35
Total	33,457	33,537	+ 80	+ .24

	Filed			Terminated		
	Crim.	Civil	Total	Crim.	Civil	Total
July	2,252	2,456	4,708	2,305	2,129	4,434
Aug.	2,245	2,228	4,473	1,771	1,852	3,623

The average number of cases terminated in fiscal 1963 was 2,712, and in May, the peak month for criminal terminations, the number reached 3,358. The average number of civil terminations in fiscal 1963 was 2,206, and in June, the high point for civil terminations, reached 2,901. How far the number of terminations per month has dropped can be seen from the foregoing figures. It is not clear why the intensive activity which usually characterizes the last two months of the fiscal year cannot be achieved throughout the whole fiscal year.

For the month of August, 1963, United States Attorneys reported collections of $4,189,714. This brings the total for the first two months of this fiscal year to $7,308,065. This is $363,222 or 5.23 per cent more than the $6,944,843 collected in August, 1962.

During August, $4,412,884 was saved in 67 suits in which the government as defendant was sued for $5,225,134. 40 of them involving $2,480,321 were closed by compromises amounting to $679,814 and 15 of them involving $595,526 were closed by judgments amounting to $132,436. The remaining 12 suits involving $2,149,287 were won by the government. The total saved for the first two months of the current fiscal year was $10,096,200 and is an increase of $1,128,168 or 12.58 per cent from the $8,968,032 saved in July and August of fiscal year 1963.

The cost of operating United States Attorneys' Offices for August, 1963 amounted to $2,942,862 as compared to $2,614,409 for August, 1962.

Total filings for the first two months of fiscal 1963 rose by .96 per cent over the same period in fiscal 1963, and total terminations rose by 2.69 per cent. The combined increase in these two categories was 3.65 per cent, whereas, the cost of operating United States Attorneys' offices rose by 12.5 per cent. Part of this rise was caused by salary increases, but if the expenditure figures for 1963 hold true in fiscal 1964, it will be seen that among the greatest increases are travel, long distance calls, and photocopy paper. Increases in expenditures should be justified by increases in volume of work but the expenditure rate was far in excess of the work production rate in fiscal 1963.

DISTRICTS IN CURRENT STATUS

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

CASES

Criminal

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

CASES

Civil

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

MATTERS

Criminal

Ala., S.	Calif., S.	Ga., M.	Ind., S.	La., W.
Alaska	Colo.	Ga., S.	Iowa, N.	Me.
Ariz.	Del.	Ill., E.	Iowa, S.	Md.
Ark., E.	Fla., M.	Ill., S.	Ky., E.	Minn.
Ark., W.	Ga., N.	Ind., N.	Ky., W.	Miss., N.

MATTERS

Criminal (Contd.)

Miss., S.	N. C., M.	S. C., E.	Tex., W.	W. Va., S.
Mont.	N. C., W.	S. D.	Utah	Wis., W.
Nev.	Okla., N.	Tenn., M.	Vt.	Wyo.
N. H.	Okla., E.	Tenn., W.	Va., W.	C. Z.
N. J.	Pa., W.	Tex., E.	Wash., E.	V. I.
N. Mex.	R. I.	Tex., S.	W. Va., N.	

MATTERS

Civil

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

* * *

ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

SHERMAN ACT

Price Fixing-Liquefied Petroleum Gas; Indictment Under Section 1. United States v. Suburban Gas, et al. (D. Oregon). On September 24, 1963, a grand jury sitting in Portland, Oregon, returned an indictment against Suburban Gas and its president, charging price fixing and allocation of customers in northwestern and central Oregon in violation of Section 1 of the Sherman Act. Defendant Suburban Gas is a major distributor of liquefied petroleum gas (propane and butane) on the West Coast. Named as co-conspirators but not as defendants were four Oregon competitors of said defendant.

The indictment charges that defendants and co-conspirators conspired from August 1959 through some time in 1961 to raise, fix and maintain prices at which liquefied petroleum gas was sold to consumers and to refrain from soliciting the customers of each other.

Defendant and co-conspirators sell approximately 7,730,000 gallons of liquefied petroleum gas worth about $1,500,000 in the market area annually, largely for use as heating and cooking fuel.

Staff: Lyle L. Jones, Marquis L. Smith, Don H. Banks and Gerald V. Barron (Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURTS OF APPEALS

POSTAGE REFUNDS

District Court Has Jurisdiction Over Actions for Refund of Allegedly Excessive Postage Paid; Action for Refund Time-Barred by 28 U.S.C. 2401 (a) if Not Commenced Within Six Years of Postmaster General's Decision Denying Special Rates. Christian Beacon v. United States (C.A. 3, September 12, 1963). Appellant's application in 1949 to the Postmaster General for a special second-class mailing classification as a non-profit corporation was denied in 1949. The special classification was subsequently granted in 1961. Appellant then brought an action for refund of allegedly excessive postage paid during the immediately preceding six years (action on the earlier payments being concededly time-barred). The district court granted the Government's motion for summary judgment on the ground that it had no jurisdiction of such actions "because of the sovereignty of the United States of America."

The Third Circuit held that adequate jurisdictional bases for such actions can be found in 28 U.S.C. 1339 and 1346 (a)(2). The Court, however, affirmed the judgment of the district court on the ground that the action was time-barred by the six-year limitations provision in 28 U.S.C. 2401(a). The Court held that this statute of limitations began to run as of the Postmaster General's adverse ruling in 1949, from which appellant did not seek judicial review, and that consequently the present refund action, which in effect sought review of that decision, had been time-barred long before its commencement.

Staff: United States Attorney, David M. Satz, Jr., Assistant United States Attorney Herbert S. Jacobs (D. N.J.)

SOCIAL SECURITY ACT

Existence of Partnership Need Only Be Proved by Preponderance of Evidence; Requirement of "Clear and Convincing" Evidence Too Stringent. Williams v. Ribicoff (C.A. 5, September 24, 1963). In this case, claimants' entitlement to social security benefits turned solely on whether their deceased mother had been a partner in the family business. The Secretary found that she had not been a partner, and the district court affirmed.

The Fifth Circuit held that, while "there is sufficient evidence to support a decision either way on the crucial question of partnership," the Secretary had applied too stringent a standard of proof in requiring "clear and convincing" evidence of a partnership arrangement. The Court held that this matter need only be proved by a preponderance of the evidence, and remanded the case to the Secretary for decision under the correct standard. Although expressing the view that "it is hard to perceive how a decision was reached rejecting the existence of the claimed

partnership," the Court ordered the remand "to insure that the requirements of orderly procedure are observed."

Staff: United States Attorney Robert A. Hauberg (S.D. Miss.)

TORT CLAIMS ACT

Inadequate Award for Pecuniary Loss in Action for Wrongful Death. Simpson v. United States (C.A. 5, September 19, 1963). This appeal in a wrongful death action raised only the question of the adequacy of the damages awarded by the district court. The Court of Appeals held that the award of $14,000 was "shockingly small" in view of the fact that decedent had a life expectancy of 16 years, and that his widow was expected to lose more than $1,700 per year as a result of his death. The Court remanded the case with instructions to enter judgment for $27,000 pecuniary loss (apparently 16 times $1,700) plus $2,317.75 in uncontested funeral expenses.

Staff: United States Attorney H. Barefoot Sanders, Jr.; Assistant United States Attorney Melvin M. Diggs (N.D. Tex.)

DISTRICT COURT

TORT CLAIMS ACT

Feres Case Bars Recovery for Injury Caused by Negligent Ordering of Inductee to Active Military Service. Nelson Dominguez-Ruiz v. United States (D. Puerto Rico, September 20, 1963). In this suit under the Federal Tort Claims Act, plaintiff alleged that he had reported for an Army pre-induction physical examination in 1958 where X-rays taken revealed the existence of fractured femoral heads in his pelvis bone, and that as a result of such examination he was rejected for active duty. In 1962 he was ordered by the Selective Service System to undergo a second pre-induction physical examination during which, in spite of plaintiff's requests therefor, no X-rays were made of his pelvis bone. Instead he was declared fit to serve in the armed forces and was sent to Fort Jackson, South Carolina, for basic training. As a result of the basic training he became ill, suffering complete paralysis of his lower extremities. He was admitted to Fort Jackson Hospital and subsequently was discharged from the armed services.

Plaintiff alleged that the Government doctors were negligent in not conducting a complete and thorough medical examination at the time of his induction into the armed services.

The Court, granting the Government's motion to dismiss, held that the suit was governed by the "incident to military service" principle of Feres v. United States, 340 U.S. 135, and Healy v. United States, 192 F. Supp. 325, aff'd, 295 F. 2d 958 (C.A. 2).

Staff: United States Attorney, Francisco A. Gil, Jr., Assistant United States Attorney Gilberto Gierbolini (D. Puerto Rico); Vincent H. Cohen (Civil Division)

RAILWAY LABOR ACT

District Court Lacks Jurisdiction to Review National Mediation Board's Selection of Form of Ballot for Representation Elections. Droggos v. National Mediation Board (N.D. Ohio). The ballot used in representation elections by the National Mediation Board under the Railway Labor Act does not provide a space in which an employee can mark his preference for "no representation" in collective bargaining. The ballot provides only for a choice between representatives. In Association for the Benefit of Non-Contract Employees v. National Mediation Board, 218 F. Supp. 114, the District Court for the District of Columbia held that this ballot violated the employees' statutory right to vote for "no representation". In the instant case, eight employees of Lake Central Airlines filed an action to enjoin the Board from using the allegedly improper ballot in a representation dispute between employees of that airline. The District Court, refusing to follow the A.B.N.E. decision, dismissed the complaint. The Court held that it lacked jurisdiction to consider the propriety of the Board's selection of a form of ballot, but also indicated that the Board's form of ballot did not deprive the employees of any statutory right.

Staff: John J. Cowan (Civil Division)

STATE COURT

LIEN PRIORITY

Judgment Lien Assigned to United States and Judgment Obtained Directly by Government Held Entitled to Priority Over Subsequent Real Estate Taxes. Savings Bank Retirement System v. Haney; Bank for Savings v. Scuderi (N.Y. Sup. Ct., New York Law Journal, August 23, 1963, p. 7). Citing Jamaica Savings Bank v. Pirozzi, New York Law Journal, February 15, 1963, page 17 (see 11 United States Attorney's Bulletin 6), a New York State Supreme Court Justice in Haney has decided in a mortgage foreclosure action that a judgment lien obtained by a bank on an insured home improvement loan, and thereafter assigned to the Government pursuant to the National Housing Act, Title I, could not be subordinated to local real estate tax liens because prior in time. Similarly, in Scuderi a judgment obtained directly by the Government in a mortgage foreclosure action pursuant to Title I of the National Housing Act was accorded priority over real estate taxes which accrued later in time.

The priority thereby granted to both the judgment lien assigned to the United States and the judgment lien obtained directly by the Government is thus identical to the priority accorded a federal tax lien competing with subsequent local realty taxes. United States v. Buffalo Savings, 371 U.S. 228. The Court reached this result despite

the argument that Congress had intended, in the National Housing Act, 12 U.S.C. 1706b, to subordinate such judgment liens to junior local tax liens.

Staff: United States Attorney Joseph P. Hoey, Assistant United States Attorney Thomas J. Lilly (E.D. N.Y.)

* * *

CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Voting and Elections: Civil Rights Acts of 1957 and 1960. United States v. Board of Registration of the State of Louisiana (E.D. La.). The Department of Justice, on October 8, 1963, filed suit in the United States District Court for the Eastern District of Louisiana under the Civil Rights Acts of 1957 and 1960. The defendants named in this action are: the State Board of Registration of Louisiana; its members - Governor Jimmie H. Davis, Lieutenant Governor C. C. Aycock and J. Thomas Jewel, Speaker of the Louisiana House of Representatives; Hugh E. Cutrer, Jr., Director of the Board, and the State of Louisiana.

The complaint, the second one filed by the Department to challenge the constitutional validity of Louisiana's voter qualification laws, alleges that the use of the Louisiana application for registration form as a test violates the Fourteenth and Fifteenth Amendments to the United States Constitution. The complaint alleges that the history of the adoption and use of the test demonstrates that its purpose is to disfranchise Negroes and to maintain white political supremacy in Louisiana. Highly qualified Negroes have been denied registration for making technical errors in filling out the form while white applicants have been assisted in filling out the form and have been registered in spite of errors similar to those for which Negroes have been denied registration. In addition, the complaint alleges that the test is arbitrary, is not a reasonable measure of literacy or intelligence, and is not reasonably related to any legitimate interest which the State of Louisiana may have in limiting the right to vote. The complaint asks that a three-judge court be convened to declare the test unconstitutional, that the further use of the test be enjoined, and that all persons who have been denied registration solely on the ground of having failed the test be placed upon the voter registration rolls.

Staff: United States Attorney Louis LaCour (E.D. La.); John Doar, David Norman and Frank Dunbaugh (Civil Rights Division)

* * *

CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

FALSE BOMB REPORT

Sufficiency of Defense; Defendant's Claim Word "Bomb" Used to Mean Something Other Than Word Reasonably Calculated to Cause Fear, Horror, and Panic in Circumstances, Rejected. United States v. George Albert Rutherford (E.D. N.Y.). On September 12, 1963, in a jury-waived trial the Court found defendant guilty of an offense under 18 U.S.C. 35(a), the misdemeanor section of the false bomb report statute. Some aspects of the case are typical of many false bomb report situations and for that reason it should serve as valuable precedent.

Defendant had boarded a commercial airliner carrying a wooden box some twelve by eighteen inches with a black handle, and walked from the first class section toward the rear of the plane. Defendant testified that after the stewardess checked his hat and coat, in answer to her question, "Can I take that?", he said, "No, me and my bomb will sit here". The stewardess testified he said, "I have to sit near the back because I have a bomb". Defendant further testified that he is a deck officer in the Merchant Marine; that in navigation lingo a sextant is called a bomb; and that when he used the word bomb, he meant to refer to his sextant. (A search of the box at the time of the incident showed it contained a sextant.) An expert witness for the Government testified that a sextant is sometimes referred to as a "hambone" but never a "bomb". Another Government witness testified that after defendant made the statement, an unidentified person said, ". . . something about a tail blowing off", and the witness then testified, defendant then said, ". . . he didn't care, he had plenty of insurance." Defendant denied making this statement.

Two items in this evidentiary pattern are significant, in that they frequently occur, and might at first glance be thought to give some prosecutive pause. The fashion in which the judge disposed of them in the Government's favor, however, dispels doubt in future cases. The first is the conflict between defendant's testimony as to the exact words he used, and the stewardess' testimony in that regard. Of this the Court said, "The conflicting version of the substance of the defendant's declaration at the time is inconsequential". It is noted that both versions recited the fact of possession of a "bomb". The second item is defendant's contention that his use of the word "bomb" was not to be taken literally or at face value, but that his use of the word referred only to his sextant and is not proscribed by 18 U.S.C. 35(a). The Court found as a matter of fact that a sextant is not commonly referred to by seamen or anyone else as a "bomb". It then cited the case of United States v. Allen, C.A. 2, 317 F. 2d 777, at page 778 (U. S. Attorneys Bulletin, Vol. 11, No. 11, p. 310) where the Circuit Court stated that the false report that a bomb was in a bag that a passenger was to carry aboard a plane was open to the inference that the destruction of the plane was contemplated. The Court here then went on to say that:

It is no defense that defendant in uttering a word reasonably calculated to cause fear, horror and panic in the circumstances in which it was uttered, really intended to convey a different thought, clothed in an abstruse definition or use of the word. The word cannot be isolated from the event in determining the guilt or innocence of the defendant. [Citing Schenck v. United States, 249 U.S. 47, 52.]

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorney Gilbert Bond (E.D. N.Y.).

ASSAULT ON FEDERAL OFFICER

Motion to Dismiss Indictment Charging Assault on Assistant United States Attorney, An Act for Which Defendant Had Been Previously Held in Contempt, on Ground of Double Jeopardy Denied. United States v. Anthony Mirra (S.D. N.Y., July 19, 1963). In the course of cross-examination by an Assistant United States Attorney regarding past convictions in the trial of another case, in which the subject was also a defendant, he arose, picked up the witness chair, and threw it at the prosecutor. For this incident, he was held in contempt of the court. He was also indicted and charged with a violation of Section 111 of Title 18, United States Code, for assault on a Federal officer. Defense counsel thereafter moved to dismiss the indictment on the ground of double jeopardy.

In denying the motion to dismiss, the Court observed that two different types of proceedings were involved rather than two different criminal proceedings - contempt which has been characterized by the Supreme Court as sui generis, and assault on a Federal officer, which is a normal criminal charge. Observing that Congress had seen fit to protect the dignity and decorum of the court by empowering the Federal courts to redress spontaneously and summarily an outrage or indignity committed in its presence, the Court, in effect, accepted the Government's argument that punishment for contempt was for an act of disrespect to the court in the court's presence and that the charge of assault was for the act of violence directed toward the prosecutor. The Court noted that if the assault had resulted in death, it would be absurd to hold that defendant could not be punished both for contempt and for homicide. In reaching this conclusion, the Court relied upon language in Merchants' Stock & Grain Co. v. Board of Trade of Chicago, 201 Fed. 20, 27 (C.A. 8, 1912), to the effect that an act which is a contempt of court and also a crime may be punished both by summary provision and by indictment, and neither will bar the other, the constitutional provision protecting an offender against double jeopardy being inapplicable, and also upon dicta in Jurney v. MacCracken, 294 U.S. 125, 151 (1935), and In re Chapman, 166 U.S. 661, 671-672 (1897).

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorney William Tendy (S.D. N.Y.).

CONSPIRACY

Deprivation of Civil Rights. United States v. Lester, et al. Three policemen, an attorney, and two nightclub operators were indicted and tried in the Eastern District of Kentucky before the Honorable Mac Swinford for conspiracy and a civil rights violation. The case arose out of an arrest and trial of George Ratterman, former professional football player and then reform candidate for County Sheriff, for disorderly conduct, breach of the peace, and resisting arrest. Ratterman was arrested by three Newport policemen in a disreputable hotel with a stripper named April Flowers. The following day medical tests indicated that Ratterman had the drug chloral hydrate in his system. At trial it was argued that the arrest was the product of a plan contrived by defendants to discredit Ratterman and thereby destroy the chance of a reform Government in Newport, which was nationally known for its night life and gambling activities. Ratterman himself was acquitted of the charges against him in the local police court, after a much publicized trial. He then went on to win his election.

Last summer the trial of the above six resulted in a hung jury after a month-long trial. The trial was repeated again this past summer when the second jury convicted the attorney and one of the hotel proprietors on the conspiracy count but acquitted them of the substantive civil rights violation and acquitted the other four (all of the policemen) on both counts. The maximum sentence was adjudged by the Court.

The basis of the Government's case was that Ratterman was deprived of his civil rights by being arrested by policemen acting wilfully and under color of law, but without legal cause or justification, imprisoned briefly, forced to make bail and be tried on false charges, all in violation of his rights to equal protection and due process of law. The case will be appealed to the Sixth Circuit Court of Appeals.

Staff: Ronald Goldfarb, Joseph Corey, and Harry Subin (Criminal Division.)

FALSE PERSONATION

Prosecutions Under 18 U.S.C. 912. In recent months the Criminal Division has received several inquiries concerning the effect of United States v. York, 202 F. Supp. 275 (E.D. Va., 1962), on prosecutions under the False Personation Statute, 18 U.S.C. 912. In York, the Court entered judgment for a defendant charged with violation of the statute's second clause (in such pretended character obtaining something of value) by construing this provision to require a showing that the accused was acting under the authority of the United States at the time of the transaction. This is a novel construction, unsupported by authority and ignoring established precedent to the contrary. The Department does not accept the analysis in York, since its conclusion is contrary to the statute's aim and would completely bar use of the provision in financial fraud situations. It is obvious that none of the imposters roaming the country passing bad checks

does so by virtue of a purported authority to receive money on behalf of the Government. On the contrary, they seek to capitalize on the integrity and good reputation of Federal employees in perpetrating fraudulent endeavors. As noted in United States v. Barnow, 239 U.S. 74, 80 (1915), the statute was designed not only to protect innocent persons from loss through reliance upon false assumptions of Federal authority but also to maintain the high reputation and dignity of the Federal service. The policy of vigorous prosecution in cases of impersonation of Federal officers and employees (United States Attorneys' Manual, Title 2, page 78)applies to instances where the subject passes bad checks or receives merchandise while posing as a Government employee as well as to cases where the subject pretends to be and acts as an officer of the United States.

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Review of Deportation Order Denied for Failure to Exhaust Administrative Remedies and Delay in Seeking Review. Shaffiq Kassab v. INS (C.A. 9, Sept. 24, 1963.) This is an appeal from several orders of the Immigration and Naturalization Service requiring that petitioner, a native of Iraq and a citizen of Israel, either voluntarily depart from the United States or be deported.

Because of petitioner's failure to depart from the United States at the expiration of his temporary stay as a visitor, he was found deportable on February 7, 1961 by a special inquiry officer and an order was entered by this officer requiring that petitioner depart voluntarily from the United States within such time and under such conditions as directed by the District Director of the Service at Los Angeles, and further providing that if petitioner did not depart as directed he was to be deported. Petitioner chose not to appeal this order to the Board of Immigration Appeals. The District Director gave petitioner until March 3, 1963 to depart, and upon his failure to do so directed him by letter of March 25, 1963 to surrender to the Service for deportation to Israel on April 9, 1963.

The question before the Ninth Circuit was whether petitioner was entitled to have his deportation order reviewed under Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a. The Court held that petitioner had not brought his case within the provisions of Section 106 in that he had not exhausted his administrative remedies by appeal to the Board of Immigration Appeals, and because his petition for review was not filed within six months from the date of the final deportation order. The Court reasoned that the final deportation order was the order of the special inquiry officer of February 7, 1961 and upon the basis of its decision in Mai Kai Fong v. INS, C.A. 9, 1962, 305 F.2d 239, found no merit to petitioner's argument that the final deportation order was the letter of March 25, 1963 of the District Director requiring petitioner to surrender for deportation. The petition for review was dismissed.

Staff: United States Attorney Francis C. Whelan; Assistant United States Attorney James R. Dooley (S.D. Calif.)

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Conspiracy to Defraud United States by Means of Filing False Non-Communist Affidavits. United States v. Dennis, et al. 18 U.S.C. 371 (D. Colo.). On September 20, 1963, six present and past officers of the International Union of Mine, Mill and Smelter Workers were convicted by a Federal jury in Denver, Colorado of conspiracy to defraud the Government by the illegal use of the facilities of the National Labor Relations Board by filing false non-Communist affidavits between 1949 and 1956. One defendant, Jesse R. Van Camp of Danville, Illinois, was found not guilty by the jury. The seven were previously convicted on the same charge in 1959 at Denver, Colorado, but were granted a new trial by the United States Court of Appeals for the Tenth Circuit on March 5, 1962. The reversal was based on the Court's ruling that an item of hearsay evidence had been admitted improperly. Bond has been continued at $5,000 for each and no date has been set for sentencing.

Staff: Assistant United States Attorney Donald McDonald (D. Colo.) and Lafayette E. Broome, Kirk Maddrix and Frank Worthington (Internal Security Division)

Foreign Agents Registration Act; Conspiracy, United States v. Igor Cassini and R. Paul Englander (D.D.C.) On February 8, 1963, the defendants were charged, by a four count indictment, with violation of the Foreign Agents Registration Act of 1938 (22 U.S.C. 612) and for conspiring to violate the provisions of that Act. (See, Bulletin, Vol. 11, No. 4, p. 104). On October 8, 1963, the case was called for trial. At that time, defendant Igor Cassini entered pleas of nolo contendere to each of the four counts. Defendant Englander entered a similar plea to one of the two counts against him by pleading nolo to the substantive offense of failure to register, and the Government moved to dismiss the remaining count which charged a conspiracy to violate the Act. Chief Judge Matthew McGuire, after ascertaining that both defendants understood that their pleas were "tantamount to a plea of guilty", accepted the pleas and postponed sentencing pending receipt of the report of the probation officer.

Staff: Alvin N. Goldstein, Jr. (Spec. Asst. to the Atty. Gen.); Kevin T. Maroney, Robert Keuch and George Fricker (Internal Security Division)

Traveling Without Validated Passport. United States v. Lee Levi Laub, Phillipp Abbott Luce, Stefan Martinot and Anatol Schlosser. On September 27, 1963, a grand jury in the Eastern District of New York returned a seven count indictment against the defendants. The first count charges defendants with having conspired to violate 8 U.S.C. 1185(b) in that they agreed to induce, recruit and arrange for a group of American citizens, including three of the defendants, to travel without bearing a valid passport to the Republic of Cuba. The remaining six counts charged three of the defendants, Laub, Luce and Martinot, who made the trip to

Cuba, with the substantive violations of departing from and entering into the United States without bearing validated passports. These three defendants were part of the so-called student group who traveled to Cuba via Europe in June of this year in violation of the State Department's travel ban.

This case marks the first prosecution for conspiracy to violate 8 U.S.C. 1185(b) and the second prosecution for the substantive offenses of departing from and entering into the United States in violation of the same section. The first entry case was that of United States v. William Worthy, Jr., who was convicted on August 8, 1962 (See: United States Attorneys Bulletin, Volume 10, No. 17, August 24, 1962). The first departure case was that of United States v. Helen Maxine Levi Travis who was indicted on June 26, 1963 (See: United States Attorneys Bulletin, Volume 11, No. 14, July 26, 1963).

Staff: United States Attorney Joseph P. Hoey (E.D.N.Y.)
Paul C. Vincent, Robert S. Brady and William Hipkiss (Internal Security Division)

* * *

LANDS DIVISION

Assistant Attorney General Ramsey Clark

Jurisdiction: Action to Enjoin Officials of General Services Administration and United States From Negotiating With Municipality for Sale of Surplus Property Without Competitive Bidding as Unconsented Suit Against United States; Discretion of Administrator of GSA under Federal Surplus Property Act, 40 U.S.C. 484(e)(3)(H); Effect of 28 U.S.C. 1391; Dismissal for Lack of Jurisdiction. Dover Sand and Gravel, Inc. v. R. W. Jones, Regional Director, General Services Administration, et al. (D. N.H., September 4, 1963). The United States condemned a portion of plaintiff's property for use as part of Pease Air Force Base and constructed four water wells upon it in connection with the water supply for the air base. A dam and flood control project in the immediate area rendered the tract acquired from the plaintiff no longer necessary for the water supply system of the air base, and the property was declared surplus to the General Services Administration for disposal.

GSA publicly invited bids for the property and three were received: $20,110 from plaintiff, $20,100 from the City of Dover, and a much lower one from a third party. All bids were rejected as being inadequate, which GSA was authorized to do under 40 U.S.C. 484(e)(2)(c). The City of Dover and GSA then commenced negotiations for the sale of the property to the City, which submitted an offer of $29,131 based upon the fair market value of the tract according to an appraisal report made for GSA. The Federal Surplus Property Act authorizes such privately conducted negotiations with a political subdivision of a state, "subject to obtaining such competition as is feasible under the circumstances, * * *." 40 U.S.C. 484(e)(3)(H). Plaintiff sought to negotiate with GSA for the sale of the property, but GSA refused to conduct any negotiations with plaintiff.

This action was then filed to enjoin the Regional Director of GSA, whose official headquarters are in Boston, Massachusetts, the General Services Administration and the United States from proceeding with the sale of the property to the City of Dover, or to others upon the ground that competition is "feasible" under the circumstances presented, and to require GSA to negotiate with the plaintiff.

The Court granted defendants' motion to dismiss the complaint for lack of jurisdiction. The Court held that the Regional Administrator of GSA was acting within the scope of his statutory authority in negotiating directly with the City, that it was wholly within the Administrator's discretion or that of his duly authorized subordinates to determine whether competition was feasible under the circumstances, and that accordingly the suit was one against the United States to which consent had not been given, citing Larson v. Domestic and Foreign Corp., 337 U.S. 682 (1949), Malone v. Bowdoin, 369 U.S. 643 (1962), and Dugan v. Rank, 372 U.S. 609 (1963).

The Court also held that the provisions of 28 U.S.C. 1361, vesting mandamus jurisdiction in the district courts, were not intended to create any new substantive rights and that if plaintiff could not have obtained relief before the enactment of section 1361 he was in no better position now.

Staff: United States Attorney Louis M. Janelle and Assistant United States Attorney Paul M. Normandin (D. N.H.)

United States; Suit Against Government Bureau Is Suit Against United States; Court Lacks Jurisdiction of Suit Against United States Without Its Consent. Cornelius Diserly v. Alfred Schmidt and Erwin Schmidt and Realty Section of Fort Peck Tribes and Superintendent of Fort Peck Indian Reservation (D. Mont.) This action was brought against the Realty Section of the Fort Peck Tribes and the Superintendent of the Fort Peck Indian Reservation for damages for alleged neglect of duties as plaintiff's guardian of land held in trust for him by the United States and for alleged defamation of character. The Court held that neither the Bureau of Indian Affairs nor any of its area offices or administrative units has any legal entity separate from the United States. The Court dismissed the complaint for lack of jurisdiction on the ground that the action was a suit against the United States without its consent.

Staff: Assistant United States Attorney Richmond F. Allan (D. Mont.)

* * *

TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

IMPORTANT NOTICE
SERVICE AND FILING OF ANSWERS - CIVIL CASES

Some confusion has arisen concerning the service and filing of answers and other responsive pleadings in civil matters in federal courts. This problem has been particularly acute in those districts where there are separate divisions of the district court located in cities in which there is no United States Attorney's office. The confusion stems from the belief that answers and similar pleadings are required to be filed on or before the last day.

Under Rule 12(a), the Federal Rules of Civil Procedure, answers are only required to be served within sixty days, or such extended time as may be allowed, and the same is true of other responsive pleadings. The only requirement as to filing is the provision of Rule 5(d) that any papers which are required to be served shall be filed within a reasonable time after service. The effect of these rules, with respect to refund and other civil suits is that it is entirely sufficient if the answer or other pleading is served on or before the last day. If such a pleading is placed in the mail on the last day and an appropriate certificate of service is executed, this constitutes sufficient compliance with the rules and avoids any default on the part of the United States. In those districts with branch offices of the district court located in other cities, it is sufficient if the United States Attorney's office places the pleading in the mail for service; it is not necessary that the pleading be received in the clerk's office on the last day. In the future, letters transmitting responsive pleadings from the Tax Division will accordingly refer to the date for service of the pleading.

CIVIL TAX MATTERS
District Court Decisions

Priority of Liens; Rights of Mortgagee to Proceeds of Dirt and Gravel Taken From Mortgaged Property. Berns Construction Co. v. U.S., et al., J. L. Wilson, Inc. v. U.S., et al. (S.D. Ind., August 8, 1963.) Taxpayer, while in default on his mortgage and while a foreclosure action was pending, contracted with plaintiffs to sell dirt and gravel from beneath the surface of his mortgaged farm. The mortgagee learned of the contracts and contacted plaintiffs demanding that any proceeds due under the contracts be held for her benefit. Prior to this, but after the commencement of the foreclosure proceedings, an assessment of income taxes was made against taxpayer. The mortgagee obtained a deficiency judgment against taxpayer. Approximately a month later, notice of lien was filed and notices of levy were served on plaintiffs. In the face of the conflicting claims, plaintiffs commenced these actions in interpleader which were later consolidated for the purposes of trial.

Basically, two issues were involved: (1) did the lien of the mortgage, executed prior to the assessment, follow the dirt and gravel severed from the realty and thus prime the federal tax lien; and (2) did the mortgagee's judgment per se make her a "judgment creditor" entitled to the protection of Section 6323 of the Internal Revenue Code of 1954.

The Court found that under Indiana law the lien of a mortgagee on realty follows elements severed from the realty, at least where the severance took place at the request of the mortgagor subsequent to the commencement of a foreclosure action, and when the value of the property is insufficient to satisfy the mortgage debt at the time the action is commenced.

The Court also held that the mortgagee became a "judgment creditor" entitled to the protection of Section 6323 on the date the foreclosure decree was entered. This was in spite of the fact that the severance of dirt and gravel from realty and the removal thereof appears to convert these elements into personalty; and that execution must be issued before a judgment creditor obtains a lien on personal property. The definition of "judgment creditor" as used in Section 6323 is the holder of a judgment and a lien. Miller v. Bank of America, 166 F. 2d 415. No decision has been made as to appeal.

Staff: United States Attorney Richard P. Stein; Assistant United States Attorney George K. Shields (S.D. Ind.); and Samuel A. Peters (Tax Division).

Offer in Compromise: Government's Motion to Amend Complaint to Add Count Alleging Offer in Compromise Null and Void on Ground of Fraudulent Inducements Granted Over Defendant's Objection That Amendment Stated New Cause of Action and Was Barred by Statute of Limitations. United States v. Sara Saladoff, Administratrix. (E.D. Pa. September 23, 1963.) The United States made an assessment on March 12, 1954 against defendant's decedent for the tax years 1948 - 1950. On November 15, 1955, defendant's decedent made an offer in compromise which offer was accepted by the Governmerment on April 18, 1956. The Government revoked the compromise on October 10, 1961 on the ground of default in payment and instituted suit on February 7, 1963 for the purpose of collecting the amount of the original assessment, less payments made pursuant to the offer. On April 23, 1963, the Government filed a motion to amend the complaint to add an allegation that the acceptance of the offer was induced by means of fraudulent misrepresentations. Defendant opposed the motion on the ground that it stated a new cause of action, and that the claim was barred by the statute of limitations under Section 6501(e)(1)(A) of the Internal Revenue Code of 1954. The Government contended that the amendment formed part of the same cause of action as set forth in the original complaint, and that the applicable statute of limitations was Section 6502 of the Internal Revenue Code of 1954. The offer in compromise contained a provision waiving the statute of limitations "for the period during which this offer is pending, or the period during which any installment remains unpaid, and for one year thereafter." Defendant argued that the Government could

not contend that the waiver provision was valid and binding, but that the remaining provisions of the offer were null and void because of the alleged fraudulent inducements. The Court held that the amendment did not state a new or different cause of action. Without deciding which statute of limitations was the applicable one (the Court did state that Section 6502 appeared to be governing), the Court held that the waiver provision was binding because in return for the Government's forebearance during the period the compromise was in effect, it was clearly contemplated by the parties that the statute of limitations would be waived. The Court reasoned that the default on the part of defendant's deceased should not work to defendant's benefit since defendant already had the benefit of the Government's inaction on its claim until the instant suit was filed. The Court's decision implies that the statute of limitations is suspended not only in situations where the offer in compromise is terminated by the Government for default in payments (see United States v. Wilson, 304 F. 2d 530 (C.A. 3d)), but also where the Government regards the offer as null and void because of fraudulent misrepresentations made to induce the Government to accept the offer.

Staff: United States Attorney Drew J. T. O'Keefe; Assistant United States Attorney Sidney Salkin (E. D. Pa.); and Levon Kasarjian, Jr. (Tax Division).

* * *