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

May 15, 1964

United States
DEPARTMENT OF JUSTICE

Vol. 12 No. 10

UNITED STATES ATTORNEYS
BULLETIN

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Vol. 12 May 15, 1964 No. 10

IMPORTANT NOTICE

The Department is planning to discontinue stocking blank white envelopes. The records show that approximately 116,000 plain white envelopes in the following sizes were furnished to the field offices of the Department during the ten months since June 30, 1963:

7530-286-6968	3 5/8 x 6 1/2
7530-198-5873	3 7/8 x 8 7/8
7530-286-6970	4 1/8 x 9 1/2

If you desire that these envelopes remain on the list of authorized supplies, please fill out the form below and forward it to the Administrative Services Office, Administrative Division.

. . . . . .

DISTRICT_____

I request that the Department continue to stock the following blank white envelopes:

Size_____

These envelopes are used in this district for_____

MONTHLY TOTALS

For the first nine months of fiscal 1964, total filings and terminations are above those for the same period of fiscal 1963. The percentages of increase, however, are quite small. Last year at this time, filings were 5.7 per cent above, and terminations were 9.7 per cent above the prior year. One of the most encouraging aspects of the figures for March 1964, is that the gap between filings and terminations has been narrowed slightly, from 5.8 per cent in February to 5.0 in March. Another encouraging aspect is that the increase in the caseload has been held down to 30 cases. Offsetting these encouraging aspects, however, is the fact that the caseload has not been reduced, and that if the present rate of terminations continues to the end of the year, total terminations will fall some 1,200 cases below the total for fiscal 1963, and some 3,000 cases below total filings. This would bring the increase in the caseload for the past four years to some 8,600 cases. Set out below is a comparison of cumulative totals for the first nine months of fiscal 1963 and 1964.

	First 9 Months Fiscal Year 1963	First 9 Months Fiscal Year 1964	Increase or Decrease Number	%
Filed				
Criminal	24,899	25,000	+ 101	+ 0.41
Civil	19,714	20,674	+ 960	+ 4.87
Total	44,613	45,674	+ 1,061	+ 2.38
Terminated				
Criminal	23,347	23,796	+ 449	+ 1.92
Civil	18,433	19,566	+ 1,133	+ 6.15
Total	41,780	43,362	+ 1,582	+ 3.79
Pending				
Criminal	10,850	11,047	+ 197	+ 1.82
Civil	23,660	23,493	- 167	- 0.71
Total	34,510	34,540	+ 30	- 0.09

Filings during March reached the third highest total for the nine-month period, and terminations reached the second highest total for the period. More criminal cases were terminated than were filed, and this helped to put total terminations slightly ahead of total filings. More civil cases were filed and terminated than in any previous month of the year. Civil terminations, however, were lower than civil filings.

	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
Sept.	3,365	2,267	5,632	2,584	1,920	4,504
Oct.	3,298	2,440	5,738	3,164	2,465	5,629
Nov.	2,794	1,789	4,583	3,020	1,806	4,826
Dec.	2,252	2,214	4,466	2,554	2,039	4,593
Jan.	2,855	2,496	5,351	2,853	2,461	5,314
Feb.	3,015	2,195	5,210	2,486	2,422	4,908
March	2,924	2,589	5,513	3,059	2,472	5,531

For the month of March, 1964, United States Attorneys reported collections of $4,444,058. This brings the total for the first nine months of fiscal year 1964 to $43,946,605. Compared with the first nine months of the previous fiscal year this is an increase of $15,001,497, or 51.83 per cent over the $28,945,108 collected during that period.

During March $3,725,879 was saved in 95 suits in which the government as defendant was sued for $4,070,039. 47 of them involving $2,484,057 were closed by compromises amounting to $232,210 and 7 of them involving $263,151 were closed by judgments amounting to $111,950. The remaining 23 suits involving $1,322,831 were won by the government. The total saved for the first nine months of the current fiscal year aggregated $59,361,676 and is an increase of $22,735,951, or 62.08 per cent over the $36,625,725 saved in the first nine months of fiscal year 1963.

The cost of operating United States Attorneys' offices for the first nine months of fiscal year 1964 amounted to $12,941,743 as compared to $12,055,778 for the first nine months of the previous fiscal year. The rate of increase in cost of operation rose during March. If projected to the end of the year, the total increase on June 30 will be approximately $1,200,000.

DISTRICTS IN CURRENT STATUS

As of March 31, 1964, the number of districts meeting the standards of currency in civil cases and matters was higher than in the preceding month but in criminal cases and matters the number of districts current dropped considerably. In criminal cases, 75 districts, or 81.5% were current; in civil cases, 79 or 85.8%; in criminal matters, 53 or 57.6%; and in civil matters, 80 districts, or 86.9% were current.

CASES

Criminal

Ala., N.	Ariz.	Conn.	Fla., M.	Hawaii
Ala., M.	Ark., W.	Del.	Fla., S.	Idaho
Ala., S.	Calif., S.	Dist. of Col.	Ga., M.	Ill., N.
Alaska	Colo.	Fla., N.	Ga., S.	Ill., E.

CASES (Cont.)

Criminal

Ind., N.	Mich., W.	N.Y., S.	Pa., W.	Va., E.
Ind., S.	Minn.	N.Y., W.	P.R.	Va., W.
Iowa, N.	Miss., N.	N.C., E.	R.I.	Wash., E.
Iowa, S.	Mo., E.	N.C., M.	S.D.	Wash., W.
Kan.	Mo., W.	N.D.	Tenn., E.	W. Va., N.
Ky., W.	Mont.	Ohio, N.	Tenn., W.	W. Va., S.
La., E.	Nev.	Ohio, S.	Tex., N.	Wis., E.
La., W.	N.J.	Okla., N.	Tex., S.	Wis., W.
Maine	N. Mex.	Okla., E.	Tex., W.	Wyo.
Mass.	N.Y., N.	Okla., W.	Utah	C.Z.
Mich., E.	N.Y., E.	Ore.	Vt.	Guam

CASES

Civil

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

MATTERS

Criminal

Ala., N.	Ga., S.	La., W.	N.Y., N.	Tex., S.
Ala., S.	Hawaii	Me.	N.C., M.	Tex., W.
Ariz.	Idaho	Md.	N.C. W.	Utah
Ark., E.	Ill., E.	Miss., N.	N.D.	Vt.
Ark., W.	Ind., N.	Miss., S.	Okla., N.	Va., W.
Calif., S.	Ind., S.	Mont.	Okla., E.	W. Va., S.
Conn.	Iowa, N.	Neb.	Pa., E.	Wyo.
Dist. of Col.	Iowa, S.	Nev.	Pa., W.	C.Z.
Fla., N.	Kan.	N.H.	S.C., E.	Guam
Ga., N.	Ky., E.	N.J.	S.D.	
Ga., M.	Ky., W.	N. Mex.	Tenn., W.	

MATTERS

Civil

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

* * *

ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

SHERMAN ACT

Indictment Under Section 1 Returned Against Flour Milling Companies. United States v. Archer-Daniels-Midland Company, et al. (W.D. N.Y.). DJ File No. 60-150-21. On April 28, 1964, a grand jury sitting in Buffalo, New York, returned an indictment charging twelve flour milling companies and six of their executives with conspiring to fix the price of hard wheat bakery flour in sales to commercial buyers east of the Rockies in violation of Section 1 of the Sherman Act. The indictment alleges that the conspiracy has continued at least from 1958 until the date of the return of the indictment.

The defendants are: Archer-Daniels-Midland Company and Lawrence J. Weidt, a vice president; Bay State Milling Co. and Bernard J. Rothwell, II, president; The Colorado Milling & Elevator Co. and Earl F. Cross, president; General Mills, Inc., and William A. Lohman, Jr., vice president; Gooch Milling & Elevator Co., Inland Mills, Inc., The Weber Flour Mills Co., and The Western Star Mill Co., and John J. Vanier, who is vice president of Gooch and president of Inland, Weber and Western Star; Peavey Co. and William R. Heegaard, vice president; International Milling Co., Inc.; The Pillsbury Co.; and Seaboard Allied Milling Corp.

During the period covered by the indictment the defendant companies, which account for 65% of all sales of hard wheat bakery flour, had average annual sales of this product of $305,000,000; this type of flour is used principally in the baking of white bread.

The indictment alleges that defendants held meetings at which company executives agreed on prices, and that, between meetings, agreed on price changes were disseminated through two industry "statistical services," the Colton Economic Service in Minneapolis, and the Hartley Service in Kansas City, Missouri.

Staff: Joe F. Nowlin, Gerald A. Connell and Richard M. Duke (Antitrust Division)

Phosphate Fertilizer Producers Indicted Under Section 1. United States v. J. R. Simplot Company, et al., (S.D. Calif.). DJ File No. 60-44-21. On April 30, 1964, a federal grand jury in Los Angeles, California returned an indictment against five phosphatic fertilizer producers. The defendants are: J. R. Simplot Co.; California Chemical Company - wholly-owned subsidiary of Standard Oil Co.; Cominco Products, Inc. - wholly-owned subsidiary of Consolidated Mining and Smelting Co. of Canada; Balfour-Guthrie & Co. Ltd. - wholly-owned subsidiary of Balfour-Williamson & Co. of England; and Western Phosphates, Inc. - wholly-owned subsidiary of Stauffer Chemical Co.

The indictment alleges that beginning at least as early as 1957 and continuing at least through 1961, defendants conspired to eliminate price competition in the sale of dry phosphatic materials in an eleven western state area. Dry phosphatic materials include treble superphosphate, ammonium phosphate and nitric phosphates. Total sales of such materials in the eleven western states exceed $35,000,000 annually.

The indictment charges defendants with agreeing to apply uniform seasonal discounts, credit terms and price differentials. Defendants are also charged with conspiring to discontinue customer trucking allowances and restricting distributor discounts to purchasers meeting certain proscribed qualifications.

Staff: Charles R. Esherick, Joseph H. Widmar, Albert P. Lindemann, Jr. and Lawrence M. Jolliffe (Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General John W. Douglas

NOTICES TO ALL UNITED STATES ATTORNEYS

Where Administrative Official Is Party Defendant, Care Must Be Taken to Insure That the Official--and Not the United States--Is Listed as Appellant in Notice of Appeal.

In several recent cases, where the Secretary of Agriculture, the Secretary of Health, Education and Welfare, or a Deputy Commissioner of Employment Compensation were the actual parties defendant, United States Attorneys have filed notices of appeal which read:

> NOTICE is hereby given that the UNITED STATES OF AMERICA, defendant above named, hereby appeals . . . .

Since the United States is not a formal party to such suits, such a defective notice of appeal may result in the loss of the administrative officer's right to appeal, unless a court of appeals can be convinced that the naming of the United States as party appellant was mere inadvertence and unprejudicial. See United States and Gondeck v. Pan American World Airways, Inc., 299 F. 2d 74 (C.A. 5). Please take care to insure to see that the proper party to the action is described correctly both in the caption and in the body of the notice of appeal.

In Cases Decided Against Government, Summary of Evidence Should Be Transmitted to Department Promptly.

As stated in the United States Attorneys' Manual (Title VI, page 2): "In any case in which the district court's decision is adverse, in whole or in part, and is appealable, the United States Attorney should make a report without delay, stating fully the questions of law and fact involved in the case, with his unequivocal recommendation for or against review, and his reasons and any comments he may care to make."

In several recent instances this requirement was not followed until the U. S. Attorney's office was prompted by the Department. The resultant delay hampered the Solicitor General's review of the matter and required the Government to obtain extensions of docketing time in cases which were ultimately determined not worthy of appeal. We wish to avoid recurrance of such matters in the future.

The questions of fact are usually, of course, best stated by a summary of the evidence presented by both parties in the district court. In order to avoid needless communications between the Division and the United States Attorneys, it is requested that the report and recommendation with regard to appeal be forwarded to the Division promptly and, if it will not delay the transmittal of the district court decision more than a day or so, together with that transmittal.

COURT OF APPEALS

AGRICULTURAL ADJUSTMENT ACT

Failure to Comply With Act's Statutory Judicial Review Procedure Deprives Courts of Jurisdiction to Consider Administrative Action; Administrative Procedure Act Does Not Obviate Necessity of Complying With That Procedure. Jilka v. Saline County ASC Committee (C.A. 10, April 6, 1964). This action was brought by two farmers to review the determination of an ASC Review Committee, made almost a year previous, sustaining a wheat allotment for the plaintiffs' farm and a penalty imposed on excess wheat. The jurisdiction of the district court was purportedly invoked under the Administrative Procedure Act. Plaintiff alleged that one member of the Review Committee was from a county which did not adjoin the county of the county committee. Therefore, plaintiffs claimed, the review committee lacked jurisdiction because not constituted in accordance with 7 U.S.C. 1363. That section provides for a review committee "composed of three farmers from the same or nearby counties." This allegation was not raised during the administrative proceedings.

The district court held that, since the action had not been commenced within fifteen days from the date the review committee's determination was mailed to plaintiffs, as required by 7 U.S.C. 1365, the court was deprived of jurisdiction by virtue of 7 U.S.C. 1367. The district court held, additionally, that the Review Committee had been properly constituted.

The Court of Appeals affirmed. It held that plaintiffs' failure to seek review in accordance with the statute deprived the courts of jurisdiction to consider the administrative action. The appellate court said that nothing in the Administrative Procedure Act relieved appellants from the necessity of complying with the special statutory review provisions. The Court held further that, in any event, the Review Committee had been properly constituted. The Court held that "nearby," as used in 7 U.S.C. 1363, means near or close at hand rather than adjoining or contiguous. The county of the Review Committee member complained of was only about five miles from the county of the county committee. The Court thought this was "nearby" in a state the size of Kansas. Finally, the Court noted that the purported ineligibility of the Review Committee member had not been raised during the administrative proceedings.

Staff: Frederick B. Abramson (Civil Division)

APPELLATE COURT RULES

Court of Appeals, Sua Sponte, Ordered Dismissal of Appeal When "Brief" Tendered by Appellate pro se Failed to Comply With Court's Rules. Clarence Duke McGann v. Federal Prison Industries. (C.A. D.C., April 14, 1964). Appellant, a federal prisoner, filed suit pro se, seeking (1) "the approximate sum of $16.62, plus interest"--representing wages allegedly due him for work performed while an inmate at Alcatrzz, and (2) "tort damages in the amount of $250,000" for mental anguish purportedly suffered. On the Government's motion the district court dismissed the complaint and McGann appealed. The Court of Appeals directed appellant to show cause why his appeal should not be dismissed.

Upon consideration of appellant's letter in response to that order, the Court granted him an additional 30 days in which to file his brief. Within the allotted time and still acting pro se, appellant tendered for filing documents entitled "Brief for Appellant" and "Supplemental Brief to Motion for Relief." The Court of Appeals dismissed the appeal on its own motion on the ground that those purported "briefs" failed to comply with the Court's rules. (Judge Fahy noted that he would have allowed appellant's papers to be filed as his brief.)

Staff: Lawrence R. Schneider (Civil Division)

CHARITABLE TRUSTS

Charitable Trust May Be Terminated When There Is No Necessity For Its Continuance. George A. Parker v. Banks (C.A. D.C., April 2, 1964). The auditor of the United States District Court for the District of Columbia reported to the Court that the trustee of a charitable trust for the benefit of Howard University had not exercised sound judgment in the administration of the trust. The United States intervened as parens patriae, and the District Court, at the Government's instance, ordered the trustee removed.

The Court of Appeals noted that, although the trustee had exercised bad judgment, there was no allegation of fraud on the trustee's part and the corpus of the trust had appreciated in value. Since removal might be construed as a reflection upon the trustee's character and, as there appeared to be no necessity for continuing the trust, the Court remanded the case to the District Court for reconsideration. The appellate court suggested that, in the circumstances, it might be more appropriate to set the removal order aside, terminate the trust, and deliver the corpus to Howard University.

Staff: Terence N. Doyle (Civil Division)

CIVIL SERVICE ACT

Discharge of F.B.I. Agent as Unsuitable, Demonstrated by Knowingly False and Irresponsible Statements Made in Letters to Members of Congress, Does Not Violate Either 5 U.S.C. 652(d) or First Amendment. Turner v. Kennedy (C.A. D.C., April 2, 1964). This action was brought by a former FBI Special Agent seeking to overturn his dismissal from the Bureau. His discharge was based on knowingly false and irresponsible statements contained in letters sent by him to members of Congress. The discharged agent argued that his dismissal violated 5 U.S.C. 652(d), which provides that the right of Civil Service employees to petition Congress for redress of grievances "shall not be denied or interfered with." He further contended that, if this statute did not prohibit his dismissal on this ground, his discharge violated the First Amendment protection against abridgment of the right to petition for redress of grievances.

The Government took the position throughout that, as was apparent from its history, 5 U.S.C. 652(d) prohibited only retaliatory disciplinary action; that, in any event, it could not be construed to protect knowingly false or irresponsible statements contained in grievance petitions and that the First Amendment required no such protection. Both the district court and Court of Appeals entered orders rejecting appellant's claims, thus confirming that the statutory

and constitutional protections of the right of petition are not absolute. Circuit Judge Fahy dissented, asserting that, while the right of petition is not absolute, only statements made with actual malice could serve as grounds for dismissal, citing the Supreme Court's recent opinion in New York Times Co. v. Sullivan, 32 L.W. 4184 (1964).

A petition for rehearing en banc is presently pending before the Court of Appeals.

Staff: Stephen B. Swartz (Civil Division)

FEDERAL TORT CLAIMS ACT

28 U.S.C. 2680(k), Which Bars "Any Claim Arising in a Foreign Country," Excludes From District Court's Jurisdiction Under Tort Claims Act Suits Based on Injuries Occurring at American Embassies and Consulates Abroad. Ola Belle Meredith v. United States, (C.A. 9, March 24, 1964). Plaintiff, injured within the confines of the American Embassy in Bangkok, Thailand, brought suit against the United States under the Tort Claims Act. The district court dismissed the claim for want of jurisdiction on the ground that the suit was barred by 28 U.S.C. 2680(k). That provision excludes from the jurisdiction of the district courts tort suits against the Government based on "any claim arising in a foreign country."

The Court of Appeals affirmed the lower court's judgment for the Government. The appellate court pointed out that, as the legislative history disclosed, Congress excluded claims arising in a foreign country because liability under the Act depends on the "law of the place where the act or omission occurred" and Congress was unwilling to subject the United States to liabilities depending upon the laws of a foreign power. Since the federal courts have no authority to create a tort law to govern American embassies abroad, the local foreign law would govern the clai laim is therefore barred.

As additional support for its decision, the Court quoted from the Fourth Circuit opinion in Burma v. United States, 240 F. 2d 720, which noted "the absence of the United States in such countries, with resulting problems of venue, and the difficulty of bringing defense witnesses from the scene of the alleged tort to places far removed; and . . . a reluctance to extend the Act's benefits to foreign populations." Finally, the Court of Appeals observed that appellant's contentions were contrary to the rule that, unless otherwise indicated by Congress, legislation is intended to apply only within the territorial jurisdiction of the United States.

Staff: United States Attorney Francis C. Whelan and Assistant United States Attorneys Donald A. Fareed and Gordon P. Levy. (S.D. Cal.)

MERCHANT SHIP SALES ACT OF 1946

Progress Payment Interest Properly Included in Price Adjustment Authorized by Section 9 of Merchant Ship Sales Act of 1946, 50 U.S.C. App. 1742. United States v. Waterman Steamship Corp. (C.A. 5, March 30, 1964). In a taxpayer's

suit for refund of income taxes, the Government counterclaimed for the return of allegedly excessive price adjustments (amounting to $706,028.17) made under Section 9 of the Merchant Ship Sales Act of 1946, 50 U.S.C. App. 1742, with respect to the wartime purchase of vessels. The Government contended that the 1946 Act did not intend to include interest on unpaid progress payments in the adjustment of purchase price that it provided for. This contention was rejected both by the district court and the Fifth Circuit, which relied primarily on New York and Cuba Mail Steamship Co. v. United States, 172 F. Supp. 684 (Ct. Cls.), and on the consistent administrative practice. The identical question is also pending in the Third Circuit in United States v. National Bulk Carriers (Nos. 14,483 and 14,484).

Staff: Sherman L. Cohn and Stephen B. Swartz (Civil Division)

RAILWAY LABOR ACT

Railway Labor Act Command in Section 2, Ninth That National Mediation Board Shall Have Access to Carrier's Books Held Enforceable Despite Board's Lack of Subpoena Power. United States v. Houston Feaster, (C.A. 5, April 20, 1964). The Court of Appeals reversed the district court's dismissal of the National Mediation Board's complaint in this action. The Board sought to compel the Alabama Docks Department, as a "carrier" under the Railway Labor Act, to produce the names and job classifications of certain employees as to whom a union had filed a representation petition with the Board pursuant to Section 2, Ninth of the Act, 45 U.S.C. 152, Ninth. The names and classifications were needed to check union authorization cards submitted by the employees and to determine whether they were performing work defined by Interstate Commerce Commisiion work orders as that of an employee under the Railway Labor Act.

The appellate court accepted the Government's contention that the Board's right of access to the requested records was enforceable despite the Board's lack of subpoena power. The Court also ruled that the Board is entitled to proceed without first invoking the assistance of the I.C.C. in determining the character of the employees' work. The Board is the body to make the initial determination whether the work being performed by the employees falls under the Act. The Court rejected appellee's contentions that the dispute was not justiciable, holding that the employees had a statutory right to recognition of their representative.

The Court also rejected the contention that the suit was in the nature of an action for mandamus and thus beyond the jurisdiction of the district court. The Court held that it was simply a suit to enjoin the carrier's officials, who have custody of the records, from interfering with the Board's statutory right to examine them.

Staff: Alan S. Rosenthal and Barbara Deutsch (Civil Division)

SOCIAL SECURITY ACT

Fifth Circuit Again Follows Celebrezze v. O'Brient in Social Security Act Disability Case. John T. Smith v. Celebrezze (C.A. 5, March 31, 1964) D.J. File No. 137-20-19. Claimant was skilled carpenter who, by reason of hernia, con-

cededly could not do his former work. The Secretary, however, found that claimant could do other light work and declined to award him disability benefits. The district court upheld the Secretary's decision and claimant appealed. The Government's brief in the Court of Appeals conceded that there was no substantial evidence in the record demonstrating exactly what light work claimant could perform. The Government urged that in the circumstances--where the impairment is not severe and the claimant has a relatively skilled background--the burden is on claimant to show not only that he cannot do his former work, but also that he cannot do any other type of job.

In a per curiam order, citing Celebrezze v. O'Brient, 323 F. 2d 989 (C.A. 5, 1963), the Court of Appeals affirmed the district court's refusal to upset the Secretary's decision. This is the ninth consecutive victory for the Secretary in the Fifth Circuit in social security disability cases, starting with Celebrezze v. O'Brient in October, 1963.

Staff: Robert V. Zener (Civil Division)

Where Operation Undergone by Claimant after Denial of Disability Benefits Removed Original Cause of Disability But Substituted Another, Secretary's Denial of Benefits Was Reversed. Cuthrell v. Celebrezze (C.A. 4, March 24, 1964). At the time of his application for disability benefits claimant was 57 years old, had a seventh-grade education and had worked as a marine carpenter, farmer and laborer. Claimant based his right to benefits on a swollen, inflamed and painful right knee. During the course of the administrative proceedings, claimant underwent several operations. As a result, his right leg was fused into a permanently stiff position and shortened by three-quarters of an inch. However, claimant was rendered free of pain. The Secretary found that despite his impairment claimant retained sufficient mental and physical capacity to engage in substantial gainful activity.

The district court affirmed the Secretary's denial of benefits but the Court of Appeals reversed. The appellate court held that the operations undergone by claimant merely effected a substitution in the cause of his disability. The Court concluded that claimant's experience equipped him only for work demanding considerable physical exertion and a strong body. Since claimant, even after his operation, was unable to do any lifting, suffered pain at the least exertion, and needed to use a cane when walking or standing, he still lacked the physical ability to engage in physical labor. The Court noted that claimant had been denied employment in the construction industry and as a service station attendant, and that he lacked experience or training for sedentary employment.

Staff: Lawrence R. Schneider (Civil Division)

DISTRICT COURT

ADMIRALTY

Cancellation of Voyage Charter Party by United States Navy on Vessel Barred Entry to Arabian Port Under Boycott of Israel by League of Arab States Held Not to Be Breach of Charter. Pan Cargo Shipping Corporation v. United

States (S.D. N.Y., March 24, 1964). Libelant, owner of the American-Flag Tanker SS NATIONAL PEACE, entered into a voyage charter party with the Military Sea Transportation Service of the United States Navy in December 1957, to lift a cargo of Navy fuel oil from "one or more safe ports in the Persian Gulf, Charterer's option." The Navy nominated the Port of Ras Tanura, Saudi Arabia. The NATIONAL PEACE was refused entry into this port by the Saudi Arabian Government because, as her owners were aware, the vessel had previously traded at an Israeli port. Libelant contended that the NATIONAL PEACE was an "arrived" ship pursuant to the provisions of the voyage charter party and furthermore contended that the Navy was required to nominate a port which was "politically" safe for the vessel.

The District Court rejected both contentions, holding that it was the responsibility of the vessel to secure entry to the port and, since it was unable to do so, it was not "ready to load" and therefore was not an "arrived" ship. The Court stated, "Here, the reason for refusing practique was not, to our understanding, a reasonable one. But the reasons for the Saudi Arabian decision in this instance are beside the point. The fact is that practique was refused, the ship was not an 'arrived' ship, and did not have entry to the port."

Under the circumstances here, the court held that "safe port" should not be given the meaning "without risk of loading interference from the Arab Boycott" because the parties never considered such a meaning.

Staff: Gilbert S. Fleischer (Civil Division)

* * *

CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Illegal State Prosecution; Voting and Elections: Civil Rights Act of 1957. United States v. George D. Warner, Jr. (C.A. No. 1219(E)(M)(S.D. Miss.) (DJ File Nos. 72-41-19, 72-41-83). On March 20, 1964, the above action was brought to enjoin the defendant, the District Attorney for Mississippi's Tenth Judicial District, from prosecuting two Negroes at the May, 1964 criminal term for allegedly making false statements to Federal officers concerning denials of their civil rights.

The Negroes were indicted by the November, 1963 state grand jury under one of three similar statutes for allegedly giving false testimony in December of 1962 during the trial of United States v. Ramsey (C.A. No. 1084, S.D. Miss.), a case involving racially discriminatory processing of Negro applicants for registration by the Clarke County Circuit Clerk.

The Government's complaint alleged that the prosecutions ought to be enjoined because (1) the State was preempted by Federal law from dealing with alleged perjury in the Federal courts, and (2) they were intended to intimidate Negro would-be voters in Clarke County, in violation of 42 U.S.C. 1971(b). The complaint asked that a three-judge district court be appointed and declare the State false statement statutes to be unconstitutional.

A motion for a preliminary injunction was filed with a supporting memorandum, and a hearing was held on April 20, 1964 before District Judge Sidney C. Mize.

At the hearing and in an Order dated April 21, 1964, the Court declined to rule on the constitutionality of the State statutes, but enjoined the defendant from proceeding further against the two Negroes--or any witness in United States v. Ramsey--on the grounds advanced by the Government, viz., that none of the statutes could be enforced against individuals giving statements to Federal officials about denials of constitutional rights, and the prosecutions were undertaken in violation of 42 U.S.C. 1971(b)

Staff: United States Attorney Robert E. Hauberg (S.D. Miss.), St. John Barrett, J. Harold Flannery (Civil Rights Division).

* * *

CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

ENTRAPMENT

Use of Contingent Fee Informer Justified by Prior Knowledge of Defendant's Activities. Joe Hill, Jr. v. United States (C.A. 5, March 12, 1964). D.J. File No. 23-40-307. Defendant Hill was convicted for possession of non-taxpaid whiskey. His conviction was brought about by the activities of a Government informer hired on a contingent fee basis, and defendant moved to suppress the evidence thus obtained. At trial the arresting agents testified, but the Government did not call the informer. The defense then put on Odum, the special employee, who testified as to his contingent pay arrangement. In rebuttal the Government put on the agent by whom Odum was hired, who testified that the reason he had investigated Hill was his past record and numerous complaints from Hill's neighbors. The Court overruled the motion to suppress, and the jury found defendant guilty,

On appeal, Hill relied upon Williamson v. United States, 311 F. 2d 441 (1962), arguing that the Government failed to justify its employment of a contingent fee informer. In a per curiam decision the Fifth Circuit affirmed, holding that the requirements of Williamson were satisfied by prior knowledge of a defendant's unlawful activity, and that appellant was not prejudiced by the showing of such knowledge in rebuttal, rather than as a part of the case in chief.

Staff: United States Attorney H. M. Ray (N. D. Miss.).

POSTAL INSPECTION OF AIR-MAIL PACKAGE

Unregistered Air-mail Package Weighing in Excess of Eight Ounces Held Not to Constitute First-Class Mail; Postal Inspection Permissible Under Postal Regulations, Statute, and Federal Constitution. Ricardo Santana v. United States (C.A. 1, No. 6185, March 31, 1964). D.J. File No. 64-65-23. Defendant was convicted of depositing lottery tickets in the mail in violation of 18 U.S.C. 1302. The facts of the mailing were undisputed. On January 27, 1961, defendant presented a package wrapped in paper and tied with a string weighing between three and four pounds at the parcel post window of the U.S. Post Office, Bayamon, Puerto Rico, and asked the postal clerk to compute the necessary postage to forward the package to the addressee in New York City via air-mail, special delivery and insured. The clerk did so, and defendant paid a total of $3.56. After defendant had left, the postal clerk, being under the impression that the package contained non-mailable meat delicacies, took it to the superintendent of mails, who opened it and discovered the lottery tickets.

It was stipulated on motion to suppress that if the search of the package and seizure of the lottery tickets were unlawful, defendant should be acquitted, but if lawful, he should be found guilty. The court found the search and seizure legal and entered the judgment of conviction appealed from (216 F. Supp. 631).

The Court of Appeals affirmed, on the ground that 39 U.S.C. 5006 authorizes indemnification by insurance only for articles sent by third or fourth-class mail, and since there is no statutory authority for insuring unregistered mail of the first class, the package must have been accepted as either third or fourth-class mail.

Staff: United States Attorney Francisco A. Gil, Jr.; Assistant United States Attorney Benicio Sanchez-Rivera (D. Puerto Rico).

OBSTRUCTION OF JUSTICE
(18 U.S.C. 1503)

Conviction Arising Out of Corrupt Acts Designed to Compel Witness to Claim Constitutional Privilege Against Self-Incrimination. Marvin R. Cole v. United States (C.A. 9, March 16, 1964). D.J. File 51-12-448. Defendant was convicted on two counts in the Southern District of California, for corruptly endeavoring to "influence, intimidate and impede," one Joel R. Benton, a witness before a federal grand jury. Evidence adduced during the trial reflected that defendant threatened and coerced Benton to plead his constitutional privilege against self-incrimination. It was also established that defendant had knowledge of the fact that the grand jury's inquiry related to possible perjury and obstruction of justice on the part of defendant.

On appeal, counsel for defendant argued that it cannot be a crime for one to advise or persuade a witness to plead his constitutional privilege since the act of so doing is lawful and an absolute right. In support of this argument, defendant's counsel cited United States v. Herron, N.D. Cal., 28 F. 2d 123 (1928), wherein it was specifically held that it is not unlawful for an attorney, regardless of motive, to advise a witness to plead his privilege against self-incrimination. In rejecting this argument, the Court repudiated the holding in Herron, stating that, "Many acts which are not in themselves unlawful, and which do not make the actor criminal, may make another a criminal who sees that the innocent act is accomplished for a corrupt purpose, or by threat or by force." It was specifically held by the Court, that though a witness may have the right to claim his constitutional privilege, one who compels a person to claim it, or with corrupt motive, advises a witness to do so, can and does obstruct or influence the due administration of justice.

Staff: United States Attorney Francis C. Whelan; Assistant United States Attorney Benjamin S. Farber (S.D. Calif.).

BRIBERY

Rice Acreage Allotment Program; Retrial of Case Which Earlier Ended in Mistrial for Failure to Produce All Statements of Witness Pursuant to Jencks Act. United States v. David Clifton Stephens (April 15, 1964, S.D. Texas). This case was previously reported in the October 4, 1963 issue of the United States Attorneys Bulletin (Vol. 11, No. 19, p. 499).

Defendant, a former County Office Manager of the Agricultural Stabilization and Conservation Service, United States Department of Agriculture, was indicted and charged with the offer and acceptance of bribes in violation of 18 U.S.C. 201 and 202, conspiracy to defraud the United States in violation of 18 U.S.C. 371, and making of a false statement in violation of 18 U.S.C. 1001.

The indictment specifically charged defendant, in part, with the acceptance of bribes in violation of 18 U.S.C. 202 to allow the production of fictitious and nonexistent rice allotments in violation of the Rice Acreage Allotment Program. The conspiracy counts charged defendant with a conspiracy to defraud the United States of the "conscientious, faithful, disinterested and unbiased services" of the defendant, a County Officer Manager, United States Department of Agriculture, in violation of Title 18 U.S.C. 371.

Defendant was convicted on three counts of conspiracy to defraud the United States and one count of accepting a bribe in the amount of $3740. On April 27, 1963, Judge Benjamin Connolly sentenced defendant to a total on all counts of eight years in prison and $17,500 in fines.

Staff: United States Attorney Woodrow Seals; Assistant United States Attorneys William A. Jackson and Fred W. Hartman; Robert M. Talcott (Criminal Division)

LABOR-MANAGEMENT RELATIONS ACT

Multiple Payments From Single Employer Held to Constitute More Than One Offense; Element of Wilfulness Defined. United States v. Keegan (C.A. 7, No. 14,190, April 2, 1964). D.J. File 156-23-136; 156-23-264. Defendant was charged in a forty-eight count indictment with violations of Section 302(b) of the Labor-Management Relations Act of 1947, 29 U.S.C. 186(b). Each count alleged that defendant, a representative of employees in an industry affect- interstate commerce, accepted payments from Interstate Motor Freight system, the employer of said employees, with each count alleging a different date of payment. Defendant was found guilty on forty-six of those counts, and appealed.

The Seventh Circuit affirmed, rejecting defendant's contentions that the trial judge erred in not requiring the Government to elect a single count of the indictment upon which to prosecute, and that the instructions as to the element of wilfulness were erroneous. With regard to the argument that 29 U.S.C. 186(b) does not make a separate crime out of each payment, but rather is intended to prohibit a course of conduct, the Court of Appeals relied upon United States v. Alaimo, 297 F. 2d 604 (C.A. 3, 1961), cert. den. 369 U.S. 817, in finding each payment to be a separate offense.

Defendants also claimed that the trial court erred in refusing to instruct the jury that in order to be wilful the defendants' violation must have been done with awareness of the restrictions of Section 186(b), or with reckless disregard for that section, and that the acts must have been done with an evil purpose. The Court of Appeals pointed out that under United

States v. Gibas, 300 F. 2d 836 (C.A. 7, 1962), cert. den. 371 U.S. 817, an evil purpose is unnecessary, and that under Inciso v. United States, 292 F. 2d 374 (C.A. 7, 1961), cert. den. 368 U.S. 920, the defendant need not be aware his actions are in violation of the statute. While it is true that the minimum proof on which conviction can be had under Section 186(b) is that the defendant showed reckless disregard for the provisions of the applicable statute, the Court points out that such recklessness consists of two elements. The first element, knowledge of the material facts surrounding the proscribed conduct, requires proof that the defendant accepted money from an employer with knowledge that he was receiving money, and that the donor was an employer of employees that he represented. The second element requires knowledge that such conduct may well be illegal, i.e. whether a reasonable man would know that such conduct is illegal, which may be found by the judge as a matter of law and which need not be submitted to the jury. This decision is consistent with the interpretations of wilfulness in United States v. Ryan, 232 F. 2d 481 (C.A. 2, 1956) and United States v. Felice, 311 F. 2d 934 (C.A. 6, 1963), that so long as the prohibited acts are done voluntarily and intentionally, awareness of the Federal statute need not be shown.

Staff: Former United States Attorney Frank McDonald; Assistant United States Attorneys John Peter Lulinski and John Powers Crowley (N.D. Ill.).

FEDERAL FOOD, DRUG, AND COSMETIC ACT

Bestselling Books "Folk Medicine" and "Arthritis and Folk Medicine" Held to Constitute False Labeling of "Sterling Vinegar and Honey" Notwithstanding Separateness in Shipment, Because of Textual Relationship and Integrated Distribution and Promotion. United States v. Cases of Sterling Vinegar and Honey (S.D. N.Y.). D.J. File 22-51-478. This was a contested in rem seizure action brought under 21 U.S.C. 334 to condemn as articles of misbranded drug several cases of "Sterling Vinegar and Honey" and a number of copies of D. C. Jarvis' best-selling books Folk Medicine and Arthritis and Folk Medicine. The property was seized on the premises of Balanced Foods, Inc., of New York City, a wholesale jobber, which shipped the items separately in interstate commerce to retail food outlets, mostly health food stores, and never sold the books to book stores. Condemnation depended on a finding--and the Court (Judge Leibell) so held--that, notwithstanding physical separateness in shipment, the books constituted false labeling "accompanying" the vinegar and honey product which was meant to be used as a drug. A textual relationship was found in that the books specifically mentioned Sterling's product and because only in the books--not on the bottles or jars--could the buyer find indications of the intended medicinal uses for Sterling Vinegar and Honey. The Court also found that the wholesaler (claimant) directly promoted sales of both the Sterling product and the books, and that it distributed them to retail outlets "in an integrated fashion." A final decree of condemnation and destruction, covering the product and the books, was entered on April 13, 1964.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorney Patricia A. Garfinkel (S.D. N.Y.).

NATIONAL MOTOR VEHICLE ACT

Owner of Motor Vehicle or One, Who Has Been Given Exclusive Use of Such Vehicle by Owner, Violates Act if He Takes Vehicle from Lien Holder, Having Superior Right to Possession, and Transports It in Foreign or Interstate Commerce. In a recent district court case involving a young man, who had been given almost exclusive use of a motor vehicle by his fiancee, the judge directed a verdict of acquittal on the grounds that the term "stolen" as used in the Dyer Act (18 U.S.C. 2312) is limited only to felonious takings of a motor vehicle from its owner, presumably title owner. Defendant was charged with breaking into an auto body shop, taking the automobile, and transporting it in interstate commerce. The car had been stored by the body shop because of a $700 repair bill which neither defendant nor his fiancee could pay. Under the state statutory law, the body shop had a mechanic's lien for the repair bill entitling it to possession until the bill was satisfied.

The trial court relying upon United States v. Turley, 352 U.S. 407 (1957), limited the term "stolen" in 18 U.S.C. 2312 to depriving the owner of the rights and benefits of ownership and held, therefore, that the motor vehicle was not stolen since defendant's fiancee, the car's owner, gave him the exclusive right to its use. It is pointed out that the sole issue in United States v. Turley was whether "stolen" was limited to a taking which amounts to common law larceny or whether it included an embezzlement or other felonious taking. The Supreme Court never considered the question whether "stolen" in 18 U.S.C. 2312 was limited to a taking from the title owner, although in general language it referred to a deprivation of the rights and benefits of an owner. For this reason we think the Court erred in basing its verdict on Turley.

The legislative history of the Dyer Act indicates that Congress did not intend to limit the scope of "stolen" to takings solely from a title owner.

Inasmuch as there are no court decisions directly in point, it is suggested that, if a similar situation arises, the United States Attorneys spell out in the indictment the particular proprietory interest in the motor vehicle of the one from whom it is taken. In this way, if the trial court dismisses the indictment on the ground that the term "stolen", as used in the Dyer Act, does not include such a taking the case may be appealed in an endeavor to obtain a judicial interpretation of the language of Section 2312 in accord with the views expressed herein.

BAIL BOND FORFEITURES

Leaving Jurisdiction Without Permission of Court. D.J. File 29-100-2573. A Federal Grand Jury in the Northern District of Illinois on September 23, 1963, indicted one Joseph D'Argento and four other persons for bank robbery. The indictment was ordered sealed by the Chief Judge of the District who at the same time set bail as to defendant in the amount of $50,000. Four days later D'Argento and three others were arresed, the indictment was released, and D'Argento moved the court for reduction of bail. The motion was continued for further hearing, but prior to such hearing defendant made bail and abandoned his motion. The Maryland National Insurance Company executed an appearance bond in the full amount of $50,000.

For many years the Northern District of Illinois had used a form of bond identical to Form 17 which appears in the Appendix to the Federal Rules of Criminal Procedure. A revised form adopted in 1959 was used for the D'Argento bond. A condition on the new form is as follows:

> That the defendant is not to depart the Northern District of Illinois . . . except in accordance with such orders . . . as may be issued by . . . the United States District Court for the Northern District of Illinois.

The revised form provides, as did the previous form that:

> If the defendant fails to obey or perform any of these conditions, payment of the amount of this bond shall be due forthwith.

From the late hours of November 17, 1963, until the early hours of November 19, 1963, D'Argento was out of the Northern District of Illinois without having obtained permission of the court. Using an alias he arranged flights to and from Los Angeles. There is evidence that on two other occasions subsequent to making bail in the instant case he went to Los Angeles for one day and returned. On these occasions he had pre-set court appearances in proceedings against him in Superior Court of California for the County of Los Angeles. Allegedly, he also made these trips for other purposes. Subsequent investigation of his activities by the FBI resulted in his being charged with theft of a Chicago-Los Angeles shipment of furs.

On December 4, 1963, while D'Argento was in Federal custody in Chicago, charged on the newer violations, the United States Attorney appeared ex parte before the court and requested forfeiture of the $50,000 bond for breach of condition of bond requiring permission of the court to leave the district. Evidence was heard and the bond was forfeited.

The Maryland National Insurance Company filed a motion to set aside the declaration of forfeiture or for remission if judgment be entered, alleging defendant and surety were not aware of the condition as to leaving the District; that the Government and the court knew, as early as September 23, 1963 that defendant was on a bail bond requiring his attendance in Los Angeles and that the Government had incurred no expense directed toward apprehension of the defendant or his return to the District. The Court noted that the new bond form and condition imposing territorial restrictions appear to be proper, United States v. Foster, 278 F. 2d 567, and that the surety apparently did nothing to explain to defendant the terms or meaning of the bond, nor to impress on defendant the possible consequences of a breach of its conditions. The Court also recognized that the surety has a duty to make some effort to see that the principal complies with the orders of the court, United States v. Nordenholz, 95 F. 2d 756. While of the opinion that the breach was not willful, the Court concluded that a forfeiture of some meaningful amount would be proper to educate the surety as to his obligations and responsibilities. Accordingly, $40,000 of the forfeiture

was remitted and judgment entered for the remaining $10,000. The surety has filed notice of appeal.

Staff: Former United States Attorney Frank E. McDonald, Jr.; Assistant United States Attorneys Thomas W. James, William O. Bittman, Donald E. Joyce and Erwin L. Katz; Herbert W. Abell, Attorney, Criminal Division.

STATUTE LIST

There is being sent to each United States Attorney with this issue of the Bulletin, a list of statutes administered by the Criminal Division of the Department of Justice. Additional copies will be supplied upon request.

ARMED SERVICES
Post Exchanges and Open Messes

Attached to this issue of the Bulletin being sent to all United States Attorneys is a memorandum on the status of Post Exchanges and Open Messes as Agencies of the United States Government under Title 18, United States Code.

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LANDS DIVISION

Ramsey Clark, Assistant Attorney General

Federal Jurisdiction: District Courts Have Jurisdiction Over Suits by United States Against State Under 28 U.S.C. 1345, Even Though Federal Question or State Waiver of Sovereign Immunity Involved. United States v. State of California (C.A. 9, February 28, 1964), D.J. File No. 90-1-9-478. The United States sued the State of California for damages allegedly resulting from negligence of state employees in starting and in attempting to extinguish a fire in a national forest. Acting sua sponte, the district court dismissed the suit, saying that 28 U.S.C. 1345, despite its grant to district courts of original jurisdiction over "all" civil actions commenced by the United States, does not confer jurisdiction over a State in a negligence action by the United States "absent a waiver of the State's sovereign immunity". The court also expressed "serious Constitutional doubts" that Congress has the power to confer such jurisdiction unless a federal question is involved. 208 F.Supp. 861 (1962). In a thorough and well reasoned opinion by Circuit Judge Browning, the Ninth Circuit has now reversed this holding.

The Court of Appeals first stated that it was "satisfied that the Constitution grants original jurisdiction to the Supreme Court over civil suits brought by the United States against a State without specific consent regardless of the nature of the controversy, provided the issue is justiciable, and that the Constitution empowers Congress to confer upon the district courts concurrent jurisdiction over such suits". Art. III, Sec. 2, Cls. 1,2; United States v. Texas, 143 U.S. 621, 643, 646 (1892); Ames v. Kansas, 111 U.S. 449 (1884). "Each State impliedly consented to such suits 'when admitted into the Union upon an equal footing in all respects with the other States', and no further consent is needed". United States v. Texas, supra. Then, tracing the history of the interplay between what are now sections 1345 and 1251 of the Judicial Code, the Court concluded that in section 1345 Congress has granted such concurrent jurisdiction to district courts. In the 1948 revision of the Judicial Code, Congress changed the previous grant of exclusive Supreme Court jurisdiction over suits to which a State was a party by providing in 1251(b)(2) that the Supreme Court should have "original but not exclusive jurisdiction of * * * controversies between the United States and a State". Thus, it was no longer "otherwise provided by Act of Congress" that section 1345's broad grant of jurisdiction should not apply to suits against States.

In addition to an impressive quality of legal scholarship to which no digest here can do credit, Judge Browning's opinion is marked by great practicality. In answering the district court's contention that the jurisdiction Congress could give district courts is limited to federal questions, the Court of Appeals said that such a limitation would lead to the incongruous result that "States could be sued in district courts when questions of constitutional power and overriding federal interest were at stake, but could be sued only in the Supreme Court when disputes concerned nonfederal issues, of relatively minor consequence in the federal constitutional scheme". Moreover, the Court found it difficult to understand how States could benefit if jurisdiction were confined to the Supreme Court, which is "primarily an appellate tribunal, ill-suited to trial of factual issues * * *. Common sense dictates that those

suits which involve routine, largely factual disputes be litigated in the district courts, and that the jurisdiction of the Supreme Court be invoked initially only in those rare cases which present large issues".

Staff: Hugh Nugent (Lands Division).

Eminent Domain; Tucker Act; Consequential Damages; Definition of Interest Taken Required; Trial. United States v. Wald, etc., Nos. 7440, 7441, 7442 (C.A. 10, April 1964) D.J. File Nos. 90-1-23-922, 90-1-23-923, 90-1-23-921. Plaintiffs alleged damages from overflow of their land due to a combination of extremely heavy rain and the manner in which drainage ditches had been constructed by the Government.

The district court found that the United States had "taken" some land, and awarded damages after a unique form of trial which included unsworn testimony outside the courtroom and confusing stipulations as to what prospective witnesses would say. The Court of Appeals reversed without stating the facts holding that to sustain a Tucker Act suit a taking must be shown and that damages alone do not constitute a taking. The Court further held that the interest taken had to be defined with precision which the judgments failed to do. With respect to the trial the Court described it as so "unorthodox" that fairness to all required a new trial.

Staff: Edmund B. Clark (Lands Division).

Zoning Regulations: To Grant Variance Would Be Nullification of and Substantial Derogation From Intent and Purpose of Zoning by Law of City of Brockton. United States v. Edward Reynard, et al. (Superior Court, Commonwealth of Massachusetts, Equity No. 20170, March 6, 1964), D.J. File No. 90-1-3-984. The individual respondents, owners of the premises designated as plot 81 Belmont, City of Brockton, Massachusetts, applied to the City Board of Appeals for a variance to permit them to construct an ice skating rink and roller skating rink with the usual accessories on the premises. Directly across the street from the proposed skating rink is a Veterans Administration Neuropsychiatric Hospital having approximately 390 patients; seventy per cent of whom are permitted to go out on the hospital grounds, which is completely enclosed by an iron fence. Some 40 patients are not allowed to leave the hospital. The Government contended that the noise from the proposed skating rink would interfere with the treatment, sleep and rest of the patients, particularly of those who are suffering from tuberculosis, and that the increased amount of traffic would not be conducive to the rest and care of patients at the hospital, many of whom are required to have complete rest in connection with the treatment of their disability.

The members of the Board of Appeals in setting forth their reason for granting the variance merely stated in their decision:

> The Board felt that it would in no way derogate from the character of the neighborhood and that a hardship would exist if not granted.

The Court ruled that this finding by the Board is not in compliance with

the provisions of section 18 of chapter 40A, General Laws, Commonwealth of Massachusetts, and stated further:

> When the United States Government decided to spend several million dollars in the construction and maintenance of the extensive Veterans Administration Hospital (which the Court observed on the view) it is reasonable to suppose an investigation was made at the time as to the surrounding neighborhood and the use permitted of property in the immediate vicinity under the provisions of the zoning by-law of the City of Brockton. The Government had a right to expect that the care and treatment of the several hundred war casualties entrusted to the hospital would not be hampered or endangered by the encroachment of zoning laws to permit other than residences in the immediate vicinity of the hospital buildings. The operation of a roller skating rink as proposed would not only cause considerable noise and disturbance to those living in the vicinity but would necessarily increase the traffic in bringing patrons to and from the proposed amusement enterprise.

Staff: United States Attorney W. Arthur Garrity, Jr., Assistant United States Attorney Paul F. Markham (District of Massachusetts) and Felthan Watson (Lands Division).

Condemnation: Nominal Compensation Payable When Right of Reverter Acquired Before Right Accrued. United States v. 926.787 Acres of Land, more or less, in Iberia Parish, State of Louisiana, and George Viator, et al., (E.D. La., Civil No. 6306), D.J. File No. 33-19-294-68. The property included in this proceeding was originally conveyed by individual vendors to the Police Jury of Iberia Parish for an airport with reversionary clauses to the effect that if the property were no longer used as an airport, or for any public purpose whatsoever, and the Police Jury desired to dispose of it, the vendors would have the option to purchase for the same basic price per acre paid by the Police Jury. The Police Jury established and operated the airport for approximately 10 or 12 years and then donated it to the United States for the purpose of establishing a naval auxiliary station.

This proceeding was instituted to eliminate the claims of the owners of the reversionary interests. They contended that the donation of the property to the United States constituted a disposition, and that they were not afforded the right to exercise the option to repurchase. They claimed compensation based on the difference between the price at which they sold the property to the Police Jury, and the value of the property at the time of the institution of this proceeding (which according to the Government's appraisal would have amounted to approximately $280,000.)

The Government, on the other hand, in support of its motion for summary judgment, contended that no right to repurchase came into being because the property always had been and is now being used "for public purposes", and that the vendors would not have a right to repurchase so long as the property is used for public purposes, whether such use was made of the property by the

Police Jury, by the United States or by any other public body and, accordingly, no compensation was owing by the United States.

The Court granted the Government's motion and agreed with the Government's position that it would be necessary for the property to cease being used for any public purpose whatsoever in order for the vendors to have a right to repurchase.

Staff: United States Attorney Louis C. La Cour and
Special Assistant to the United States Attorney
Norton L. Wisdom (E.D. La.)

* * *

TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

IMPORTANT NOTICE

Indictments returned or informations filed in all criminal tax cases within the supervisory responsibilities of the Tax Division, including direct referral matters, should not be dismissed without prior approval of the Department except when the defendant is dead or when a superseding indictment or information has been returned or filed. In cases involving physical or mental health problems, the procedure set out on pages 5-6 and Appendix D of the Tax Division's "The Trial of Criminal Income Tax Cases" should be followed.

United States Attorneys' Manual, Title 4:45, section headed "Dismissal", is being amended accordingly.

CIVIL TAX MATTERS
Appellate Decisions

Enforcement of Internal Revenue Summons; Defense That Its Use Is in Furtherance of Criminal Investigation Held Invalid as Matter of Law. Fred D. Siegel v. Clifford E. Tyson, Jr., Special Agent (C.A. 5, No. 20861; May 5, 1964). Appellant was served with an Internal Revenue summons in the course of an investigation into the tax liabilities of his daughter and son-in-law. He refused to comply on the ground that the investigation was into criminal, and not civil, tax liability, and so the use of the summons was unauthorized under Section 7602 of the 1954 Code. At the enforcement hearing the Government freely conceded that the investigation could well end with a recommendation for criminal prosecution. The court ordered enforcement. During the pendency of the appeal appellant's son-in-law was in fact indicted. The Fifth Circuit affirmed the enforcement order from the bench at the conclusion of oral argument. Their written opinion will follow, but the Court indicated that it was going to hold that this defense is invalid as a matter of law, because Section 7602 authorizes the issuance of a summons even though the investigation could well lead to a criminal prosecution.

Staff: Burton Berkley and Joseph M. Howard (Tax Division)

Injunction Against Collection of Federal Taxes (Penalties) for Failure to Collect and Pay Over Withholding Taxes. Shaw v. United States (C.A. 9, April 16, 1964) (64-1 U.S.T.C., par. 9421). Orr v. Dietrich (C.A. 7, April 24, 1964) (64-1 U.S.T.C., par. 9429). In the Shaw case, the complainant filed suit to enjoin the collection of a tax (denominated a penalty) assessed against him for wilful failure to collect, account for, and pay over taxes with respect to wages of employees of a company which he operated, as required under the provisions of Section 6672 of the 1954 Code. The basis of the suit was that the assessment and attempted collection were illegal in that the assessment had not been preceded by issuance of a statutory notice of deficiency (90-day letter). The Ninth Circuit affirmed the judgment of the district court which dismissed the complaint on the ground that the statutory deficiency notice requirements applied only to deficiencies in income, estate and gift taxes and not to other

types of taxes, such as penalties assessed under Section 6672. In the Orr case, the complainant sought an injunction, contending that the withholding tax system was unconstitutional. Affirming the lower court's order, the Seventh Circuit pointed out that the complainant had failed to show that the bar of Section 7421(a) of the 1954 Code was inapplicable under the rule of Enochs v. Williams Packing Co., 370 U.S. 1. See also Botta v. Scanlon, 314 F. 2d 392 (C.A. 2).

Staff: George Lynch, Meyer Rothwacks, Joseph Kovner (Tax Division)

District Court Decisions

Injunction: 28 U.S.C. 2410 Held Not to Constitute Waiver of Sovereign Immunity so as to Permit Taxpayers to Bring Suit to Quiet Title to Property and Inquire Into Merits of Underlying Assessments. Willard E. Batts and Flossie W. Batts v. United States (D. No. Car., April 9, 1964). This suit was brought by taxpayers to enjoin the United States and its agents from levying upon or collecting tax assessments made against them and to have the said assessments declared null and void and the cloud upon plaintiffs' title removed. Plaintiffs claimed jurisdiction under 28 U.S.C. 1340 and a waiver of sovereign immunity under 28 U.S.C. 2410. Plaintiffs contended they could attack the merits of the underlying assessments in this action.

The Court held that when Congress enacted Section 2410, it did not intend for a taxpayer to have the prerogative of suing the Government to litigate the validity of tax assessments which had created a lien upon the the taxpayer's property. If such procedure were allowed, the collection of taxes would be delayed, imposing an undue burden on tax collection efforts. The Court further held that Section 2410 merely waives sovereign immunity for the protection of the Government and does not authorize an action unless independent jurisdictional grounds exist elsewhere. 28 U.S.C. 1340 does not confer the independent jurisdiction since taxpayers seek the voidance of the lien in a manner not permitted by statute.

Staff: United States Attorney Robert H. Cowen; Assistant United States Attorney John R. Hooten (D. No. Car.); Wallace E. Maloney and Frank N. Gundlach (Tax Division)

Transferee Liability Successfully Asserted Against Three Stockholders of Maine Corporation, who Were Residents of, and Domiciled in Massachusetts Under Uniform Fraudulent Conveyance Act, Enacted in Massachusetts. United States v. Aaron J. Rosenberg, Henry Halpern, and Harold Leventhal. (D. Mass., December 26, 1963). Prior to a 1956 assessment against the Granite State Redi-Mix Concrete Company, Inc., a Maine corporation, for 1954 corporation federal income taxes in the amount of about $3,000, Granite State had distributed a liquidating dividend of $8,000 to each of its three stockholders by means of checks or charges against a Massachusetts' bank. Each of these distributions was received in Massachusetts. This distribution left the corporation with insufficient funds to pay the assessment, and suit was brought against the stockholders for the purpose of collecting the balance of the assessment due and owing by the Corporation, after it exhausted its assets by satisfying part of its tax liability. Since all events pertaining to this transaction occurred in Massachusetts, the Government argued that the three stockholders were jointly and severally liable for the balance of Granite State's tax liability

for the reason that the payment of the liquidating dividend constituted a fraudulent conveyance. Under the law of Massachusetts, a transfer without fair consideration, if it renders a transferor insolvent, is deemed fraudulent; and Judge Wyzanski, in determining the question of insolvency considered the Corporation's liability for taxes, although this liability was unknown at the time of the liquidating distribution. Commissioner v. Keller, 59 F.2d 499.

The Government had argued that it had a claim for income taxes against Granite State because at the time of the liquidating distribution all of the events and transactions had occurred which gave rise to the tax liability.

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