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

March 19, 1965

United States
DEPARTMENT OF JUSTICE

Vol. 13 No. 6

UNITED STATES ATTORNEYS
BULLETIN

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MONTHLY TOTALS

January was a particularly active month, with the third largest number of cases filed and the second largest number terminated in any of the first seven months of fiscal 1965. Unfortunately, cases filed have outnumbered cases terminated in six of the first seven months of fiscal 1965. As a result, the pending caseload is over ten per cent higher than it was on the same date a year ago. In the remaining months of this fiscal year, every effort should be made to terminate as many cases as possible. Unless this is done, we will wind up with the largest increase in the pending caseload of any year since the litigation reporting system was begun. Following is a table giving a comparison of the cases filed, terminated and pending during the first seven months of fiscal year 1964 and 1965.

	First 7 Months Fiscal Year 1964	First 7 Months Fiscal Year 1965	Increase or Decrease Number	%
Filed				
Criminal	19,061	18,834	- 227	- 1.19
Civil	15,890	16,164	+ 274	+ 1.72
Total	34,951	34,998	+ 47	+ 0.13
Terminated				
Criminal	18,251	17,263	- 988	- 5.41
Civil	14,672	15,425	+ 753	+ 5.13
Total	32,923	32,688	- 235	- 0.71
Pending				
Criminal	10,571	11,620	+1,049	+ 9.92
Civil	23,616	26,050	+2,434	+10.31
Total	34,187	37,670	+3,483	+10.19

The outstanding achievement in January was the reversal of the downtrend in case terminations. The gap between total filings and terminations is a substantial seven per cent. If the caseload is to be reduced, not only will this gap have to be wiped out, but a considerable preponderance of terminations over filings will have to be established by June 30, 1965. Following is an analysis of the number of cases filed and terminated monthly during the first seven months of fiscal 1965.

	Filed			Terminated		
	Crim.	Civil	Total	Crim.	Civil	Total
July	2,321	2,460	4,781	2,230	2,391	4,621
Aug.	2,176	2,224	4,400	1,846	1,590	3,436
Sept.	3,284	2,214	5,498	2,054	2,556	4,610
Oct.	3,284	2,464	5,748	3,251	2,131	5,382
Nov.	2,497	2,005	4,502	2,741	2,132	4,873
Dec.	2,574	2,204	4,778	2,612	2,059	4,671
Jan.	2,698	2,593	5,291	2,529	2,566	5,095

For the month of January, 1965, United States Attorneys reported collections of $3,326,507. This brings the total for the first seven months of this fiscal year to $42,591,128. Compared with the first seven months of the previous fiscal year this is an increase of $6,766,208 or 18.89 per cent over the $35,824,920 collected during that period. The percentage of increase has dropped considerably since December 1964 when aggregate collections were over thirty per cent ahead of the same period in fiscal 1964. Nevertheless, if the present rate of increase should continue to the end of the fiscal year, total collections will exceed $60,000,000 for the first time in the history of the Department.

During January $3,555,220 was saved in 91 suits in which the government as defendant was sued for $4,662,589. 48 of them involving $1,828,864 were closed by compromises amounting to $389,503 and 18 of them involving $1,938,091 were closed by judgments amounting to $717,866. The remaining 25 suits involving $895,634 were won by the government. The total saved for the first seven months of the current fiscal year was $68,956,873 and is an increase of $18,189,234 or 35.82 per cent over the $50,767,639 saved in the first seven months of fiscal year 1964.

The cost of operating United States Attorneys' Offices for the first seven months of fiscal year 1965 amounted to $10,933,285 as compared to $10,108,970 for the first seven months of fiscal year 1964.

DISTRICTS IN CURRENT STATUS

Set out below are the districts in a current status as of January 31, 1965.

CASES
Criminal

Ala., N.	Conn.	Idaho	Ky., E.	Mich., W.
Ala., M.	Del.	Ill., N.	Ky., W.	Minn.
Ala., S.	Dist. of Col.	Ill., E.	La., E.	Miss., N.
Ariz.	Fla., N.	Ill., S.	La., W.	Miss., S.
Ark., E.	Fla., S.	Ind., N.	Maine	Mo., E.
Ark., W.	Ga., N.	Ind., S.	Md.	Mo., W.
Calif., S.	Ga., S.	Iowa, S.	Mass.	Mont.
Colo.	Hawaii	Kan.	Mich., E.	Neb.

CASES (Cont.)
Criminal (Cont.)

Nev.	N.C., M.	Pa., E.	Tex., N.	Wis., E.
N.H.	N.C., W.	Pa., M.	Tex., S.	Wyo.
N.J.	Ohio, N.	Pa., W.	Tex., W.	C.Z.
N. Mex.	Ohio, S.	R.I.	Utah	Guam
N.Y., N.	Okla., N.	Tenn., E.	Vt.	
N.Y., E.	Okla., E.	Tenn., M.	Va., W.	
N.Y., S.	Okla., W.	Tenn., W.	Wash., E.	
N.C., E.	Ore.	Tex., E.	W. Va., N.	

CASES
Civil

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

MATTERS
Criminal

Ala., N.	Ga., S.	Me.	Ohio, S.	Tex., E.
Ala., M.	Hawaii	Md.	Okla., N.	Tex., S.
Ala., S.	Idaho	Miss., N.	Okla., E.	Tex., W.
Alaska	Ill., E.	Miss., S.	Okla., W.	Utah
Ariz.	Ill., S.	Mont.	Pa., M.	Vt.
Ark., E.	Ind., N.	N.H.	Pa., W.	Va., W.
Ark., W.	Ind., S.	N.J.	R.I.	W. Va., N.
Calif., S.	Iowa., N.	N. Mex.	S.C., E.	W. Va., S.
Colo.	Kan.	N.C., E.	S.C., W.	Wyo.
Fla., N.	Ky., E.	N.C., M.	S.D.	C.Z.
Ga., N.	Ky., W.	N.C., W.	Tenn., W.	Guam
Ga., M.	La., W.	N.D.	Tex., N.	

MATTERS
Civil

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

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ADMINISTRATIVE DIVISION

Assistant Attorney General for Administration S. A. Andretta

The following Memoranda applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 3, Vol. 13 dated February 5, 1965:

MEMOS	DATED	DISTRIBUTION	SUBJECT
398	2-1-65	U.S. Attorneys & Marshals	Prescribing Regulations With Respect To Military Personnel And Civilian Employees' Claims Act of 1964 (78 Stat. 767)
399	2-8-65	U.S. Attorneys	Suits Against Government In Which Wrong Defendant Is Named
400	2-12-65	U.S. Attorneys & Marshals	Reduction In Purchase of Office Furniture and Typewriters: and Moratorium on Purchase Of Filing Cabinets
372-S1	2-10-65	U.S. Attorneys & Marshals	Use of Form DJ-83 Under Promotion Plan
124 REV.-S6	2-19-65	U.S. Attorneys	Docket And Reporting System Manual-Post-Judgment Collection Matters

ORDERS	DATED	DISTRIBUTION	SUBJECT
330-65	2-2-65	U.S. Attorneys & Marshals	Designating Ramsey Clark to act as Deputy Attorney General
331-65	2-18-65	U.S. Attorneys & Marshals	Re Registration With Respect to Gambling Devices
332-65	2-23-65	U.S. Attorneys & Marshals	Assigning Functions to Exec. Assistant To Attorney General With Respect To President's Committee On Equal Employment Opportunity and The President's Council On Equal Opportunity

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ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

Supreme Court Vacates District Court Order Dismissing Count I of Indictment Charging Violation of Section 10 of Clayton Act. United States v. Boston and Maine Railroad (S. Ct. No. 232). D.J. File 60-193-25. On March 8, 1965, the Supreme Court vacated an order of the District Court for the District of Massachusetts dismissing count 1 of an indictment charging the Boston and Maine Railroad, its president (and director), and two vice presidents with having violated Section 10 of the Clayton Act. The District Court had dismissed on the ground that the indictment, as amplified by the bill of particulars, did not state a crime under the statute.

Section 10 makes it a misdemeanor for a common carrier to have any business dealings, except on the basis of competitive bidding, in excess of $50,000 per year with any corporation "when the common carrier shall have upon its board of directors or as its president, manager, or as its purchasing or selling officer or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has any substantial interest in such other corporation. . ." (emphasis added). The indictment charged that defendant officers of the Boston and Maine sold ten railway coaches valued in excess of $50,000 to the International Railway Equipment Corporation without competitive bidding and that defendant officers had a substantial interest in International. A bill of particulars specified that the "substantial interest" was "an understanding, agreement, relationship, arrangement and concert of action among the said defendants . . . and International . . . for, among other things, the purpose of producing profits for International from dealings by it in property acquired from the B & M . . . and pursuant to which defendants . . . were to and did receive substantial monies."

The arrangement between individual defendants and International was spelled out in greater detail in count 2, which was based upon the same facts and charged individual defendants with a violation of 18 U.S.C. 660. In brief, the great bulk of International's business consisted of dealings in B & M equipment. The B & M equipment which constitutes the subject matter of the instant case had been sold under the direction of individual defendants to International for $250,000, about one-half its market value, and immediately resold for $425,000 to a purchaser that had initially sought to buy the equipment directly from the B & M for $500,000. International paid individual defendants a share of the profits made in the purchase and resale.

The District Court held that the term "any substantial interest in", as employed in the statute, encompassed only a "then present legal interest" and did not include "one whose only interest is in the outcome of what may have been an illegal and illicit plan to siphon off for his personal benefit property of the Boston and Maine Railroad through the medium of International."

The Supreme Court explicitly held that the District Court's view of the phrase was too narrow. The Court stated that the term in question covers "either an existing investment of some kind in International by the three individual appellees for their use, or a joint venture or continued course of dealings, licit or illicit, with International for profit sharing."

However, the Court declined to hold that the statute covered all conflict of interest situations, such as bribery. Although the Court thought that the indictment and bill of particulars may allege only a bribe, the case was remanded with the observation that the "Government may choose to file, and the District Court may choose to allow, an amended bill of particulars . . ." which, presumably, would conform with the Court's interpretation of the statute.

Staff: Robert B. Hummel, I. Daniel Stewart and John H. Dougherty (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURT OF APPEALS

FEDERAL TORT CLAIMS ACT

Air Traffic Controller's Conduct in Assisting Pilots of Two Aircraft Within Control Zone Held Reasonable in All Respects; Parties Injured in Crash of Light Aircraft Not Entitled to Recovery. Siesel A. Franklin and Helen W. Franklin v. United States, et al. (Nos. 14609-11, C. A. 7, February 17, 1965). D.J. File 157-23-526. These suits were instituted by Siesel Franklin and his wife for damages sustained in a crash of their Beechcraft Bonanza as it was landing at Chicago's Meigs Field. It was alleged that the Beechcraft crashed as a result of encountering wake turbulence generated by a helicopter which an F.A.A. controller had also cleared to land. The United States and Chicago Helicopter Airways, Inc., were named as the principal defendants. The district court entered judgment in favor of Mrs. Franklin in the amount of $83,000, but denied recovery to Mr. Frankilin on the ground that he was contributorily negligent. The Government and Chicago Helicopter appealed and Siesel Franklin then cross-appealed. The Court of Appeals, accepting each of the arguments made by the Government, ruled that the district court "was in error in holding . . . [that] the operator of the control tower (1) had a duty to advise the pilot of the Beechcraft of the presence of the helicopter in the control zone; (2) in presuming or assuming the tower was aware of a helicopter turbulence problem, and (3) that he did not keep the helicopter within his view." The Court stated that the controller's "conduct in assisting the pilots of the two aircraft was reasonable and proper in every respect." As an additional reason for holding in our favor, the Court ruled that the crash of the Beechcraft could not possibly have been caused by the Beechcraft's encountering wake turbulence of the Chicago helicopter. The contributory negligence finding, with respect to Siesel Franklin, was upheld. The Franklins have filed a petition for rehearing en banc. Should the petition be denied, the Seventh Circuit's opinion will be especially helpful to the Government in defending against similarly unjustified claims in pending and future litigation involving F.A.A. control tower operators.

Staff: Lawrence R. Schneider (Civil Division)

Suit by Contractor for Wrongful Interference by Government Employees With His Performance of Government Contract Held Not Cognizable Under Tort Claims Act. Blanchard v. St. Paul Fire and Marine Ins. Co., et al. (No. 21107, 21111, C. A. 5, February 9, 1965). D. J. File 78-17-4. Blanchard instituted a Tort Claims Act suit against the United States on the ground that certain federal employees had wrongfully interfered with the performance of a contract which he had with the Government. The Fifth Circuit affirmed the district court's dismissal of the action. The Court of Appeals held that the "claim is grounded essentially in contract and plainly does not come within the coverage of the

Federal Tort Claims Act." The Court stated that "claims such as that asserted by Blanchard here--which are founded upon an alleged failure to perform explicit or implicit contractual obligations--are not deemed 'tort' claims for the purposes of the division between Tort Claims Act and Tucker Act jurisdiction. This is so irrespective of whether the plaintiff chooses to characterize the failure in terms of 'negligence' upon the part of the contracting officer or other government officials." The Court quoted at length from the Ninth Circuit's decision in Woodbury v. United States, 313 F. 2d 291, noting that the "rationale" of Woodbury had been "approved" by the Fifth Circuit in United States v. Smith, 324 F. 2d 622.

Staff: Lawrence R. Schneider (Civil Division)

GUARANTY

Where Lender, Because of Adverse Change in Financial Status of Borrower, Refuses Further Loan Disbursements and Calls Outstanding Loans, Guarantor Liable Under Unconditional Guaranty. United States of America v. Buffalo Coal Mining Company, Inc., et al. and Buffalo Coal Mining Company, Inc., et al. v. United States (C.A. 9, No. 19,206, February 19, 1965). D. J. File 105-6-2. In 1952, the Reconstruction Finance Corporation lent Buffalo Coal $425,775 for rehabilitation and operation of a mine. The loan was to be disbursed as work progressed and the RFC was given the right to withhold or terminate disbursements upon an "adverse change" in the financial status of the venture. As additional security, the RFC received personal guaranties totalling $50,000 from two of Buffalo Coal's principal shareholders. There was no "adverse change" clause in the guaranties. The RFC learned that an adverse change had taken place, exercised its right to terminate further disbursements, and called the loans. Buffalo Coal was unable to pay and the guarantors refused to honor their agreement. The United States thereafter sued Buffalo Coal, the principal debtor, and the two guarantors. The district court gave judgment for the United States against Buffalo Coal and the note and against the United States on the guaranties, holding that the guaranties were conditioned upon disbursement of the entire loan. On cross-appeals the Ninth Circuit affirmed the judgment against Buffalo Coal and reversed the judgment in favor of the guarantors. The Court held that the record showed a prospective breach by Buffalo Coal justifying the withholding of further loan disbursements by the Government and satisfying the implied condition precedent in the guaranties that the full amount of the loan would be disbursed.

Staff: Alan S. Rosenthal, Stephen B. Swartz and Max Wild (Civil Division)

HABEAS CORPUS

Where Petition for Habeas Corpus Does Not Allege Illegal Confinement or Restraint, Petition Should Be Dismissed Despite Fact That Petitioner May Be Entitled to Some Other Form of Relief. Ruby v. United States and the Secretary of the Navy (C.A. 9, No. 19,683, February 12, 1965). D. J. File 145-8-718.

Petitioner, acting without counsel, alleged in a petition for habeas corpus that he had received an undesirable discharge from the Navy without investigation, board hearing, or court martial. He further alleged that he was informed by the Navy that all administrative remedies had been exhausted and that he was free to seek judicial review. The district court dismissed the petition on the ground that there was no allegation of illegal confinement or restraint.

The Court of Appeals affirmed. It stated that Harmon v. Brucker, 355 U.S. 579, was of assistance to petitioner only insofar as it holds that an illegal discharge is subject to judicial review, but that the case does not support use of habeas corpus as the form of review.

Noting that petitioner was without counsel, the Court of Appeals undertook to determine whether the petition should have been retained by the district court as an ordinary civil action for review of illegal agency action. The Court of Appeals held that the petition should not have been so retained. The Court pointed out that district courts must give petitions for habeas corpus priority attention, and stated that a person invoking the "emergency remedy" of habeas corpus must be held to the requirements for that writ. (The Court further noted that an exception to this rule obtains where the requirements for a petition by a federal prisoner under 28 U.S.C. 2255 are met.)

Staff: United States Attorney Cecil F. Poole, and Special Assistant United States Attorney H. H. Brandenburg (N. D. Cal.).

INDISPENSABLE PARTIES

Individual Civil Service Commissioners Indispensable Parties to Action Seeking Review of Discharge From Civil Service Position; Plaintiff Given Leave to Amend Complaint. Yates v. Manale (C.A. 5, No. 21296, February 12, 1965). D. J. File 35-32-6. The Court of Appeals affirmed the district court's dismissal of a complaint seeking review of a civil service discharge, on the ground of failure to join the individual Civil Service Commissioners as defendants. However, the Court of Appeals directed the district court to grant leave to amend the complaint by joining the individual Commissioners, if plaintiff makes the application promptly after issuance of the mandate of the Court of Appeals.

Staff: United States Attorney Louis C. LaCour and Assistant United States Attorney Walter F. Gemeinhardt (E.D. La.).

SERVICEMEN'S READJUSTMENT ACT

Servicemen's Readjustment Act Places Veteran Under Independent Obligation, Controlled by Federal Law, to Indemnify Government For Amounts Paid as Result of Guaranty of Veteran's Loan; United States Not Estopped by Unauthorized Acts

of Its Agents. United States v. Rossi (C.A. 9, No. 19,173, February 10, 1965). D.J. File 151-12-2476. Acting under provisions of the Servicemen's Readjustment Act of 1944, 38 U.S.C. 1801, and regulations issued thereunder, the Administrator of Veterans Affairs guaranteed a home loan to defendant, a veteran. Defendant later failed to make payments on the note, and sought advice from his local Veterans Administration office about disposing of the property. After explaining his plight, defendant was apparently told by an unidentified VA employee that if he could get someone to take the property off of his hands, he would no longer be liable for the loan.

Acting upon this advice, defendant arranged to resell the home to its builder. It was not shown, however, that the builder either assumed defendant's obligation under the note and deed of trust or became the substitute beneficiary under the Administrator's guaranty. The builder later resold the home; eventually there was a default; the deed of trust was foreclosed, and the property was sold. The Administrator was required to make a payment under his guaranty. Following defendant's refusal of the Administrator's demand for indemnification for the payment, this suit was brought.

The district court ruled that the action was one for a deficiency and thus subject to the State law requirements of notice. The court also ruled that the United States was estopped because of the oral release of defendant by the unidentified VA employee.

The Court of Appeals reversed. It held that the Servicemen's Readjustment Act and its regulations placed defendant under an independent obligation, governed by federal law, to indemnify the United States for any amount paid out under the guaranty. The Court further held that the statements of the unidentified VA employee did not result in a release or an estoppel. Noting that 38 U.S.C. 1817 specifies the procedure which must be followed before a release is issued, the Court observed that that procedure was not shown to have been followed. Thus, said the Court, the case was governed by the settled rule that, where an official of the United States acts outside his actual authority, the United States is not estopped.

Staff: Frederick B. Abramson (Civil Division).

SOCIAL SECURITY ACT

In Disability Cases, Secretary May Not Rely on One Portion of Testimony in Disregard of "Overwhelming" Evidence to Contrary; Must Show Availability if Jobs in Vicinity of Applicant's Home; and Must Consider Not Only Whether Applicant Can Perform Available Jobs, But Also Whether He Would Be Employed; District Courts Should Write Opinions in Social Security Disability Cases. Cyrus v. Celebrezze (C.A. 4, No. 9501, January 26, 1955). D. J. File 137-80-66. The Secretary of Health, Education and Welfare denied plaintiff's application for disability benefits on the ground that he was capable of performing light and sedentary jobs. The Court of Appeals affirmed the district court's reversal of the Secretary's decision. Rejecting the Secretary's reliance on the opinions

of two doctors who thought that applicant could perform sedentary work, the Court of Appeals noted that these doctors conceded a limited acquaintance with applicant's condition, and held that these opinions were not substantial evidence to support a denial of benefits in the face of "overwhelming" evidence to the contrary. In the alternative, the Court held the Secretary's conclusion defective in view of the absence of proof that light and sedentary jobs "were available in the vicinity of Cyrus' home." Finally, the Court noted the evidence that light and sedentary jobs did exist in a local factory, but stated that "the more pertinent issue" is "employability" and that employers, concerned with safety records and insurance programs, would not hire a person with the applicant's handicaps. The Court criticized use by the vocational consultant who testified before the hearing examiner of the "U.S. Dictionary of Occupational Titles." The Court stated that, while such a publication "may have a proper function," it could not be relied upon exclusively, without evidence of the "reasonable availability" of jobs within the applicant's capacities.

Noting that the district court had written no opinion, the Court of Appeals stated that "we recommend to trial judges that they should prepare opinions in cases of this type." But the Court went on to state that such opinions are not indispensable for affirmance on appeal, where the district court's order is plainly supported by the record.

Staff: Samuel J. Heyman (Civil Division).

Railroad Employment Counts Toward Insured Status For Purposes of Disability Freeze, But Not For Purposes of Disability Benefits; Cause Remanded For Taking of Additional Evidence on Claimant's Ability to Work; District Court Criticized For Reversing Secretary Without Explaining Grounds for Action. Banks v. Celebrezze (C.A. 6, No. 15812, February 20, 1965). D.J. File 137-30-157. Plaintiff applied for disability benefits and a disability freeze. The "freeze" means a freezing of an individual's insured status for old-age benefits purposes, despite unemployment due to disability. To be eligible for both benefits and a freeze, the claimant must have 20 quarters of eligible earnings.

Plaintiff had worked 15 years for a railroad and 4½ years for a coal company. Railroad employment has a separate system of disability benefits under the Railroad Retirement Act (plaintiff had applied for these benefits and had been turned down), and consequently is not eligible employment for purposes of Social Security disability benefits. Section 210(a) of the Social Security Act, however, provides that railroad employment may be used for purposes of establishing eligibility for the disability freeze.

Noting that plaintiff had only 17 quarters of non-railroad employment, the Court of Appeals, after reviewing the foregoing statutory provisions, held that the Secretary was correct in denying the application for disability benefits.

With respect to establishment of disability for purposes of the freeze, the Court held the record inadequate in one respect, and remanded for the taking of additional evidence. Claimant had a low intelligence and severe psychological problems. However, this condition had existed while he worked for the railroad and the coal company. Claimant argued that he was still unemployable -- that he survived with the railroad only because his father was his foreman, and that he was eventually fired from the coal company because of his deficient mentality. There was no evidence on this issue, and accordingly the Court remanded for the taking of additional evidence.

In the statement of facts, the Court noted that the district court reversed, directing a grant of benefits and a freeze, and went on to say: "Unfortunately, the brief memorandum and order entered does not advise us on what grounds he reached either conclusion." The Court then cited Celebrezze v. Zimmerman, (D.J. File 137-73-87; United States Attorneys Bulletin, Vol. 13, p. 8), a recent decision in which the Fifth Circuit Court of Appeals discussed the desirability of a district court opinion in cases where the Secretary's decision is reversed.

Staff: Sherman L. Cohn and Marilyn S. Talcott
(Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

FRAUD

Denial of Motion to Suppress Evidence Obtained Through Routine Examination of Defendant's Employment Records by Housing and Home Finance Agency Pursuant to Contract Agreement to Permit Such Inspection. United States v. Carmen Ottilio; United States v. William M. Young (D. N.J.). D.J. File 130-48-5723. Defendants individually contracted with the Government to perform demolition work on projects administered by the Public Housing Authority and in the course thereof submitted false payrolls. This was discovered as a result of routine examination of employment records by Housing and Home Finance Agency representatives pursuant to a provision of the basic contract requiring the contractor to make such records available for review by interested local and federal agencies.

Both defendants were duly advised by the agents of their rights against self-incrimination, and were informed that complaints of underpayment of wages had been received. Defendants raised no objections and in fact, Young gave a signed admission of such underpayment. Indictments were returned charging violations of 18 U.S.C. 1001.

Both defendants moved to suppress the evidence obtained, stating the agents had no search warrant. They argued that the search was in violation of the Fourth Amendment and that retention of the information controvened the Fifth Amendment. In denying the motion the Court noted the circumstances under which the examination of records occurred. It was made pursuant to the contract, during regular working hours wnd without objection by either defendant. Rights secured by the Fourth and Fifth Amendments can be waived, and where an employer, in order to obtain Government business, specifically agrees to permit inspection of records and accounts, he voluntarily waives claim to privacy he might otherwise have had. Zap v. United States, 328 U.S. 624 (1945). Unreasonable searches and seizures are proscribed by the Constitution, and an examination of records under the circumstances here could not be characterized as being unreasonable.

Staff: United States Attorney David M. Satz, Jr.;
Assistant United States Attorney Richard Levin (D. N.J.).

FEDERAL HOUSING FRAUD

Uttering and Making False Documents. Thomas Roth v. United States, 339 F. 2d 863 (C.A. 10). D.J. File 130-13-607. Eight Defendants were charged in a thirteen-count indictment with substantive violations of 18 U.S.C. 1010 in the uttering and making of false documents to influence FHA action and the aiding and abetting of same. Appellant, manager of firms dealing in aluminum siding, was named in each count, together with one Kinchloe, the secretary of the companies. One Venable, a salesman, was named in the first three counts and the other five defendants, also salesmen, were named in two of the remaining

counts. All counts covered transactions with different homeowners. A separate trial was granted on the first three counts. Kinchloe was freed on motion for judgment of acquittal. These counts charged Venable with making and using the false documents and Roth with aiding and abetting same. The evidence adduced at trial showed Roth visited the homeowners, paying kickbacks previously promised by Venable.

On appeal, the Court held that there had been a proper joinder under Rule 8 F.R. Crim. P., the offenses being of a similar nature and growing out of a common plan, and that also the trial court properly excercised its discretion in severing the first three counts for trial. The Court noting that aiding and abetting contemplated that a defendant "associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed," concluded that the evidence proved commission of the offense by someone and that Roth's acts aided and abetted such commission.

BANKRUPTCY FRAUD

Subsequent Disclosure of Concealed Assets to Trustee in Bankruptcy Does Not Prevent Conviction For Making False Oath in Original Schedules and For Concealing Assets. United States v. Lawrence J. Young, 339 F. 2d 1003 (C.A. 7, 1964). D.J. File 49-23-552. Appellant was convicted on three counts charging him with knowingly and fraudulently making false oaths and concealing assets from the creditors in bankruptcy proceedings.

The concealed assets, his interests as contract vendee in a Chicago residence property and as sole legatee in an estate, were subsequently disclosed in proceedings before the referee, so that the trustee became aware of their existence. Nevertheless, said the Court, all the elements of the offense were proved.

> The offense of making the false oaths were completed when the knowingly false schedules were sworn to and filed..... And the offenses are not expunged by recanting.....The failure to schedule the assets constituted a concealment.

In addition, the Court held that a demand for assets, on the part of the trustee, was not necessary to establish a concealment. The conviction and sentence to 120 days' imprisonment were upheld.

Staff: United States Attorney Edward V. Hanrahan;
Assistant United States Attorney John Powers Crowley
(N.D. Ill.)

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Last Deportable Act Basis For Computing Continuous Physical Presence Requirement For Suspension of Deportation. United States ex rel. Giuseppe Gagliano v. Esperdy. (S.D.N.Y., 65 Civ. 8, February 23, 1965.) D.J. File 39-51-2284. Relator, an Italian citizen, sought release under a writ of habeas corpus. He first entered the United States as a crewman in 1921. His spouse is an American citizen. They have two grown children and some grandchildren. Relator was convicted in 1927, on his plea of guilty, of the unlawful sale of narcotics and sentenced to imprisonment for one year. Pursuant to 8 U.S.C. 1251, he was deported in 1955, but returned illegally in 1957 or 1958 as a stowaway. The Immigration and Naturalization Service instituted deportation proceedings in 1961, and on the basis of the foregoing finding, reinstated the 1955 order of deportation pursuant to Section 242(f) of the Act (8 U.S.C. 1252 (f)), which became final on June 8, 1961.

After the Board of Immigration Appeals denied a motion to reopen the deportation proceedings, relator in March 1963 petitioned this Court for review of that denial. Finding there was a question whether this Court or the Court of Appeals had jurisdiction over that petition under Section 106(a) of the Act (8 U.S.C. 1105a), the District Judge reserved decision to await a determination of that question then pending before the Supreme Court. In October 1964, the Supreme Court held in Giova v. Rosenberg, 379 U.S. 18, that review could only be had in the Court of Appeals. The District Judge thereupon dismissed relator's petition and the latter promptly petitioned the Court of Appeals (CA 2) for review of the Board's order. The appellate court dismissed the petition as untimely, not having been filed within six months after the Board's ruling (8 U.S.C. 1105a(a)(1)).

In view of the obvious hardship resulting from reservation of the decision by the District Court pending the ruling of the Supreme Court in Giova, the Court of Appeals stated in its memorandum that it had considered the procedure suggested in Phillips v. United States, 312 U.S. 246 (1941), which presumably would have involved directing the Board to vacate its prior order and reenter a new one on the same terms so that relator could make timely petition for review of the reinstated order. However, the Court of Appeals dismissed this procedure in favor of suggesting that habeas corpus be sought (8 U.S.C. 1105a (a)(9)). Relator was then in custody and promptly thereafter applied for a writ of habeas corpus, which was granted.

The only issue at the hearing under the writ was whether relator was within the classes described in subsections (1) or (2) of 8 U.S.C. 1254(a), and if not, the Attorney General had no discretion to suspend his deportation. Relator's conviction of the narcotics offense rendered him deportable under a ground enumerated in subsection (2), which requires a continuous physical presence period of not less than ten years following commission of an act constituting a ground for deportation. The Court concluded relator's last entry as a stowaway constitutes such a ground, hence the physical presence period has not been

fulfilled, citing Patsis v. Immigration and Naturalization Service, 337 F. 2d 733 (CA 8, 1964); (cert. pet. pending October 1964 Term, No. 865).

The District Court pointed out that another insuperable obstacle to relator's eligibility for suspension of deportation is subsection (f) of 8 U.S.C. 1254, which provides that paragraph (a) (2) is not applicable to entry as a crewman. The Court said there would seem to be no basis for recognizing relator's illegal entry as a stowaway as entitling him to greater rights than he would be entitled to upon his original entry as a crewman.

In dismissing the writ, the Court added that the dismissal rendered moot the question of whether habeas corpus was an appropriate remedy, observing that the purpose of changing the statute (8 U.S.C. 1105a(a)) was to provide that a petition to the circuit court of appeals be the exclusive remedy of reviewing a final order of deportation to eliminate delaying tactics in this type of proceeding which resulted from their being entertained in overburdened district courts, citing Foti v. Immigration and Naturalization Service, 375 U.S. 217 (1963).

The Court further commented that it is true that relator by choosing what turned out to be the wrong court, found himself precluded from seeking his remedy in the Court of Appeals within the specified six month period. Though it is unlikely that similar cases will occur in the future, which explains the procedure in this case, there may be sufficient merit in cases of special demonstrated hardship like this one, to have the Service vacate its order and reinstate it to enable petitioner to seek review in the manner which Congress has prescribed.

Relator was granted twenty days to appeal, the filing of which is anticipated. He has pending before the Court of Appeals (CA 2, Docket No. 29445) a petition for review of the denial by the Board of Immigration Appeals of a motion to reopen the deportation proceedings, having then sought to establish the possibility of qualifying for suspension of deportation, the factual situation being the same as considered in the instant proceedings. The Government proposes to consolidate both actions. Further clarification regarding the scope of cases reviewable under Section 106(a) of the Act (8 U.S.C. 1105a) should develop.

Staff: United States Attorney Robert M. Morgenthau; and Assistant U.S. Attorney James G. Greilsheimer (S.D.N.Y.)

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LANDS DIVISION

Acting Assistant Attorney General J. Edward Williams

Condemnation: Wherry Housing Valuation; Pretrial Orders; Instructions; Capitalization of Income Before and After Deduction of Debt Service; Comparable Sales in Selection of Capitalization Rate; Deduction of Reserve for Replacement Fund; Exclusion of Reproduction Cost; Excess Mortgage Proceeds (Windfall); Admissibility of FHA Policy Letters; Argument of Government Counsel. The Sill Corporation v. United States (C.A. 10, No. 7607, Mar. 3, 1965) D.J. File 33-37-118-149. The district court entered judgment on a jury verdict adopting the Government's high valuation of $302,000 for the Wherry sponsor's interest in Artillery Village at Fort Sill, Oklahoma.

On the sponsor's appeal, the Court of Appeals affirmed, holding that (1) capitalization of income after deduction of debt service (depreciation, mortgage insurance premiums and payments, both principal and interest) is a proper valuation method, as contended by the Government; (2) testimony with respect to the ratio of sales price to income of other Wherry and federally controlled housing was properly admitted to support the capitalization rate used by the Government experts; (3) the Government experts' deduction of the accumulated replacement reserve fund from the estimate of value was proper where the sponsor had received the fund and where there was testimony that the property was in need of repair; (4) evidence of reproduction cost was correctly excluded because the sponsor's property interest in a Wherry project is limited and controlled and because the policy has been to allow an income return based on original, not reproduction,cost; (5) evidence of excess mortgage proceeds or "windfall" (the amount the mortgage exceeds the sponsor's actual construction cost) was admissible as bearing on market value, since it was shown that FHA would consider the existence of windfall in reviewing a request for rental increases; (6) use of the word "windfall" was permissible where it appeared in documentary evidence and justified relaxation of the pretrial order prohibiting its use; (7) FHA policy letters relating to windfall and requests for rental increases were relevant, even though not promulgated in compliance with the Federal Register Act or the APA; and (8) Government counsel's reference in closing argument to the sponsor's receipt of a windfall was possibly over-emphasized but was not prejudicial since "the excess mortgage proceeds did prove to be a windfall and, as such, it was not wholly irrelevant to the ultimate issue of just compensation."

As to the first point, the Court of Appeals noted that the theories of capitalization of income both before and after deduction of debt service were submitted to the jury under pretrial agreement, constituting "the blueprint of the lawsuit," and that both theories have been approved in adjudicated cases. It said: "The fallacy of this argument [the sponsor's view that debt service should be disregarded] may lie in the fact that the only interest taken here is a possessory right in a lease." The instructions submitted both theories to the jury, which the Court said it must assume the jury

understood and intelligently applied. It indicated that the jury evidently accepted the sponsor's exhortation not to compromise and to accept only one of the theories.

As to the sixth point, the Court stated that pretrial orders "are not hoops of steel and may always be modified in the interest of the administration of justice." Regarding the last point, the Court observed that while Government counsel may not strike foul blows, they may prosecute their case with earnestness and vigor.

Staff: Raymond N. Zagone (Lands Division).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS

District Court Decisions

Embezzled Funds; Funds Embezzled Prior to Decision of Supreme Court in James v. United States Held Taxable Income Which Could Be Collected in Taxpayer's Bankruptcy Proceeding. Matter of Charles W. Hyer. (E.D. N.Y., December 15, 1964, affirming Referee's Decision of September 17, 1964). Taxpayer-bankrupt was an accountant who obtained from his clients signed, blank checks to be used for the payment of their taxes, but, instead of making these checks payable to the taxing authorities, taxpayer made them payable to himself and appropriated the proceeds for his own use. His clients subsequently paid the taxes out of their own funds. The Government claimed that these embezzled funds were income and an assessment was made and a proof of claim was filed in taxpayer's bankruptcy proceeding. Taxpayer's former clients filed claims in the bankruptcy proceeding in the amounts that were embezzled from them. The trustee in bankruptcy objected to the Government's claim.

The referee in bankruptcy held, and the District Court affirmed, that based upon James v. United States, 366 U.S. 213 (1961), the embezzled funds are taxable income, even though this embezzlement took place during 1953 through 1956, during which time, under Wilcox v. United States, 327 U.S. 404 (1946) and Rutkin v. United States, 343 U.S. 130 (1950), the proceeds of an embezzlement scheme were not deemed taxable income. Thus, it was concluded that the restriction set forth in the James decision against criminal prosecutions involving periods prior to that decision did not extend to civil proceedings to collect the tax based upon embezzlement income.

The Court further held that under Section 64a of the Bankruptcy Act the Government was entitled to priority in payment, thereby priming taxpayer's former clients. The trustee has filed a notice of appeal to the Second Circuit Court of Appeals.

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorney William N. McKee, Jr. (E.D. N.Y.); and Charles A. Simmons (Tax Division).

Tax Liens; Federal Tax Lien Did Not Attach to Cause of Action Assigned by Taxpayer to His Attorney Even Though Assignment Was Unrecorded and, Therefore, Unenforceable Under State Law Against Creditors of Taxpayer. United States v. Lester. (S.D. N.Y., July 20, 1964). (CCH 65-1 U.S.T.C. ¶9221). In this action, the Government sought to have its tax liens foreclosed against the proceeds arising from the settlement of a legal claim originally owned by taxpayer which he had allegedly assigned to another. Ruling on cross-motions for summary judgment, the Court denied the Government's motion on the ground that it had not been shown that taxpayer had any interest in the cause of action subsequent to his assignment of it, to which the federal tax lien could attach. The Government had argued that the assignment was invalid under the law of

Texas, where it was made, because it was not recorded, but the Court reasoned that "the Government's tax lien rights derive from and are limited by the federal statutes which create them [and] are not dependent on what rights the Government as a creditor may be able to avail itself of under state statutes." The Court found no requirement as between assignor and assignee that the assignment be recorded for the taxpayer-assignor to divest himself of his interest in the claim and concluded, therefore, that the Government could not argue invalidity on this ground.

The Government had further contended that the assignment was for collection only and not absolute, but the Court denied the Government's motion in this regard also and found that the assignment was at least absolute on its face. However, the Court denied defendant's motion for summary judgment as a "purchaser" of the claim against whom the tax lien must be recorded to be valid under §6323 of the Internal Revenue Code of 1954 and ruled that this issue presents a triable question of fact. To the Government's alternative argument that, if New York rather than Texas law applied, the assignment might be invalid as a fraudulent conveyance, the Court replied that the Government had failed to establish itself as a creditor, entitled to creditors' remedies, and could therefore rely only on its tax lien, attaching to the property rights as determined between assignor and assignee.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorneys Philip H. Schaeffer and David E. Montgomery (S.D. N.Y.).

Tax Liens; Federal Tax Liens Validly Attached Against Monies Due Taxpayer Under Service Contract, Although Contract Was Allegedly Assigned to and Work Performed by Non-taxpayers. Floyd D. Bullock, et al. v. United States. (E.D. Wash., December 14, 1964). (CCH 65-1 U.S.T.C. ¶9208). Frank Fletcher, the taxpayer, was the owner and operator of the Everclean Janitorial Service, and he was awarded a contract to perform janitorial services at an Air Force Base in December of 1962. Shortly thereafter Fletcher entered into a purported assignment of all of his rights and responsibilities connected with the Air Force contract to plaintiffs. However, vouchers under that contract were to be continued in the name of the taxpayer. Plaintiffs had an informal conference with personnel at the Air Force Base in which they were informed that under 41 U.S.C. 15, the janitorial service contract could not be assigned. Later they represented to Air Force officials at the base that they were foremen or supervisors under the taxpayer. Vouchers were presented and checks issued in the name of the taxpayer. In June, 1963, taxpayer was in default of the payment of taxes to the Internal Revenue Service and the monies due from the Air Force to him under the service contract were impounded under the resulting tax lien.

The Court held that, as between taxpayer and plaintiffs, taxpayer had better title to the service contract, and therefore the federal tax liens could validly attach to monies due under it. The Court held that plaintiffs failed to show that the Government had accepted the purported assignment,

noting that formal notice of assignment was not given to the Air Force, and business continued to be conducted in taxpayer's name during the term of the contract. Accordingly, plaintiffs' suit to recover the monies due under the contract was dismissed.

Staff: United States Attorney Frank R. Freeman (E.D. Wash.).

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