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UNITED STATES ATTORNEYS
BULLETIN

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NOTICE

In the item concerning employee orientation which appeared on page 151 of the last United States Attorneys Bulletin (Vol. 13, No. 8) the last word in the third paragraph should be "requisition", rather than "inventory".

NEW APPOINTMENTS - DEPARTMENT

The following Departmental officials have been appointed to office since January 1, 1965:

Attorney General - Nicholas deB. Katzenbach
Deputy Attorney General - Ramsey Clark
Assistant Deputy Attorney General - Harold B. Sanders
Assistant Deputy Attorney General - Ernest C. Friesen
Assistant Attorney General, Civil Rights Division - John Doar

NEW APPOINTMENTS - UNITED STATES ATTORNEYS

The following new United States Attorneys have entered on duty since January 1, 1965:

Alaska - Richard L. McVeigh

Mr. McVeigh was born June 12, 1933 at Spaulding, Nebraska, is married and has three children. He attended Notre Dame University from September 13, 1951 to June 5, 1955 when he received his A.B. degree; the University of Alaska during the school year 1953/54; and Georgetown University Law School from September 23, 1959 to June 4, 1962 when he received his LL.B. degree. He was admitted to the Bar of the State of Alaska in 1963. He served in the United States Air Force from October 19, 1955 to May 9, 1959 when he was honorably discharged as a First Lieutenant. From December 1, 1960 to June 30, 1962 he was Legislative Assistant to the Honorable E. L. Bartlett, United States Senator from Alaska; from June 29, 1962 to February 25, 1963 he was a legal assistant to the Attorney General of Alaska in Juneau; from February 25 to December 31, 1963 he was an Assistant Attorney General at Anchorage; and in 1964 he was an associate attorney with the firm of Ely, Guess, Rudd and Havelock in Anchorage. On October 30, 1964 he was appointed United States Attorney for the District of Alaska by the court. His Presidential nomination as United States Attorney was confirmed by the Senate on March 11, 1965.

Arizona - William P. Copple

Mr. Copple was born October 3, 1916 at Holtville, California, is married and has three children. He attended the University of California and received his A.B. degree on June 16, 1949 and his LL.B. degree on January 25, 1951. He

was admitted to the Bar of the State of Arizona the following year. From June 2, 1936 to April 6, 1941 he was employed by the United States Department of Interior, Bureau of Reclamation, Boulder City, Nevada; from April 17, 1941 to April 10, 1942 by the Operations & Maintenance Department at the Panama Canal; from 1942 to 1945 at the Kaiser Shipyards, Richmond, California, and from 1945 to 1948 by his father in the construction business in Yuma, Arizona. In 1952-53 he engaged in the private practice of law in Yuma, and since that time he has been a partner in the firm of Westover, Copple, Keddie & Choules, in Yuma. He also served as a member and later Chairman of the Arizona Highway Commission from 1953 to 1958, and at the time of his appointment was a member of the Central Arizona Project Commission. His nomination as United States Attorney was confirmed by the Senate on March 11, 1965.

California, Southern - Manuel L. Real

Mr. Real was born January 27, 1924 at San Pedro, California, is married and has four children. He attended the University of Southern California from 1943 to 1944, and from 1946 to 1949, when he received his B.S. degree; and Loyola University from 1948 to 1951 when he received his LL.B. degree. He was admitted to the Bar of the State of California in 1952. He served in the United States Navy from 1942 to 1946 and was honorably discharged as an Ensign. From 1952 to 1954, he served as an Assistant United States Attorney in the Southern District of California, and from 1955 to his entry on duty as United States Attorney he was engaged in the private practice of law. His nomination as United States Attorney was confirmed by the Senate on January 26, 1965.

Oklahoma, Eastern - Robert B. Green

Mr. Green was born January 27, 1934 at Sallisaw, Oklahoma, is married and has one child. He attended Northeastern State College at Tahlequah, Oklahoma from May 27, 1952 to May 26, 1955 when he received his A.B. degree and the University of Oklahoma Law School from September 11, 1954 to June 9, 1957 when he received his LL.B. degree. He was admitted to the Bar of the State of Oklahoma that same year. He served in the United States Army from November 3, 1957 to May 2, 1958 when he was honorably discharged as a Private. He then engaged in the private practice of law with his father and brother in Sallisaw until July 10, 1961 when he was appointed an Assistant United States Attorney for the Eastern District of Oklahoma. On February 1, 1965, he was appointed United States Attorney for the Eastern District of Oklahoma by the court. His Presidential nomination as United States Attorney was confirmed by the Senate on April 7, 1965.

As of April 23, 1965, the nominations of the following United States Attorneys to new four-year terms were pending before the Senate:

Florida, Middle - Edward F. Boardman
Kansas - Newell George
Massachusetts - W. Arthur Garrity, Jr.
Michigan, Eastern - Lawrence Gubow
Minnesota - Miles W. Lord
Missouri, Western - F. Russell Millin
New York, Eastern - Joseph P. Hoey
Rhode Island - Raymond J. Pettine

As of April 23, 1965, the nomination of the following appointee as United States Attorney was pending before the Senate:

Kentucky, Western - Ernest W. Rivers

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ADMINISTRATIVE DIVISION

Assistant Attorney General for Administration S. A. Andretta

MEMOS AND ORDERS

The following Memoranda applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 6, Vol. 13 dated March 19, 1965:

MEMOS	DATED	DISTRIBUTION	SUBJECT
401	3-3-65	U.S. Attorneys	Furnishing of Necessary Copies of Documents to be Filed in Court
402	3-11-65	U.S. Attorneys	Federal Immunity Statutes
403	3-11-65	U.S. Attorneys	Photographs at U.S. Commissioners' Hearings
243-S1	4-15-65	U.S. Attorneys	Return of Witness Statements Produced Pursuant to 18 U.S.C. 3500.
400-S1	4-19-65	U.S. Attorneys and Marshals	Inventory of Filing Cabinets
386-S1	4-20-65	U.S. Attorneys and Marshals	Fees and Expenses in Rendering International Judicial Assistance.

ORDERS	DATED	DISTRIBUTION	SUBJECT
333-65	4-13-65	U.S. Attorneys and Marshals	Re Remission or Mitigation of Seizure or forfeiture of Gambling Devices.
334-65	4-19-65	U.S. Attorneys and Marshals	Assignment of Functions Re President's Committee on Equal Employment Opportunity, President's Council on Equal Opportunity, and Economic Opportunity Council.

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ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

Court of Appeals Upholds District Court's Unsealing Order With Modifications. U. S. Industries, Inc., et al. v. United States District Court for the Southern District of California, Central Division, et al. (C.A. 9) No. 19,619. D.J. File 60-16-62. On April 7, 1965, the Court of Appeals affirmed, with modifications, an order of the district court unsealing a "Memorandum of Government Relating to the Imposition of Sentences and Fines", filed under seal, after pleas of nolo contendere in Sherman Act criminal cases. The memorandum, which contained information within the purview of the grand jury secrecy provisions of Rule 6(e) F.R. Crim. P., had, in connection with sentencing, been made available for scrutiny by the attorneys for defendants in the criminal cases. In subsequent discovery proceedings similar to those in Olympic Refining Co. v. Carter, 332 F. 2d 260, plaintiffs in several civil antitrust suits against defendants who had been defendants in the criminal cases, sought to obtain copies of the memorandum. An order unsealing the memorandum and making it generally available was entered by the district court in the discovery proceedings. Defendants in the civil cases together with a number of witnesses before the grand jury petitioned the Court of Appeals for writ of mandamus to reverse the unsealing order. The United States took the position that the court properly directed release in the interest of justice, since defendants had seen it and treble damage plaintiffs were entitled to equal access. The States of California and Hawaii, which have claims against defendants, filed amicus briefs in support of the unsealing order.

The Court of Appeals reviewed the reasons underlying the policy of grand jury secrecy, and determined that, since the criminal case was over, the only continuing reason was that of encouraging untrammeled testimony of future grand jury witnesses. It held that, in the exercise of discretion, a district court could in these circumstances grant disclosure of the document's substance and, by deleting witnesses' names or by other means, protect the policy of grand jury secrecy. In this matter of first impression, the Court of Appeals stated that it took the appropriate action itself, deleting portions of the Government memorandum and returned excised copies to the district court for unsealed filing, retaining the original copy of the document in its own files. The Court did not disclose what changes it had made in the memorandum. It also concluded that the district court had not abused its discretion in unsealing the document for "particularized need" since it would be "highly inequitable and averse to the principles of federal discovery to allow one party access to a government document and not the other".

Staff: Lionel Kestenbaum and Elliott Moyer (Antitrust Division)

Eight Major Oil Companies Charged With Violation of Sherman Act. United States v. The American Oil Company, et al. (D. N.J.). D.J. File Cr. 60-57-170 United States v. The American Oil Company, et al. (D. N.J.). D.J. File Civ. 60-57-176. On April 8, 1965, a grand jury sitting in the District of New Jersey at Newark returned an indictment against eight major oil companies: the American Oil Co.; the Atlantic Refining Co.; Cities Service Oil Co.;

Gulf Oil Corp.; Humble Oil & Refining Co.; Sinclair Refining Co.; and Socony Mobil Oil Co., Inc.

The indictment, in three counts, charges all eight defendants in Count I with having conspired to fix tank-wagon and retail prices in a trading area comprising New Jersey, Pennsylvania and Delaware, in violation of Section 1 of the Sherman Act, by means of alleged overt acts to fix prices and to substantially restrict the amount of gasoline available to distributors and dealers selling private brand gasoline, i.e., gasoline sold under a trade-name or brand-name owned or controlled by the distributor or dealer rather than by the refiner.

Counts II and III charged Atlantic, the two Cities Service companies and Humble, with having conspired and attempted to monopolize the sale of gasoline in the trading area, in violation of Section 2 of the Sherman Act, by the fixing of tank-wagon and retail prices and the substantial restriction of the amount of gasoline available to distributors and dealers engaged in the sale of private brand gasoline in the trading area.

The indictment charges that the eight defendants sold more than 3.6 billion gallons of gasoline in the trading area in 1960, having a retail dollar value of over $720,000,000. This gallonage accounted for over 67% of all gasoline sold in the trading area. The four defendants charged under Counts II and III sold over 1,500,000,000 gallons in the area, having a retail dollar value of over $300,000,000 and accounting for approximately 28% of the gasoline sold.

Private brand gasoline, which retails at a price below that of branded gasoline, accounted for about 6.4% of all the gasoline sold in the trading area.

On April 8, 1965, the Department also filed a companion civil suit, asking for injunctive and other relief to compel the adoption by the defendants of competitive policies.

Staff: John J. Galgay, John D. Swartz, Bernard Wehrmann, Gerald R. Dicker, Robert D. Canty and Kenneth C. Anderson (Antitrust Division)

Criminal and Civil Contempt Action Filed Against Publishers of City Directories. United States v. R. L. Polk & Co., et al. (E.D. Mich.). D.J. File 60-352-2. On April 13, 1965, Chief Judge Theodore Levin was petitioned for an order to show cause why R. L. Polk & Co., and others, should not be found in criminal and civil contempt for violating certain provisions of a consent decree entered on March 16, 1955, (Civ. 13135). The earlier judgment enjoined certain restraints and monopolistic practices in the publication and sale of city directories throughout the United States. Judge Levin signed an order directing Polk, and others, to show cause at a hearing set for May 10, 1965, why each of them should not be adjudged in contempt of court.

Named as respondents were R. L. Polk & Co., the leading publisher of city directories in the United States, its president, Walter J. Gardner, both of Detroit, Michigan; the Association of North American Publishers, New York, New York; and Southern Directory Co. (Inc.), Asheville, North Carolina. The Association is an unincorporated voluntary city directory library association and includes among its principal officers Mr. Gardner and other salaried employees of Polk. Southern is a city directory publisher and a member of the Association.

The petition charges that Polk and Gardner knowingly sold or caused to be sold city directories below cost for the purpose or with the effect of destroying a competitor or eliminating competition in identified towns and cities throughout the United States, in violation of Section V (D) of the judgment; that respondents knowingly allocated cities, territory and markets for the publication and sale of city directories; that they hindered, restricted and prevented other publishers from publishing competitive city directories; that they refrained from competing or left Association publishers free from competition in identified cities and towns, in violation of Section VI (A) of the judgment; that Polk and the Association executed a plan to prevent non-members of the Association from freely competing with Polk in markets served, or intended to be served by Polk; and that Polk knowingly acquired the physical assets, business and good will of other publishers without application to the court and a showing that such acquisitions may not tend substantially to lessen competition or create a monopoly in the publication or sale of city directories in any section of the United States, in violation of Section VII of the judgment.

Polk has been the leading publisher of city directories in the United States since the inception of the industry. It is charged with engaging in unfair competitive practices to increase its dominant position and to eliminate publishers with limited assets from freely competing in local markets.

Staff: Leo A. Roth and Robert W. Tobin (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURT OF APPEALS

AGRICULTURAL ADJUSTMENT ACT

Secretary of Agriculture's Determination Re National Marketing Quota for Flue-Cured Tobacco Held Reviewable. Orville L. Freeman, Secretary of Agriculture v. Darius N. Brown, et al. (C.A. 5, No. 21588, February 26, 1965). D.J. File 106-20-120. The Fifth Circuit reversed a judgment of the district court (which it previously had stayed pending the determination of the appeal) enjoining the Secretary of Agriculture from enforcing a reduction of ten per cent in the acreage allotments for Type 14 flue-cured tobacco for the 1964-65 marketing year below that for the 1963-64 marketing year. The Court of Appeals rejected the Government's claim that the district court was without jurisdiction to review the Secretary's action, holding that (1) Congress did not intend in the Agricultural Adjustment Act to preclude review of the manner in which the national quota was fixed if the Secretary "failed to comply with statutory mandates relating to the gathering and using of statistics, the consideration of which is a condition precedent to determining whether types of tobacco should be treated as separate kinds in establishing marketing quotas;" and (2) the Secretary's determination not to treat Type 14 as a separate kind of tobacco for the 1964-65 marketing year did not fall within the exception in the Administrative Procedure Act for review of agency action committed to agency discretion, because the Secretary's discretion, rather than unfettered, was subject to the requirement that he compile and use the latest statistics in making his determination. In reaching the merits of appellees' claim, the Court held that the Secretary had failed to use the latest statistics in determining whether Type 14 should have been treated as a separate kind of flue-cured tobacco.

The judgment of the district court was, however, reversed because of its breadth and the case remanded with directions to that court to enter an order directing the Secretary "to reconsider within a reasonable time the question of treating Type 14 as a separate kind of flue-cured tobacco in the light of all available and material facts" including the latest statistics.

Staff: Alan S. Rosenthal and Martin Jacobs (Civil Division)

CIVIL SERVICE

Removal of Internal Revenue Officer Charged with Taking a Bribe, But Acquitted on Criminal Charge Subsequent to Removal, Upheld. Arnold Finfer v. Mortimer M. Caplin, Commissioner of Internal Revenue (C.A. 2, No. 28957, March 26, 1965). D.J. File 35-52-12. Appellant, a veterans' preference eligible, was discharged from his position as an Internal Revenue Service revenue officer for accepting a bribe from a taxpayer. At the time of his discharge, he was under an indictment for the same offense. He did not take a timely appeal either within the IRS or to the Civil Service Commission. He was subsequently acquitted on the

bribery charge. After the agency and the Commission denied reinstatement, appellant instituted this action in the district court. The Government's motion for summary judgment was granted and, upon the employee's appeal, the Second Circuit affirmed. The Court of Appeals held, with respect to our arguments of laches and failure to exhaust the administrative remedies, that such arguments "scarcely can be asserted under the circumstances here presented." The Court reasoned that "[i]t would have been contrary to sound strategy" for appellant "to enter upon a series of hearings of appeals before administrative agencies" prior to his trial on the criminal charges. The Court found nevertheless that "the Commissioner could well have concluded that the evidence was substantial enough to justify a refusal to reinstate." The Court noted that the law does not require the "same quality" of proof in a removal proceeding to discharge as that required in a criminal case to convict. As to appellant's argument that his superiors had arbitrarily removed him without giving him an opportunity, at the initial agency hearing, to confront and cross-examine witnesses, the Court stated: "Despite Finfer's unusual predicament, if he had wanted an opportunity . . . to confront the witnesses against him, it was not arbitrary to require him to abide by the regulations and appeal to the Civil Service Commission." Appellant has filed a petition for rehearing in this case.

Staff: Lawrence R. Schneider (Civil Division)

FEDERAL JURISDICTION

Federal District Court Has Jurisdiction to Enjoin Further State Court Proceedings in Action Properly Removed to Federal Court. Heasley v. Register (C.A. 8, No. 17862, March 22, 1965). D.J. File 145-12-905. Plaintiff brought an action in a state court to quiet title to property which had been bought at a foreclosure of federal tax liens securing plaintiff's tax indebtedness. This action was removed to the United States District Court for the District of North Dakota. Plaintiff's motion to remand was denied, and the District Court entered an order of dismissal, from which no appeal was taken. Plaintiff then attempted to procure a default judgment in the state court. Judge Register, of the District Court, enjoined plaintiff and the state judge from any further proceedings. An appeal from this order was dismissed on appellee's motion. Plaintiff then sued Judge Register, seeking damages of $400,000. The District Court dismissed the complaint, and the Court of Appeals affirmed, stating that the quiet title action was properly removed to the Federal District Court and that the Federal Court was accordingly authorized, in aid of its jurisdiction, to enjoin further state proceedings.

Staff: John O. Garaas, United States Attorney (D. N.D.)

INTEREST - FEDERAL TORT CLAIMS ACT

Judgments in Favor of Several Dependents Awarded for One Death, in Amounts of Less Than $100,000 Each But in Aggregate Amount Exceeding That Figure, Are Judgments "not in excess of $100,000 * * * in any one case" and Therefore Governed by 31 U.S.C. 724a. United States v. State of Maryland for the Use of Meyer, et al. (C.A. D.C., Nos. 18676, 18677, March 11, 1965). D.J. Files 157-16-1177, 157-16-1178. Plaintiffs were the survivors of the pilot and co-pilot of a Capital Airlines airplane, which collided with a National Guard

airplane over Brunswick, Maryland. Judgments in their favor against the United States were affirmed by the Court of Appeals in 1963 322 F. 2d 1009, certiorari denied, 375 U.S. 954, pending on motion for leave to file petition for rehearing as No. 543, October Term, 1963. Although the judgment entered was on one piece of paper, it made individual awards to each of the dependents of each decedent. Although the total amount awarded for each death exceeded $100,000, the amounts awarded to seven of the eight plaintiffs were less than $100,000. Plaintiffs did not file a transcript of the judgment with the General Accounting Office, as required for the payment of interest under 31 U.S.C. 724a. Some nine months after the issuance of the mandate by the Court of Appeals affirming the judgment of the district court, which had been rendered without any reference to interest, plaintiffs moved to compel the payment of interest. Rejecting the Government's contentions that the motion came too late and that as to seven of the eight plaintiffs the provisions of 31 U.S.C. 724a precluded the award of interest, the district court granted the motion and awarded interest.

The Court of Appeals reversed. Judge Fahy, speaking for the majority, ruled that the judgments were not judgments in excess of $100,000 in any one case within the meaning of 31 U.S.C. 724a, notwithstanding the provision of the Wrongful Death Act of Maryland which provides that only one action shall lie for each death. He noted that the federal interest statute should be construed and applied according to its own purposes, which were to enable a person with a judgment not in excess of $100,000 to receive prompt payment without awaiting a special appropriation, and to relieve the United States of the obligation of paying interest. Such purposes would best be served by construing the statute as applying to individual awards not in excess of $100,000, notwithstanding any provisions of local law. In so ruling, the Court adopted the administrative construction of the statute by the Comptroller General. Hayashi, 40 Comp Gen. 307.

The Court, however, agreed with the district court that the absence of a provision for interest in the judgment itself and in the mandate of affirmance does not foreclose a plaintiff from receiving interest under 28 U.S.C. 2411(b). Accordingly it affirmed the award of interest to the eighth plaintiff, whose award was in excess of $100,000.

Judge Danaher dissented on the ground that the statutory language "in any one case" should be construed in light of local law, and that since only one case could be brought under the Maryland Wrongful Death Act for one death, the several awards for each death should be treated as arising "in any one case."

Staff: David L. Rose (Civil Division)

JUDICIAL IMMUNITY

Federal District Judge Immune from Suit in Connection With Contempt Order Issued in Excess of His Jurisdiction. Heasley v. Davies (C.A. 8, No. 17861, March 22, 1965). D.J. File 145-12-903. Judge Davies, of the United States District Court for the District of North Dakota, found plaintiff guilty of contempt for violating an injunction issued in connection with a tax lien receivership proceeding, and sentenced plaintiff to 18 months' imprisonment. On appeal this conviction was reversed on the ground that, at the time plaintiff's acts

were committed, the receivership proceeding had terminated and the injunction was not longer in effect. Heasley v. United States, 312 F. 2d 641. Pending appeal, plaintiff was on bail, and so never went to prison. After winning the appeal, plaintiff brought this action for false imprisonment against Judge Davies, seeking damages in the amount of $100,500. The Court of Appeals affirmed the district court's dismissal of the complaint on the grounds of judicial immunity. Conceding that Judge Davies had acted "in excess of" his jurisdiction, the Court of Appeals said that judicial immunity protected him from suit so long as there was not a "clear absence" of jurisdiction to issue the contempt order.

Staff: United States Attorney John O. Garaas (D. N.D.)

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

Injury to Workman Occurring on Skid Attached to Pier, But Over Navigable Waters, Held Injury Occurring on Navigable Waters Within Coverage of Longshoremen's Act. Michigan Mutual Liability Co. v. Arrien (C.A. 2, No. 29241, April 5, 1965.) D.J. File 83-51-115. On September 4, 1963, Parisi, a longshoreman, was helping to discharge cargo from a ship moored at a pier in Brooklyn, New York. To provide additional working space in discharging cargo the workers had, in accordance with their usual practice, attached a skid to the pier. The skid was a removable rectangular platform which was attached to and supported by the pier. When the pier was not being used to load or discharge cargo the skid was dismantled and stored on the wharf. Parisi was working on the skid when a pallet suspended from the ship's cable broke, throwing cargo onto the skid, striking Parisi's leg and knocking him into the water. He suffered totally disabling injuries to his shoulder, head, leg and foot. His employer and insurance carrier paid him $55 a week as compensation under the New York Workmen's Compensation Law, treating the accident as one which had occurred on land.

Parisi applied for compensation under the Longshoremen's Act and the Deputy Commissioner, after full hearing, ruled that the injury had been sustained upon the navigable waters of the United States, and entered an award for the payment of $70 per week under that Act. The district court upheld the award.

The Court of Appeals affirmed. The majority accepted the Deputy Commissioner's position that the skid, while attached to the wharf, occupied the position above the water only temporarily, so that the space below it was not withdrawn from navigation, and remained a part of the navigable waters. The majority distinguished T. Smith & Sons v. Taylor, 276 U.S. 179, on the ground that it merely sustained an award of state compensation, noting that under Calbeck v. Travelers Insurance Co., 370 U.S. 114, it was clear that the Longshoremen's Act was intended to provide compensation whether or not the injury might also be within the reach of a state compensation law.

The majority noted that its decision sustaining the award was also compelled by the statutory presumption contained in Section 20 of the Act (33 U.S.C. 920), and the twilight zone doctrine announced by the Supreme Court in Davis v. Department of Labor, 317 U.S. 249.

Judge Hays dissented on the ground that a sharp line must be drawn between injuries upon navigable waters, and those occurring on land. He believed that, under the Supreme Court's decision in T. Smith & Sons v. Taylor, supra, and the Second Circuit's decision in Vega v. United States, 191 F. 2d 921, the injury occurring upon the skid was not within the admiralty jurisdiction and therefore should not be covered by the Longshoremen's Act.

Staff: Morton Hollander and David L. Rose (Civil Division)

Where Compensation Claimant's Pre-existing Condition May Have Been Aggravated by One or Both of Two Accidents, Claims in Connection With Each Accident Should Have Been Considered and Decided Administratively on Fully Consolidated Basis. Lumbermen's Mutual Casualty Co., et al. v. Einbinder (C.A. D.C., No. 18,269, February 25, 1965). D.J. File 83-16-252. In 1958, the claimant, a milk deliveryman, was injured when he fell down a flight of stairs. Lumbermen's, the workmen's compensation insurance carrier at that time, paid compensation benefits and medical expenses. In 1961 claimant again fell, this time while loading crates of milk and while another insurance company was the workmen's compensation insurance carrier. In January 1962, claimant filed claims for medical needs allegedly resulting from both accidents and the Deputy Commissioner held a consolidated hearing with respect to both claims. The Deputy Commissioner thereafter found that claimant's condition, osteoarthritis of the hip, had been aggravated by the fall and held that the employer and Lumbermen's must pay the medical expenses to be incurred by claimant as a result of that injury. No decision or findings were made with respect to the 1961 injury. The district court (Holtzoff, J.) affirmed the Deputy Commissioner's compensation award as supported by substantial evidence. The Court of Appeals reversed the district court's decision and ordered the case remanded to the Deputy Commissioner for reconsideration by him of both claims (i.e., that resulting from the 1958 fall and that resulting from the 1961 fall) on a fully consolidated basis and for him to make findings of fact and enter an order with respect to both injuries.

Staff: Martin Jacobs (Civil Division)

MALPRACTICE

Decision That VA Doctor's Assignment of Mental Patient to Open Ward Was Not Negligent, Despite Referring Physician's Belief That Patient Had Suicidal Tendencies, Affirmed. Baker v. United States (C.A. 8, No. 17652, April 5, 1965). D.J. File 157-28-61. Plaintiff had been admitted to a VA hospital with a report from the referring physician indicating that he had suicidal tendencies. Despite this report, plaintiff was placed in an open ward, in which no precautions were taken against suicide attempts. A few days after admission, he attempted suicide and sustained the injuries for which this action was brought under the Tort Claims Act. His principal contention was that the admitting physician's decision not to put him in a closed ward was negligent. The district court found that there was no negligence, and made the following statement in the course of its opinion; "Calculated risks of

necessity must be taken if modern and enlightened treatment of the mentally ill is to be pursued intelligently and rationally."

On appeal, plaintiff's principal contention was that this statement was an erroneous statement of the applicable state law (Iowa). The Court of Appeals rejected this contention. It read the district court's statement regarding "calculated risk" as merely a factual conclusion, based on expert psychiatric testimony, as to the local standard of care required in the circumstances of this case, rather than as a statement of a rule of law of general applicability.

Staff: Robert V. Zener (Civil Division)

MARITIME LIENS

Lien for Freight Overcharges Enforceable Even Though Arising After Ship Has Discharged Cargo; Prohibition of Lien Clause in Charter Party Effective to Prevent Charterer from Incurring Lien for Freight Overcharges. United States v. The S. S. Lucie Schulte et al. (C.A. 2, No. 29110, April 6, 1965). D.J. File 61-18-109. The United States brought this action to enforce a lien on a ship for freight overcharges on Government cargo carried by the ship. The bills of lading had been signed by a company which was operating the ship under charter, and which later became insolvent. The shipowners raised two alternative defenses to the Government claim, both presenting a novel question. First, they contended that the lien for freight overcharges exists only during the "union of the cargo and the ship"--i.e., while the cargo is on board. Here the overcharges were made and paid after unloading. Second, they relied on the standard clause in the charter party prohibiting the charterer from creating any lien on the ship.

The district court rejected both defenses. The Court of Appeals reversed, holding that the first defense was invalid but that the second defense should have been sustained. On the first point, the Court of Appeals rejected the owners' argument that, since maritime liens are secret, they should be given a restricted scope. The Court found that any distinction based on whether payment of the freight charges, or demand for payment, is made before or after unloading would be "impossible to justify on any ground of logic or of policy."

As to the prohibition of lien clause in the charter party, the Court recognized that the "prime purpose" of the clause may have been to prevent liens of materialmen under the Lien Act (which liens are concededly cut off by a prohibition of lien clause in a charter party). However, the Court saw no ground for limiting the broad language of the clause--which prohibits "any lien"--to materialmen's liens. Likewise, the Court saw no reason for relieving the United States--which it characterized as "a shipper in large volume and of extraordinary sophistication"--from the obligation of finding out whether a ship on which it places cargo is subject to a prohibition of lien clause in a charter party.

Staff: Robert V. Zener (Civil Division)

SOCIAL SECURITY ACT

Administrative Decision Favorable to Disability Claimant Reviewed by Court of Appeals on Claimant's Petition and Sustained on Merits. Haluska v. Celebrezze (C.A. 8, No. 17918, March 31, 1965). D.J. File 137-39-87. A hearing examiner of the Department of Health, Education and Welfare determined that plaintiff was under a disability and accordingly reversed the initial administrative decision that plaintiff's previously awarded disability benefits should be terminated. Plaintiff's request for review by the Appeals Council was denied. The Appeals Council pointed out to plaintiff that "the hearing examiner's decision is wholly favorable to you." Nevertheless, plaintiff sought judicial review of the administrative decision. The district court dismissed his complaint. The Court of Appeals affirmed on the ground that the administrative decision was supported by substantial evidence. On appeal, the Secretary contended that Section 205(g) of the Social Security Act, 12 U.S.C. 405(g)--the judicial review provision--contemplates only review of decisions adverse to the claimant. Referring to this contention, the Court of Appeals stated that "we have preferred to disregard it and have proceeded to the merits."

Staff: United States Attorney John O. Garaas (D. N.D.)

Third Circuit Remands Disability Case to Permit Secretary to Make Findings as to Reasonable Employment Opportunities. Bujnovsky v. Celebrezze (C.A. 3, No. 14843, April 7, 1965). D.J. File 137-62-126. In this social security disability benefits case, the Secretary, finding that claimant, a coal miner, had no impairment of consequence, denied his application for benefits without attempting to show that lighter work was reasonably available. The district court reversed and remanded the case for the awarding of benefits.

The Third Circuit affirmed the reversal but modified the order of remand to permit the Secretary to introduce evidence to show whether plaintiff is able to engage in substantial gainful activity. The Court rejected the Government's main contention that substantial evidence supported the Secretary's decision denying benefits. However, the Court agreed with the alternative argument that, rather than an award of benefits, a remand to determine reasonable employment opportunities was required since the Secretary had made no findings on that question.

Staff: Frederick B. Abramson (Civil Division)

DISTRICT COURT

SOCIAL SECURITY ACT

District Court Requires Filing of Retainer Arrangements in Social Security Cases. The following order was entered by Judge Field of the United States District Court for the Southern District of West Virginia, on February 11, 1965:

IN RE: ATTORNEY FEES IN SOCIAL SECURITY REVIEWS

It appearing to the Court that the unregulated use of contingent fee arrangements in Social Security Reviews has in certain cases been the subject of abuse and resulted in the collection of inequitable and unjustifiable amounts; and

It further appearing that the interests of justice require that the amounts of such fees be subject to the supervision of this Court in which the litigation has been conducted;

It is therefore ORDERED that in all Social Security cases presently pending on the docket of this Court, the attorney of record shall file a statement of the terms of his employment or retainer, together with a copy of any contract of employment for his services.

It is further ORDERED that in any case wherein an award for benefits is ordered, no fee for services shall be collected by the attorney until it first shall have been approved by order of this Court.

This order shall be effective upon the date of entry and the Clerk of this Court shall send a certified copy thereof to all attorneys of record in such cases pending on the docket at either Charleston or Beckley.

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

GAMING

Bingo, In-Line, Multiple-Coin, Pinball Machines Declared Gambling Devices Covered by Gambling Devices Act of 1962. United States v. Two Coin-Operated Pinball Machines (W.D. Ky., March 26, 1965) D.J. File 159-23-67. The Government instituted a libel for the forfeiture of two pinball devices which had been transported in interstate commerce, the answering claimants being the distributor and the manufacturer. After a jury verdict finding the devices to be designed and manufactured primarily for use in connection with gambling, the Court issued findings of fact and conclusions of law, substantially as follows:

Respondents are coin-activated, electrically-operated machines consisting of a base section which contains an inclined playboard, plunger device, a number of holes and a quantity of rubber bumpers on the playboard, and a vertical section upon which the results of play are recorded. The object of play is to propel metal balls by means of the plunger onto the inclined playboard so that the ball will fall into certain holes and thereby light corresponding light bulbs located on the vertical section of the machines. When three or more bulbs are lighted in a row, or in some other predetermined order, the machine registers so-called free plays. Any number of coins can be inserted before play begins and the number of free plays to be awarded for successful operation of the device can thereby be increased although the rate of increase of free play awards cannot be controlled by the player and may or may not increase upon the insertion of a particular coin. After striking the ball with the plunger the ball is propelled onto the playboard and descends the inclined plane totally dependent upon the law of gravity and chance contact with the posts affixed to the board. The player has no control over this descent and only negligible, if any, skill is involved in the operation or play of the device. Free plays won on the machine are recorded on a three-digit counting meter (replay register). Although the free games so registered may be used by depressing appropriate buttons to activate the machine, it can also be immediately cleared by operation of an on-off switch located on the base section or by disconnecting the device from its power source and then reconnecting it. Inside the base section are also the total plays meter which records the number of coins inserted and the number of free plays used in the play of the machine; and a replays meter which records the number of free plays which have been won on the play of the machine. Subtracting the totals of these two meters will result in the number of free games eliminated from the machine without being used in play. The devices are so equipped that the replay meter may be readily rewired in order to record only the number of free games so eliminated. "The great number of free games which can be achieved by players, the provision for multiple coin insertion in order [to] increase the reward for successful play, the facility with which free plays can be eliminated from the free play register and the ease by which free plays so eliminated can be counted renders these devices peculiarly and uniquely suited for gambling

purposes. Successful play of these devices cannot be achieved by the application of skill and depends upon the result of the application of an element of chance. The successful player of these devices will win not only a right to replay the devices but also the opportunity to have free games redeemed for cash or merchandise."

The Court also found that Kentucky Law had not "specifically enumerated" these devices as lawful so as to create an exception to the application of 15 U.S.C. 1171. The Court declared the Gambling Devices Act of 1962 to be a constitutional exercise of the legislative power.

Staff: United States Attorney William E. Scent (W.D. Ky.).

STATUTORY PRESUMPTION

Instructions; Liquor Law Violation; Constitutionality of Inferences Authorized by Statute. United States v. Gainey (Supreme Court, No. 13, October Term, 1964, decided March 1, 1965). D.J. File 23-19M-512. Defendant was convicted of violating 26 U.S.C. 5601(a)(1) (possession, custody or control of a set up, unregistered still and distilling apparatus), and 26 U.S.C. 5601(a)(4) (carrying on "the business of a distiller or rectifier without having given bond as required by law"). In the course of his instructions the trial judge informed the jury of two statutory provisions (26 U.S.C. 5601(b)(1)(2)) which authorize a jury to infer guilt of the substantive offenses from the fact of a defendant's unexplained presence at the site of an illegal still. The Court of Appeals for the Fifth Circuit reversed the convictions on the ground that these statutory inferences are unconstitutional, because it thought the connection between unexplained presence at an illegal still and the substantive offenses of "possession" and "carrying on" is insufficiently rational to satisfy the due process requirements formulated by the Supreme Court in Tot v. United States, 319 U.S. 463.

The Supreme Court reversed, holding the inference authorized § 5601(b)(2) constitutionally permissible, without reaching the validity of § 5601(b)(1) because the sentences imposed by the trial court were concurrent. The Court held that there was sufficient rationality in the conviction between the fact proved and the ultimate fact assumed. The Court further held that the statute did not impinge on the trial judge's powers over the judicial proceeding, and that the statutory phrase, "unless the defendant by the evidence in the case and by proven facts and circumstances explains such presence to the satisfaction of the jury" cannot be considered a comment on the defendant's failure to testify.

On this last issue the Court stated in Footnote 7, "Indeed the better practice would be to instruct the jurors that they may draw the inference unless the evidence in the case provides a satisfactory explanation for the defendant's presence at the still, omitting any explicit reference to the statute itself in the charge."

Read together with the text to which the note is appended and the concurring opinion of Mr. Justice Douglas, the quoted language admonishes judges, in charging the jury, to avoid: (1) anything resembling a comment on the defendant's failure to take the stand, and (2) "overawing" the jury with the disclosure that the inference is "enshrined in an Act of Congress," or suggesting that the inference is mandatory, rather than merely permissive.

In view of the foregoing, and the fact that the Narcotics Import and Export Act erects a comparable presumption in almost identical terms, it is recommended that United States Attorneys advise the district judges to forego reading to the jury the presumption statutes in these cases, and to model their instructions in accordance with the Supreme Court's suggestion.

FRAUD

Violations of Securities Laws; Use of Mails. Paul E. McDaniel v. United States (C.A. 5, April 7, 1965). D.J. File 113-74-13. Appellant and others were convicted in the Southern District of Texas on charges of conspiracy and the fraudulent sale of unregistered securities through the use of the mails. On appeal, he contended that the evidence did not support the verdict since the mailings were done by outsiders who had no connection with the alleged fraud, the scheme had reached fruition and the sales had been completed before the mailings occurred. The Court of Appeals for the Fifth Circuit, after reviewing the evidence, found that the mails were used during the scheme and afterwards and, although appellant may not have known that the confirmations of sales and certificates were to be mailed, the mailings were such an integral part of the transactions that the use of the mails should have been foreseen and contemplated.

The Court stated: "The evil at which the Securities Act is directed is the fraud in the sale of securities . . . In other words, a scheme to defraud in relation to a sale of securities, and the use of the mails in consummation thereof, is the gist of the crime. The use of the mails need not be central to the scheme to defraud." The Court rejected the argument that the mails were used after the scheme had reached fruition, stating that it did not matter whether appellant himself did the mailing: the use of the mails by his brokers must have been fully contemplated by him, and attributed to him.

Appellant also claimed error in the admission of a document offered as an admission against a co-defendant. The document was identified as having been prepared by various officers of the company strictly as an office memorandum and as a record of the company made in the course of business. The trial court admitted the document under the Federal Business Record Act, 28 U.S.C. 1732a. The Court of Appeals found: "The memorandum was not designed to be put into evidence, and hence to be self-serving. Instead, it was a summary or history based upon the corporate records for use by retained counsel in advising the company. Thus, those who prepared it had every motive to make it truthful, complete and accurate. All the hallmarks of authenticity surround this document."

Appellant was sentenced to serve 18 months in prison and to pay a fine of $14,100. An additional 5-year sentence was suspended.

Staff: United States Attorney Woodrow B. Seals;
Assistant United States Attorneys James R. Gough,
William M. Schultz and Fred L. Hartman. (S.D. Texas).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

IMMIGRATION

Illegitimate Child of Husband Stepson of Wife Deemed Under Immigration Laws. Luneta Nation v. Esperdy (S.D. N.Y. 64 Civ. 1218, March 19, 1965) D.J. File 39-51-2509). Plaintiff, a citizen of the United States, brought this declaratory judgment to challenge the denial by defendant and the Board of Immigration Appeals of her petition to classify as a nonquota immigrant the illegitimate child of her alien husband.

Under the immigration laws a child of a United States citizen is entitled to nonquota immigrant status and by definition includes a stepchild, whether or not born out of wedlock, providing the child had not reached the age of 18 years at the time the marriage creating the status of stepchild occurred (8 U.S.C. 1101 (b)(1)). Defendant and the Board of Immigration Appeals in denying the petition relied on legislative history indicating that the definition extended only to the illegitimate children of the female party to the marriage creating the status of stepchild.

After considering the legislative history of the statute and its broad language, the Court concluded that the definition of stepchild was intended to encompass the illegitimate child of both parties to the marriage. Plaintiff's motion for summary judgment was granted.

Staff: United States Attorney Robert M. Morgenthau (S.D. N.Y.); Roy Babitt and James G. Greilsheimer of Counsel.

Alien Exchange Visitor Engaged in Research Entitled to Different Degree of Stringency in Waiver of Foreign Residence Requirement. John H. and Shirley M. Lehnert v. King (W.D. N.Y., Civ. 11034, March 23, 1965) D.J. File 39-53-191. Plaintiff, a British national, was admitted to the United States as an exchange visitor to perform advance research in the Department of Experimental Radiology at the University of Rochester. Under the terms of her admission she was required at the termination of her stay in the United States to return to Great Britain or to a country cooperating in the Exchange Visitor Program and reside there for two years before becoming eligible for an immigrant visa and permanent re-entry into the United States. A waiver of the foreign residence requirement may be granted an exchange visitor under 8 U.S.C. 1182(e) by the Attorney General upon a favorable recommendation of the Secretary of State after the Commissioner of the Immigration and Naturalization Service determines that the departure of the exchange visitor would impose exceptional hardship on the visitor's citizen or resident alien spouse or child. The authority of the Attorney General and the Commissioner under the statute has been delegated by 8 C.F.R. 212.7(c) to District Directors of the Service.

Plaintiff married a citizen of the United States and applied for a waiver of the foreign residence requirement. Defendant denied her application on the ground that her departure would not cause her citizen husband exceptional hardship. Plaintiff in this declaratory judgment action contended that the defendant erred in denying her application. The Court after consideration of the legislative history of Section 1182(e) supra, concluded that Congress intended two standards to be applied in determining applications for waiver of the foreign residence requirement. It was the Court's view that if the exchange visitor came to the United States to learn in order to give his countrymen the benefit of such education, the exceptional hardship rule was to be strictly applied; but if the visitor came to educate Americans, less stringent application of the rule was intended by Congress.

It appeared to the Court that the administrative authorities had not indicated any policy as to the less stringent hardship rule, and that if it were applied to plaintiff's application the facts and circumstances could well justify a finding of exceptional hardship. The Court concluded by saying that the District Director should make the requisite finding and forward the application to the Secretary of State. Subsequently, on April 14, 1965, the Court amended the decision to direct defendant to forward the application to the Attorney General for consideration of the legislative history and his direction as to the standard to be applied by defendant.

Staff: United States Attorney John T. Curtin; Assistant United States Attorney C. Donald O'Connor, of Counsel (W.D. N.Y.)

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Forfeiture of Veterans Benefits. Robert G. Thompson v. William J. Driver, Administrator of Veterans Affairs (D.D.C.) D.J. File 146-1-51-382. Following a remand ordered by the United States Court of Appeals for the District of Columbia Circuit (see U.S. Attys. Bull., Vol. 10, No. 15, p. 443, dated June 27, 1962), the Administrator ruled that Thompson, a disabled veteran of World War II who was convicted under the Smith Act in 1949, had in 1950 and 1951 rendered assistance to an enemy within the meaning of 18 U.S.C. 2388, for which conduct the Administrator had cancelled Thompson's disability payments pursuant to the requirements of 38 U.S.C. 3504.

When the matter came to be heard in the District Court for the District of Columbia on cross-motions for summary judgments and on defendant's alternative motion to dismiss, the Court, Jones, D.J., on April 14, 1965, ruled that as used in 18 U.S.C. 2388 the term "war" meant a war declared by Congress, and that as the United States was not at war with North Korea in 1950-1951 (the time period in which Thompson had made the remarks upon which the Administrator had acted), the Administrator could not terminate his disability payments on the basis of such conduct.

Staff: DeWitt White (Internal Security Division)

Contempt of Congress. United States v. Donna Allen; United States v. Dagmar Wilson; and United States v. Russell Nixon. (Dist. Col.) D.J. File 146-1-16-3371. On December 30, 1964, separate indictments were returned by a grand jury in Washington, D. C., charging Donna Allen and Dagmar Wilson each with two counts for refusal to answer a pertinent question, and refusal to answer any questions, and charging Russell Nixon in a single count for refusal to be sworn or answer any questions, all before the House Committee on Un-American Activities. The three defendants were arraigned on January 8, 1965, and each pleaded not guilty to all charges.

The three cases were consolidated and on April 7, 1965, a single trial commenced before Judge Edward Curran without a jury. On April 8, 1965, Judge Curran rendered a judgment of guilty as charged against all three defendants. The matter was referred to the Probation Office and sentencing was deferred until receipt of a probation report.

Staff: United States Attorney David C. Acheson and
Assistant United States Attorney Joseph Lowther (D.C.);
Paul C. Vincent (Internal Security Division)

Espionage (18 U.S.C. 794(c); 18 U.S.C. 793(g); 18 U.S.C. 371; and 18 U.S.C. 951). United States v. Robert Lee Johnson and James Allen Mintkenbaugh (E.D. Va.) D.J. File 146-1-79-384. On April 6, 1965, a Federal grand jury in Richmond, Virginia, returned a three-count indictment charging Robert Lee Johnson and James Allen Mintkenbaugh with conspiring to transmit national defense information to the Soviets, conspiring to obtain such information, and conspiring to act as agents of the Union of Soviet Socialist Republics without notifying the Secretary of State. Named as co-conspirators, among others known to the grand jury only by code names, was Vitaly Ourjoumov, a Soviet National.

Johnson and Mintkenbaugh were assigned to the G-2 (intelligence) section of the Berlin Area Command in Germany in 1953. The indictment alleges that in East and West Berlin, Germany; in Paris and Orleans, France; in Moscow, Union of Soviet Socialist Republics; and in various places in the United States including the Eastern District of Virginia, Johnson and Mintkenbaugh conspired with Ourjoumov and other individuals to obtain and furnish information relating to our national defense to the Union of Soviet Socialist Republics. It is charged that defendants and their co-conspirators communicated with each other through codes, ciphers, and other types of secret writing. It is also charged that they utilized specific objects such as hollowed-out batteries, hollowed-out shoe heels, and hollowed-out cigarette lighters, to conceal and transmit national defense information.

As overt acts, it is alleged that Johnson and Mintkenbaugh met with each other and with their co-conspirators at Moscow, and at various places in Germany, France, and the United States. Both Johnson and Mintkenbaugh obtained military assignments and employment in furtherance of the conspiracy.

Johnson and Mintkenbaugh were arrested on April 5, 1965, pursuant to warrants based on a complaint filed in Alexandria, Virginia on the same day. On April 8, an order for the removal of Mintkenbaugh from the Northern District of California to the Eastern District of Virginia was signed by the District Court Judge in San Francisco.

Johnson and Mintkenbaugh were arraigned before Judge Oren Lewis in the District Court of Alexandria, Virginia, on April 15, 1965, and both defendants entered pleas of not guilty to all charges in the indictment. Judge Lewis set the trial for September 7, 1965, and bail was continued at $20,000 for each defendant.

Staff: United States Attorney Claude V. Spratley, Jr.; Assistant United States Attorney Plato C. Cacheris (E.D. Va.); Paul C. Vincent and William J. Hipkiss (Internal Security Division).

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LANDS DIVISION

Acting Assistant Attorney General J. Edward Williams

Condemnation; Valuation; Rock; Exclusion of Demand of Government; Consequential Losses Not Recoverable; Rule 71A Commission Procedure; No Prejudice From Lack of Instructions. Tobin Construction Co. v. United States (C.A. 10, March 5, 1965), D.J. File 33-37-267-961. The Tobin Company obtained a contract with the United States to furnish rock for road construction in connection with a dam and reservoir project near Eufaula, Oklahoma. Three months later it leased a tract of land on a royalty basis as a quarry site. Plans for the Government project for years earlier had contemplated road relocation, and an interchange precisely where Tobin's quarry was opened was shown on plans and was staked on the ground several months prior to its Government contract and lease. Tobin's employees were specifically advised of the plans when they started to open the quarry. Nevertheless, they proceeded and removed rock until stopped by condemnation. Tobin claimed value as a rock quarry, but this was rejected by the commission and the trial court, as was its claim for losses caused by having to use a less favorably situated quarry to complete its contract and the cost of opening the quarry and erecting its crushers.

The Court of Appeals affirmed. It first reiterated the rule that the needs of the Government for its project must be excluded from consideration and said:

> We agree with the Commission that Tobin established the rock quarry for the purpose of obtaining a source of materials for the performance of his Government contract, and until Tobin leased the land, there was no commercial quarry thereon and the land had no market value as a commercial quarry aside from the Government's demand.

As to the claims for expenses of opening the quarry and moving to another one, the Court said:

> It is true, as Tobin suggests, that "just compensation" is not wedded to market value or any other method or formula. See: United States v. Cors, supra; Harwell v. United States, supra; United States v. Merz, 376 U.S. 192; Sill Corporation v. United States, (10CA) ____ F. 2d _____. But, "just compensation" is wedded to the morals of the market place under which it is bound to pay only for that which it takes and severance damages for that which remains. It is not bound to pay for that which it injures or even destroys as a consequence of the taking. In short, it is not bound to pay "consequential damages". See: Stipe v. United States, supra, and cases cited.
>
> The decisive fact is that the Government did not take Tobin's business, it took only the land on which the business was situated and which, as we have seen, has no constitutionally compensable

value as a commercial quarry. It follows that whatever loss Tobin sustained due to the frustration or destruction of his business did not amount to a taking of his property and was, therefore, not compensable. See: Stipe v. United States, supra.

Rejecting a claim that the commission had not been properly instructed under Merz, the Court held that the commission was fully aware of the law applicable to the facts.

Staff: Roger P. Marquis (Lands Division).

Federal Lease; Obligation to Restore Leased Premises; Measure of Damages for Breach by United States. Dodge Street Building Corporation v. United States (C.Cls., Feb. 19, 1965), D.J. File 90-1-23-946. The United States leased the fourth, fifth and sixth floors of the Elks Club Building in Omaha for office purposes. The lease conferred upon the Government the right to make alterations and erect additions and required that, at termination, the Government would restore the leased premises to the condition existing at the beginning of the lease, except for ordinary wear and tear and damages by the elements. In the original lease a special proviso limited the restoration to partitions, plumbing and electrical wiring at the places indicated on drawings of the original floor plans.

By supplemental agreement, the restoration provisions were further modified to provide that, should the Government make changes in or additions by construction and installation for its use of general toilet room facilities on the fourth, fifth and sixth floors, then the Government, at the termination of the lease, would not be required to restore that part of the demised premises used for said general toilet room facilities, provided the Government elected not to remove said general toilet room facilities at or before the expiration so that they would remain as installed and become the property of the lessor. In consideration for the Government not removing said general toilet room facilities, the lessor further agreed not to require the Government to restore any plumbing from wherever removed on the fourth, fifth and sixth floors. The word "plumbing" was defined to mean and include all water and sewer pipes, toilet room, bathroom and shower room fixtures, partitions and flooring installed in and used in conjunction with and comprising the bathrooms and shower rooms.

The fourth, fifth and sixth floors originally were designed for and devoted to hotel use having a total of 105 rooms--35 on each floor. Each room contained private lavatory and toilet. Twelve of the rooms on each floor had full baths. The seventh and eighth floors were combined for use as a ballroom and club. The first floor was the lobby floor and the second and third floors had been devoted to office use.

After the commencement of the tenancy, the Government made extensive additions, alterations and repairs, including the removal, addition and alteration of partitions, floors, walls, ceilings, doors, windows, hardware, millwork, plumbing, electrical wiring, light fixtures, switches, outlets and electrical panels. All three floors were painted and the bedroom-type

lighting fixtures were replaced by large ceiling fluorescent fixtures. Carpeting was replaced by asphalt tile. Common shower rooms, one on each of the three floors, were converted to general toilet rooms for men and women and the outmoded electrical power supply and systems were transformed to a system adequate for either hotel or office use. The Government removed the 35 bathrooms which were part of each of the hotel rooms, and at the termination of the tenancy was called upon to restore the premises to the same condition existing at the commencement. The Government refused to make complete restoration, contending that it was not required to reinstall the individual bathrooms and numerous other items because of the limited restoration obligation and because the premises were more valuable for office use than for hotel use, if restored.

Suit followed and the Court found that the supplemental agreement did not require the Government to reinstall the individual bathrooms, that the cost of doing the work which the Government was required to do by the terms of the lease would be $47,273, but that the premises had a highest and best use for office use in the condition in which the Government was required to place it. The Court found further that the fair market value of the premises in the condition in which the Government left them was $560,000. The Court also found that, assuming that the fourth, fifth and sixth floors had been restored to their condition as of the commencement of the lease (except for bathrooms, plumbing and bathroom partitions), the fair market value would have been approximately $500,000.

The Court concluded, therefore, that if the Government had complied with its restoration obligation by spending $47,243 to restore the premises as required by the terms of the lease, the premises would have been diminished in value by an additional $60,000. In this situation, the Court held that where the expense of restoration exceeds the diminution in market value of the property caused by the lessee's nonperformance, the diminution in fair market value is the proper measure of damages. Moreover, if the fair market value is greater in its unrestored condition than it would be if restored in accordance with the covenants of the lease, the lessor has sustained no damage and is entitled to recover nothing.

Staff: Herbert Pittle (Lands Division).

Federal Construction; Immunity of Contractor From Local Interference; Removal; Application of State Zoning Laws to United States. City of North Miami, Florida v. Grant-Sholk Construction Company, Inc. (S.D. Fla.) D.J. File 90-1-0-724. Defendant company entered into a contract with the General Services Administration to construct a Government Post Office in North Miami, Florida. A portion of the construction site area selected by General Services was not zoned for any form of commercial purpose. Accordingly, when defendant started to excavate, the City of North Miami obtained a temporary injunction in the state court restraining any further activity.

The case was removed to the federal court on the basis of 28 U.S.C. 1441. A motion to remand was denied when the Court agreed that an independent contractor could, nevertheless, be considered an agent of the United States within the meaning of the statute. In holding the case removable, the Court relied on Yearsley v. Ross Constr. Co., 309 U.S. 18; Ward v. Congress Construction Co., 99 Fed. 598 (C.A. 7, 1900); and W. H. Elliott & Sons Co., Inc. v. The City of Portsmouth, N.H., et al., Civil No. 2039 (D. N.H.) (unreported).

Motions filed on behalf of defendant to dissolve the temporary restraining order and to dismiss the action were then sustained on the ground that the action constituted a suit against the United States beyond the Court's jurisdiction. Ward v. Humble Oil & Refining Co., 321 F. 2d 775 (C.A. 5, 1963). In view of its decision on the jurisdictional issue, the Court did not pass directly on our contention that state zoning statutes cannot be applied as a ground for enjoining construction of a federally authorized project. United States v. City of Chester, 144 F. 2d 415 (C.A. 3, 1944); Miller v. Arkansas, 352 U.S. 187. The Court's opinion is reported in 237 F. Supp. 573.

Although Government agencies operating in nonexclusive jurisdiction areas ordinarily require that all construction conform with local zoning ordinances, there are occasions when strict application of local laws would interfere with a legitimate federal activity. This was considered one of such occasions.

Staff: United States Attorney William A. Meadows, Jr.; Assistant United States Attorney Aaron A. Foosaner (S.D. Fla.); and Thos. L. McKevitt (Lands Division).

Navigable Waters; Action for Declaratory Judgment and Injunction Restraining Secretary of Army and Other Government Officials From Constructing Fixed-Span Bridge Across Sabine-Neches Canal Between Port Arthur and Pleasure Island, Jefferson County, Texas; Plenary Power of Congress Under Commerce Clause to Authorize Construction of Bridge Even Though It Would Obstruct Passage of Mobile, Oil-Drilling Rigs Constructed and Repaired by Plaintiff; Dismissal Upon Ground That Proposed Bridge Would Be Improvement and Benefit to Navigation. Levingston Shipbuilding Company v. The Honorable Stephen Ailes, Secretary of the Army, et al. (E.D. Tex., Beaumont Div., Mar. 30, 1965) D.J. File 90-1-3-1136. This action was brought to obtain a declaratory judgment that a proposed fixed-span bridge with a vertical clearance of 138 feet across the Sabine-Neches Canal at Port Arthur, Texas, which was authorized by Congress, would be an unlawful obstruction to navigation and a public nuisance, and for a preliminary and permanent injunction against the Secretary of the Army, the Chief of Engineers and the Galveston District Engineer restraining them from constructing the bridge.

Plaintiff's business is located on the Sabine River at Orange, Texas, upstream from the location of the proposed bridge and is engaged in the construction and repair of mobile drilling rigs and platforms used in drilling for oil and gas in the Gulf of Mexico, and elsewhere.

In the Rivers and Harbors Act of 1962, 76 Stat. 1173, Congress authorized plans submitted by the Corps of Engineers for the improvement of navigation

in the Sabine-Neches Waterway. Among other things, the plans contemplated the dredging of channels to a depth of 40 feet, the widening of the canal from 200 feet to 400 feet, the improvement of three turning points in the channel and the replacement of an existing, obstructive bascule bridge with a fixed-span bridge having a vertical clearance of 138 feet and a horizontal clearance of 400 feet. The mobile drilling platforms and rigs constructed and repaired by plaintiff usually are in excess of 138 feet in height and would be unable to pass under the proposed bridge.

Defendants filed a motion to dismiss for lack of jurisdiction, which was taken under advisement by the Court following oral argument and the submission of briefs, pending a hearing on the merits. A trial on the merits was held and additional briefs submitted. In a memorandum opinion filed March 30, 1965, the Court sustained defendants' motion to dismiss and rendered judgment for defendants.

The Court held that, although plaintiff would suffer special injury by the construction of the proposed fixed-span bridge, the Congress had plenary power under the Commerce Clause to authorize its construction.

The Court further held that defendants were acting within the scope of their authority in going forward with the plans for the construction of the proposed fixed-span bridge and were acting as agents of the United States, citing Larson v. Domestic & Foreign Corporation, 337 U.S. 682. The Court found that the existing bascule bridge was a hazard to navigation and that its replacement by the proposed fixed-span bridge would be an improvement, aid, or benefit to navigation. In effect, the Court held that, since the Congress had authority under the Commerce Clause to improve the Sabine-Neches Waterway, including the construction of a fixed-span bridge, plaintiff was not entitled to relief.

Staff: United States Attorney William Wayne Justice; Assistant United States Attorney Richard B. Hardee (E.D. Texas); and David D. Hochstein (Lands Division).

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CRIMINAL TAX MATTERS

Supreme Court Decision

Lesser Included Offenses--Instructions to Jury. In Sansone v. United States, decided March 29, 1965, the Supreme Court affirmed (7-2) a conviction for the wilfully attempted evasion of 1957 income tax by the filing of a false return, in violation of Section 7201, Internal Revenue Code, finding no merit in petitioner's contention that the jury should have been permitted to find him guilty only of lesser offenses under Sections 7203 and 7207. See Rule 31(c), F.R. Crim. P. The proof showed, and petitioner conceded, a substantial understatement of income on the tax return; the main factual issue at the trial was whether the understatement was wilfully made. The Court held that (1) whether one offense is necessarily included within another must be determined by comparing the essential elements of the two crimes, as those elements are disclosed by the statutory definitions, the allegations of the indictment, and the proof adduced in support of the indictment, */ and that if the lesser offense, upon such comparison, contains some but not all of the elements of the greater offense charged, it is included within the greater; but (2) that even if it appears that the offense charged includes one or more lesser offenses, the jury should be instructed with respect to the latter only if there is some rational view of the evidence on which it may acquit of the greater and convict of the lesser. The Court held that on this record there is no such view of the evidence: petitioner was either guilty of the felony of attempted tax evasion or he was entitled to an acquittal; there was no middle ground.

The essential elements of a Section 7201 case are wilfulness, the existence of a tax deficiency, and an affirmative act of attempted evasion--in this case the filing of a false return. The elements of a Section 7207 case are wilfulness and the filing of a document known to be materially false. The aggravating element which must be present in every Section 7201 case, but which is not required under Section 7207, is the existence of a tax deficiency. The only respect in which petitioner's return was alleged or proved to be false was in the understatement of income and tax, and if it was not false in this respect it was not false at all. Ergo, under no view could petitioner be not guilty under Section 7201 but guilty under Section 7207. It follows that he was not entitled to the requested instruction, even though the Court held that Section 7207 (unlike its predecessor in the 1939 Code, cf. Achilli v. United States, 353 U.S. 373) does apply to the income tax.

Similarly, the elements of a Section 7203 case relevant here are wilfulness and the omission of the statutory duty to pay the tax when due. Since the only

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*/ In this respect, the decision does not follow the concept of some earlier decisional law that a court is confined, in determining whether an offense is a lesser one included within the offense charged, to the elements of the two offenses as they are defined in the respective statutes.

issue at trial was wilfulness--it being conceded that an erroneous return was filed--petitioner here again was either guilty of the felony of evasion or guilty of nothing, wilfulness being an element of both offenses. The Court also held as a matter of law that no defense to a Section 7201 charge is made out by showing that at the time the false return is filed, taxpayer intended to report the income and pay at a later time, since the crime of wilfully attempting to defeat the assessment of a tax is complete when the false return is filed.

It will be noted that although the offenses proscribed by both Sections 7203 and 7207 were held, on the basis of the allegations of the indictment and the evidence adduced to prove them, to constitute lesser offenses necessarily included in the crime charged here, no error was found in the trial judge's refusal to submit those offenses to the jury. It is not enough that the proof make out commissions of those offenses; it is necessary also, before a choice of verdicts may be submitted to the jury, that under some reasonable view of the proof, defendant may be found guilty only of the lesser included offense or offenses. It follows that there would be no merit in any argument designed to distinguish a future case from Sansone solely on the ground that in Sansone the existence of a tax deficiency was conceded. Even if the defense adduces evidence to show that there is no deficiency (e.g., testimony that net worth increases arose from a prior cash hoard rather than current income) there will ordinarily be no occasion to submit Section 7203 or 7207 questions to a jury in a Section 7201 case where a false return has been filed, because, if the defense testimony raises a reasonable doubt as to evasion, it will inevitably raise the same doubt as to the wilful failure to pay a tax or the wilful filing of a false return; defendant is either guilty under Section 7201 or he is guilty of nothing. An exception to this generality is found in an example given by the Court: if there is evidence of unclaimed deductions which, if believed, would offset specific items of unreported gross receipts, the jury should be instructed that it may acquit under Section 7201 and convict under Section 7207.

Turning now to cases in which no return or other false document has been filed and the evasion prosecution rests upon some other affirmative act or acts, Section 7207 presents no problem but Section 7203 may. If a defendant is charged in such an indictment with evasion of, e.g., the wagering tax and under some rational view of the proof the jury might acquit on that offense but convict for a wilful failure to perform some duty under Section 7203, it is clear that a lesser included offense instruction should be given. This is true even though a Section 7203 violation (e.g., wilful failure to file or to pay the tax) is not spelled out in the indictment, the rationale apparently being that the indictment must be construed as in effect charging that the offense was committed by any means which the prosecution may prove at the trial. Cf. State v. Mele, 140 Conn. 398, 402-403.

Staff: Paul Bender, Assistant to the Solicitor General; Joseph M. Howard and Richard B. Buhrman (Tax Division)

CIVIL TAX MATTERS

District Court Decisions

Bankruptcy; Subrogation; Under Section 57i, Bankruptcy Act, Surety on Bond Given to Secure Payment of Taxes Not Entitled to Subrogation to Priority of U.S. Until Claim of U.S. Was Paid in Full. In the Matter of Hi-Press Air Conditioning of America, Inc. (S.D. Cal., January 6, 1965). The bankrupt-taxpayer obtained a bond in the amount of $30,000 in favor of the District Director of Internal Revenue to secure payment of certain taxes for the fourth quarter of 1962 and to stay the assessment of such taxes pending deferred payment. Taxpayer defaulted in making payment, and, pursuant to demand for payment, the surety on the bond paid the taxes for the fourth quarter of 1962 in the amount of $29,500. The United States, meanwhile, had filed its proof of claim for these taxes and for additional taxes for a different period in the amount of $6,200. The surety contended that it was entitled to be subrogated to the position of the United States to the extent of its payment on the bond.

The Referee in Bankruptcy, in ruling that the entire claim of the United States must be paid before the surety could claim subrogation, relied on the 1962 amendment to Section 57i of the Bankruptcy Act, which provides that when a creditor is secured, in whole or in part, by the individual undertaking of a person, that person may file a proof of claim in the creditor's name in the bankruptcy proceeding when the creditor fails to prove and file the claim and that person is subrogated to the rights of the creditor; except that, in the absence of an agreement to the contrary, this subrogation does not apply until the amount paid to the creditor on the bond or undertaking plus dividends paid to the creditor from the bankrupt estate equal the amount of the entire claim of the creditor. Thus, until the additional tax claim of the United States was paid, the surety could not claim subrogation.

Staff: United States Attorney Manuel L. Real; and Assistant United States Attorneys Loyal E. Keir and Ronald S. Morrow (S.D. Cal.).

Jury Trial; Taxpayers Not Entitled to Trial by Jury in Action to Enforce Federal Tax Liens. United States v. S. P. Warren, et al. (W.D. N.C., November 17, 1964). (CCH 65-1 U.S.T.C. ¶9211). The Government instituted this lien foreclosure action pursuant to Section 7403, I.R.C. 1954, which specifically authorizes such actions, against certain property of taxpayers. Taxpayers moved for jury trial and the Government opposed this motion.

In denying taxpayers' motion, the Court reasoned that taxpayers were not entitled to jury trial under the provisions of Section 7403 because that section provides that the court shall proceed to adjudicate all matters involved in a tax lien foreclosure action and to finally determine the merits of all claims to and liens upon the property and there is no language to indicate that a taxpayer is entitled to a jury trial. Alternatively, the Court reasoned that under no circumstances is a taxpayer entitled to a jury trial either on constitutional or statutory grounds when the claim asserted is in the form of a lien against his property relying on Damsky v. Zavatt, 289 F. 2d 46 (C.A. 2), and other

similar cases. The Court also noted that the Supreme Court, in Wickwire v. Reinecke, 275 U.S. 101, had explicitly stated that it is within the power of Congress to provide for any reasonable system for the collection of taxes and the recovery of them when illegal, without jury trial, if only the injunction against the taking of property without due process of law in the method of collection and protection of the taxpayer is satisfied.

Staff: United States Attorney William Medford; and Assistant United States Attorney Joseph R. Cruciani (W.D. N.C.).

Priorities; Payments by Person Deemed Surety on Mortgage Note Held Not to Discharge Note; Mortgage Lien Remained for Benefit of Surety and Took Precedence Over Tax Liens. United States v. Boston and Berlin Transportation Co., Inc. (D. N.H., November 13, 1964). (CCH 65-1 U.S.T.C. ¶9207). The taxpayer-corporation, in connection with obtaining a loan, executed a mortgage and note on its rolling stock, and, because of the insecure financial status of the corporation, Mrs. Nevins was required to sign the note as "co-maker." She and her husband were the sole stockholders of the corporation, and, upon the death of her husband, she became the sole stockholder. The mortgage was duly recorded and later assigned to a bank. In February of 1952, the corporation entered into a contract to sell its business, including the mortgaged rolling stock. The purchaser was to pay the mortgage and the bank agreed to this but there was no novation. From March through November of 1952, a series of tax liens were filed against the corporation. During this period the purchaser ceased making payments and the Court found that Mrs. Nevins later made payments on the note. Subsequently, additional amounts were paid by the purchaser and the note was paid and there was an excess fund against which the Government sought to foreclose its tax liens in this suit.

After trial, the Court ruled that Mrs. Nevins had made certain payments on the note; that, although she signed the note as "co-maker," she actually signed as a surety; that she was an assignee of the mortgage and note to the extent of her payments, because under New Hampshire law, where justice so requires, the payment of a mortgage note is considered an assignment of both instruments and not a discharge; that although the Government is usually entitled to have debts owing to it satisfied first under the provisions of 31 U.S.C. 191 when the debtor is insolvent, as here, there are judicially recognized exceptions such as a prior mortgage; and that, although it was impossible to trace the proceeds of the eventual sale of the mortgaged rolling stock, it did not bring more than the original mortgage, and, therefore, the Court concluded that Mrs. Nevins was entitled to a percentage of the fund in question based upon the ratio of her payments to the total payments made by the purchaser.

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

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