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UNITED STATES ATTORNEYS
BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 14 January 21, 1966 No. 2

IMPORTANT NOTICE

It has come to our attention that some attorneys may be neglecting civil cases because of preoccupation with criminal work. Civil cases and claims should have equal attention with criminal cases and matters. It is the Department's policy to move all of these cases and matters expeditiously.

ANTITRUST DIVISION POLICY

From time to time articles on the Antitrust Division appear in periodicals and newspapers which purport to describe various aspects of antitrust policy. Many of these articles have been inaccurate and misleading, including articles purporting to report interviews with top officials of the Division. For example, it is not true that the Division plans a sharp reduction in its criminal prosecutions.

Guidance as to Division policy is to be derived from the Section and Field Office Chiefs and from written memoranda circulated within the Division at the direction of the Deputy Director of Operations, Director of Operations, First Assistant or Assistant Attorney General. Reliance should not be placed on articles in periodicals or newspapers or on any sources other than those described in the preceding sentence for guidance as to Division policy.

MONTHLY TOTALS

The November figures on pending caseload show an increase, not only over the same month in fiscal 1965, but also over last month's total. In other words, the drive to reduce the caseload instead of going forward, has gone into reverse temporarily. At least we hope the reverse is temporary, as each month's increase only makes it more difficult to cut back the number of pending cases. The increase during November amounted to only 72 cases, but if even this small rise were repeated during each of the remaining seven months of the fiscal year, we would have an additional 500 cases pending to add to the 8200 cases which were added during the five fiscal years, 1961-1965. An intensive effort to see that terminations exceed filings each month is the only way in which the pending caseload will be reduced.

	First 5 Months Fiscal Year 1965	First 5 Months Fiscal Year 1966	Increase of Decrease Number	%
Filed				
Criminal	13,562	13,261	- 301	- 2.22
Civil	11,367	11,778	+ 411	+ 3.62
Total	24,929	25,039	+ 110	+ .44
Terminated				
Criminal	12,122	12,203	+ 81	+ .67
Civil	10,800	11,236	+ 436	+ 4.04
Total	22,922	23,439	+ 517	+ 2.26
Pending				
Criminal	11,533	12,181	+ 648	+ 5.62
Civil	23,837	24,504	+ 667	+ 2.80
Total	35,370	36,685	+1,315	+ 3.72

During November the rate of terminations dropped sharply as compared with October. The decrease was especially evident in civil cases where the terminations dropped 18.9% from October; in criminal cases the drop was 15.6%. Fewer civil cases were terminated during November than in any of the preceding four months of fiscal 1966.

	Filed			Terminated		
	Crim.	Civil	Total	Crim.	Civil	Total
July	2,296	2,465	4,761	2,212	2,194	4,406
Aug.	2,585	2,555	5,140	1,870	2,245	4,115
Sept.	3,162	2,103	5,265	2,448	2,258	4,706
Oct.	2,702	2,415	5,117	3,078	2,507	5,585
Nov.	2,516	2,240	4,756	2,595	2,032	4,627

For the month of November 1965 United States Attorneys reported collections of $8,201,273. This brings the total for the first five months of this fiscal year to $27,625,769. This is $3,587,552 or 11.49 per cent less than $31,213,321 collected in the first five months of fiscal year 1965.

During November $4,273,770 was saved in 98 suits in which the government as defendant was sued for $5,560,855. 55 of them involving $2,120,302 were closed by compromise amounting to $635,686 and 22 of them involving $1,119,033 were closed by judgments amounting to $651,399. The remaining 21 suits involving $2,321,520 were won by the government. The total saved for the first five months

of the current fiscal year was $77,394,013 and is an increase of $17,752,844 or 29.77 per cent over the $59,641,169 saved during the same period of fiscal year 1965.

The cost of operating United States Attorneys' Offices for the first five months of fiscal year 1966 amounted to $8,062,194 as compared to $7,801,354 for the same period of fiscal year 1965.

DISTRICTS IN CURRENT STATUS

Set out below are the districts in a current status as of November 30, 1965.

CASES

Criminal

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

CASES

Civil

Ala., N.	Dist. of Col.	Ky., E.	Mo., W.	N.C., W.
Ala., M.	Fla., N.	La., W.	Mont.	N.D.
Ala., S.	Fla., S.	Me.	Neb.	Ohio, N.
Alaska	Ga., N.	Mass.	Nev.	Ohio, S.
Ariz.	Ga., M.	Mich., E.	N.H.	Okla., N.
Ark., E.	Hawaii	Mich., W.	N.J.	Okla., E.
Ark., W.	Ill., N.	Minn.	N.Mex.	Okla., W.
Colo.	Ind., N.	Miss., N.	N.Y., E.	Ore.
Conn.	Ind., S.	Miss., S.	N.C., E.	Pa., E.
Del.	Iowa, S.	Mo., E.	N.C., M.	Pa., M.

CASES (Cont.)

Civil (Cont.)

Pa., W.	S.D.	Tex., E.	Va., W.	Wyo.
P.R.	Tenn., E.	Tex., S.	Wash., E.	Guam
R.I.	Tenn., M.	Tex., W.	Wash., W.	V.I.
S.C., E.	Tenn., W.	Utah	W.Va., N.	
S.C., W.	Tex., N.	Va., E.	W.Va., S.	

MATTERS

Criminal

Ala., N.	Ga., M.	Neb.	Pa., M.	Tex., S.
Ala., M.	Ga., S.	N.H.	Pa., W.	Tex., W.
Ala., S.	Idaho	N.J.	R.I.	Utah
Alaska	Ind., S.	N.C., M.	S.C., E.	Vt.
Ariz.	Ky., W.	N.C., W.	S.D.	Wash., E.
Ark., E.	La., W.	N.D.	Tenn., E.	W.Va., N.
Ark., W.	Me.	Ohio, N.	Tenn., M.	Wyo.
Calif., S.	Mich., W.	Okla., N.	Tenn., W.	C.Z.
Colo.	Mo., W.	Okla., E.	Tex., N.	Guam
Fla., N.	Mont.	Okla., W.	Tex., E.	V.I.

MATTERS

Civil

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

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ADMINISTRATIVE DIVISION

Acting Assistant Attorney General for Administration John W. Adler

Witnesses - Members of the Job Corps

There have been several inquiries concerning the status of trainees and volunteers of the Job Corps under the Economic Opportunity Act for purposes of the witness statute. The trainees and volunteers are not considered government employees when serving as witnesses. Therefore, they are entitled to the statutory allowances of a fee of $4 per day, mileage at 8¢ and, if they cannot return home the same night, subsistence of $8 per day.

Generally, members of these programs who are full-time, salaried employees of the federal government administering the programs are government employees and would come within the provisions of 28 U.S.C. 1823 when serving as government witnesses.

Memos and Orders

The following Memoranda and Orders applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 25, Vol. 13 dated December 10, 1965:

MEMOS	DATED	DISTRIBUTION	SUBJECT
184-S7	12/27/65	U.S. Attorneys & Marshals	Position Schedule Bonds for 1966-67
429-S2	12/22/65	U.S. Attorneys & Marshals	Retirement Applicants
437	10/29/65	U.S. Attorneys	Criminal Prosecutions Under "Wire Tapping Statute"
438	10/29/65	U.S. Attorneys	Seat Belt Safety Standard Act P.L. 88-201
439	10/29/65	U.S. Attorneys	Defense Suppression of Evidence Obtained by Electronic Surveillance
440	11/ 9/65	U.S. Attorneys	Public Law 89-64, Amending 18 U.S.C. 35(a), Approved July 7, 1965 (79 Stat. 210, H.R. 6848)
442	12/ 1/65	U.S. Marshals	Transmitting Process to Other Districts for Service

ORDERS	DATED	DISTRIBUTION	SUBJECT
349-65	11/24/65	U.S. Attorneys & Marshals	Technical Amendments of Regulations Relating to Immigration and Nationality Act, as Amended
350-65	12/28/65	U.S. Attorneys & Marshals	Standards of Conduct
351-65	12/30/65	U.S. Attorneys & Marshals	Designating Zeigel W. Neff as Acting Chairman of Board of Parole

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ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

Acquisition by Pittsburgh Brewing Company of Duquesne Brewing Company Challenged. United States v. Pittsburgh Brewing Company, et al. (W.D. Pa.) D.J. File 60-0-37. On December 28, 1965, a complaint was filed alleging that Pittsburgh Brewing Company (Pgh. B. Co.) and Milton G. Hulme, Chairman of the Board of Directors of Pgh. B. Co., have attempted to monopolize the sale and distribution of beer in seven markets in Pennsylvania, Ohio, and West Virginia; that in furtherance of the attempt to monopolize, the defendants sought to acquire for Pgh. B. Co. a controlling interest in Duquesne Brewing Company of Pittsburgh (Duquesne); and that the effect of the acquisition may be substantially to lessen competition or tend to create a monopoly in the production and sale of beer in the same seven markets.

Both Pgh. B. Co. and Duquesne are among the 30 leading brewers in the United States. Pgh. B. Co. is the largest and Duquesne the second largest seller of beer in all Pennsylvania markets alleged, and the sales of each are substantially larger then their nearest competitor in such markets. In the three Ohio-West Virginia markets, their combined sales are larger than their nearest competitor.

On December 6, 1965, Pgh. B. Co. offered to purchase from Duquesne 180,000 shares of its stock. Such purchase would give Pgh. B. Co. control of Duquesne. The offer was rejected by Duquesne. Thereafter, on December 10, 1965, Pgh. B. Co. offered to acquire such stock directly from the shareholders of Duquesne. This offer was to expire on December 29, 1965, unless extended.

The complaint seeks temporary injunctive relief, the effect of which would prevent Pgh. B. Co. from acquiring control of Duquesne pendente lite, and further seeks permanent relief to require Pgh. B. Co. and Hulme to divest themselves of all Duquesne stock and to enjoin them from making any further acquisitions of Duquesne stock and from controlling or attempting to control or exercising any influence over Duquesne.

On December 29, 1965, after hearing on the Government's motion for temporary restraining order, the parties entered into a court-approved stipulation which provided that, pending final disposition of the case, the defendants will not vote any stock of Duquesne and will not in any other manner control or attempt to control the conduct, policies or operations of Duquesne. The Court interpreted on the record the stipulation as covering instances where Pgh. B. Co. sought to "influence" the conduct and operations of Duquesne. The stipulation also provides for early trial and is to remain in effect until after final disposition of the case.

After suit was instituted, counsel for defendants advised the Government that Pgh. B. Co. had decided it was not going to extend the offer or accept the share tendered pursuant to its offer and that all shares so tendered were being returned to the shareholders. This does not dispose of the case, however, since the Government has prayed, inter alia, for full divestiture by

the defendants of Duquesne stock and a prohibition against their acquiring any stock of Duquesne in the future.

Staff: John J. Hughes, Carl J. Melone and Richard M. Walker (Antitrust Division)

Government's Motion For Preliminary Injunction Granted. United States v. Pennzoil Company, et al. (W.D. Pa.) D.J. File 60-0-37-64. On December 30, 1965, Judge Louis Rosenberg issued an order granting the Government's motion for preliminary injunction in the above case. In a seventy-one page opinion Judge Rosenberg found that the proposed acquisition of Kendall Refining Co. by Pennzoil Co. "is or may be" within the proscriptions of Section 7, and therefore should be enjoined until a final hearing on the merits.

On June 11, 1965, Pennzoil and Kendall entered into an agreement under the terms of which Pennzoil would acquire Kendall. Pennzoil and Kendall are both producers and refiners of Pennsylvania Grade crude oil and marketers of high quality motor oils manufactured from said crude oil. On August 4, 1965, the present action was filed. The complaint alleged that consummation of the proposed acquisition would eliminate competition between Pennzoil and Kendall in the purchase of Penn Grade crude, eliminate Kendall as a substantial competitive factor in the purchase of Penn Grade crude. A preliminary injunction was prayed for.

At the hearing on the Government's motion for a temporary restraining order held on August 4, 1965, the defendants at the urging of the Court agreed to take no further action toward consummation of the acquisition until a decision had been issued on the Government's motion for preliminary injunction. A hearing on said motion was held from September 14, 1965 through September 21, 1965.

At said hearing, the Government offered substantial evidence to prove that the appropriate line of commerce was Penn Grade crude, that the appropriate section of the country in which to measure the effects of the proposed acquisition was a geographic area commonly referred to as the Penn Grade producing area, comprised of Southwestern New York, Western Pennsylvania, West Virginia, and Eastern Ohio, and that the probable effects of the acquisition would be as alleged in the complaint.

The defendants urged that (1) crude oil can be a line of commerce, since only the end products made from crude oil have economic significance, and in the sale of these products the defendant companies compete with all petroleum companies in the United States; (2) that even if crude oil is a line of commerce, the appropriate line is all crude oil rather than just Penn Grade crude; (3) that even if Penn Grade crude is the appropriate line of commerce, the acquisition cannot lessen competition, since the Penn Grade industry is a dying one due to a rapidly dwindling source of supply; and (4) a preliminary injunction would cause irreparable injury to the defendant, and divestiture is an adequate remedy should the Government prevail at a trial on the merits.

The Court made short shrift of defendants' argument that there can be no line of commerce without regard to end use of the raw material, and that there

is no legal precedent for so doing. The Court found that Penn Grade crude has a higher lubricant yield than other crudes, has distinct prices, has distinct customers from crudes, and is recognized by the industry as a separate entity. Realizing that there may indeed be other relevant lines of commerce involved and that all crude oil may well constitute a line of commerce, Judge Rosenberg found that Penn Grade crude constitutes a well defined submarket as defined in Brown Shoe.

The Court also found that the appropriate geographic market is, as urged by the Government, the Penn Grade producing area. It is solely within this area that all Penn Grade crude is produced, bought, sold, and refined; and none is either brought into or shipped from this area. Judge Rosenberg found the area to be the only geographic area in which Penn Grade refiners compete for the purchase of their raw material, and thus an appropriate geographic market within the meaning of Section 7.

The Court rejected defendant's arguments that Kendall's inadequate resources prevent it from competing effectively and from maintaining its competitive position in the Penn Grade industry. It also rejected the contention that Penn Grade crude is being depleted to such an extent that Penn Grade crude refiners will have to turn to other crude to meet their refinery requirements.

After discussing the market shares of the respective companies and the high degree of concentration in the Penn Grade industry, caused to a large extent by recent acquisitions of Pennzoil, the Court stated:

> Should the proposed merger be consummated, it must inevitably follow that (1) competition between Pennzoil and Kendall in the purchase of Penn Grade crude will be eliminated; (2) Kendall will be eliminated as a substantial competitive factor in the purchase of Penn Grade crude from independent producers; and (3) concentration in the production and purchase of Penn Grade crude will be substantially increased.

Staff: John H. Waters, David R. Melincoff and Charles W. K. Gamble (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURT OF APPEALS

AGRICULTURAL ADJUSTMENT ACT

Tobacco Acreage Allotment Case Remanded to Review Committee for Further Factual Findings and "a Reasoned Opinion." Austin et al. v. Jackson et al., (C.A. 4, No. 9994, December 6, 1965). DJ File 106-54-201. After certain of their land had been taken by the Federal Government, the Bellamy heirs caused the tobacco acreage allotments pertaining to that land to be transferred to land which they allegedly acquired from Henry Vann. Soon thereafter, the Bellamys agreed to and later did re-sell the land to Vann. Subsequently, the Sampson County (N.C.) ASC Committee retroactively cancelled the acreage allotments which had been transferred on the ground that the transfer violated the Agricultural Adjustment Act. The farmers appealed the cancellation to the Review Committee, maintaining that the transfer had been authorized by 7 U.S.C. 1313(h), which permits the owners of land acquired by the Government to transfer the allotments pertaining to that land to other land which the farmers own or acquire. The Review Committee upheld the cancellation because, in its view, the Bellamys never had been the bona fide owners of the Vann land and the entire transaction had been not a genuine purchase and sale of land but rather the sale of an allotment, which is prohibited by the Act.

The district court held that "the purported findings of facts made by the Review Committee are not sufficient in law to support the conclusions reached," and therefore remanded the case to the Review Committee. The Court of Appeals concurred in this holding and further found "that the Review Committee failed in its duty to render a reasoned opinion"; it therefore affirmed the remand to the Review Committee. In dictum, the Court of Appeals indicated that the crucial question was what the Bellamys' intent had been at the time of the initial purchase, thus suggesting agreement with our position that unless the land purchase was bona fide, the cancellation was proper. (The Fifth Circuit so held in a case controlled by regulations promulgated after the years involved in this case. Chandler v. David, 350 F. 2d 669 (C.A. 5)).

Staff: Florence Wagman Roisman, Civil Division

ARMED SERVICES

District Court May Entertain Mandamus Action Seeking Correction of Military Discharges. Hubert Ashe v. Robert S. McNamara, (C.A. 1, No. 6580, December 14, 1965). DJ File 145-15-87. Several years following his dishonorable discharge from military service, appellant instituted this suit seeking to mandamus the Secretary of Defense to change his discharge to one under honorable conditions. The dishonorable discharge was issued at the direction of a Naval court-martial following appellant's conviction of assaulting a fellow sailor. Appellant was

one of three enlisted men tried together for the offense; all three were represented by the same counsel. During the course of the trial, one of appellant's co-defendants surprised counsel by inculpating the appellant. In light of that unexpected change in testimony, counsel requested an adjournment in order that separate counsel might be appointed to represent appellant and his antagonistic co-defendant. The request was denied and the court martial proceeded to its conclusion.

Following the completion of his prison sentence, appellant petitioned the Naval Board for the Correction of Military Records, which Board is authorized by statute to change the nature of discharges. See 10 U.S.C. 1552. The Board, however, denied the petition and the Secretary of the Navy approved that action.

In response to the request for judicial intervention we contended, in the main, that habeas corpus is the only vehicle by which the federal courts may inquire into the propriety of court-martial judgments. The Court did not agree. It concluded that review could be had of the Correction Board's determination and that mandamus would lie to compel the Board, and the Secretary, to change a discharge which had been predicated on a patent constitutional defect.

Staff: Edward Berlin, Civil Division

FEDERAL RULES OF CIVIL PROCEDURE

Vague Complaint Held Properly Dismissed for Failure to State Claim Upon Which Relief Could Be Granted. Leona Legg v. United States (C.A. 9, No. 20214, December 7, 1965). DJ File 137-12-294. Appellant's complaint, naming the United States as defendant, charged unnamed defendants "acting under the authority of state law, entered into a contract equitably secured on the part of plaintiff . . . in payment for partial dentures, eyeglasses, laundry services, body brace and orthopedic shoes and adequate OAI monthly benefits due the plaintiff". It was further alleged that plaintiff had been defrauded of her right to partial dentures and that "beauty care was completely abolished by defendants".

The Court of Appeals affirmed the dismissal of the complaint as "ambiguous, uncertain and verbose", citing Rules 8(a)(1); 8(e)(1); 10(a). The Court added that the complaint "states no claim upon which relief can be granted," citing Rule 12(b)(6).

Staff: United States Attorney Manuel L. Real and
Assistant United States Attorney Frederick M. Brosio, Jr. and
Larry L. Dier. (S.D. Cal.)

FEDERAL TORT CLAIMS ACT

Judgment affirmed in Favor of United States in Malpractice Action Based on Claim That Prison Doctors Negligently Failed to Diagnose and Remove Tumor. Charles Estes Hunter v. United States (C.A. 6, No. 16,272, December 14, 1965).

DJ File 157-71-73. In this tort claims action, plaintiff sought $500,000 damages for injuries allegedly sustained as a result of the negligence of federal penitentiary physicians in failing to diagnose and remove a fatally malignant tumor from his right hip. The district court entered judgment for the Government, finding that plaintiff had not established (1) that had an operation taken place on June 29, 1962 -- which was the date when plaintiff allegedly consented to surgery -- he would not have sustained an injury, and (2) that had an operation been performed on or after July 9, 1962 -- at which time the doctors recommended exploratory surgery -- it would have been too late to have saved plaintiff's life. The Court of Appeals affirmed the judgment below "for the reasons set forth in the findings of fact" of the lower court.

Staff: Lawrence R. Schneider (Civil Division)

Plaintiff Who Walked in Dark Area on Government-owned Premises Was Not Contributorily Negligent Under Georgia Law. United States v. Thomas Bell and Ruth B. Bell (C.A. 5, No. 21937, December 16, 1965). DJ File 157-20-125 and 157-20-126. In a per curiam decision the Court of Appeals affirmed a judgment awarding damages for injuries suffered by Mrs. Bell when she fell into a drainage ditch near a military hospital at Ft. Gordon, Georgia. The district court had held that the Government was negligent in its maintenance of the drainage ditch and in its failure to illuminate the path nearby. The district court and the Court of Appeals rejected the Government's contention that plaintiff was contributorily negligent as a matter of Georgia law when she voluntarily walked in an area she knew to be dark. The Court of Appeals stated "that the negligent failure to illuminate a structure which is dangerous in darkness relieves the plaintiff of contributory negligence if such failure created additional hazards unknown to her".

Staff: United States Attorney Donald H. Fraser and
Assistant United States Attorney William T. Morton
(S.D. Ga.)

IMMUNITY OF GOVERNMENT AGENCY FROM PAYMENT OF LITIGATION EXPENSES

Federal Crop Insurance Corporation Held Liable for Attorney's Fees Under State Statute Assessing Such Fees Against Recalcitrant Insurance Companies. Ruby R. Baker v. Federal Crop Insurance Corporation (Sup. Ct. of Oregon, November 17, 1965). DJ File 106-61-107. Following the successful prosecution of an indemnity claim under a Federal Crop Insurance Policy, plaintiff moved to have attorney's fees assessed against the FCIC pursuant to an Oregon statute which permits their assessment against an insurance company which wrongfully has refused to honor a claim for benefits. Over the FCIC's contentions that sovereign immunity, or at the very least federal law, precluded any such levy and further, that the Oregon legislature did not intend to reach political entities operating as insurers, the Court granted plaintiff's request. The Court was of the view that, in light of the FCIC's corporate nature and its authority to "sue and be sued", it is not entitled to the Government's immunity from suit. The Court did not pass expressly upon our contentions that in any event, federal law must be applied. We had urged that it is the federal rule that with

limited exceptions not relevant here, each party must bear its own attorneys' fees. Consideration is presently being given to petitioning for a writ of certiorari.

Staff: Edward Berlin (Civil Division)

DISTRICT COURT

FEDERAL TORT CLAIMS ACT - DISCRETIONARY FUNCTION

Award of Contract by United States Is Discretionary Function, and United States Is Not Responsible for Negligence of Government Contractor. Lipka and Abbott v. United States v. Vaughn; Sicko v. United States v. Vaughn; Smith v. United States v. Vaughn, (N.D. New York). DJ Files 157-50-321, 157-50-330, 157-50-331. A Government contractor was engaged in the performance of its contract when a cofferdam which it had constructed collapsed. Several employees of the contractor were killed and several were injured. These actions were brought under the Federal Tort Claims Act to recover damages resulting therefrom. The Court held that the failure of the cofferdam was caused by negligence on the part of the contractor and its employees. Plaintiffs had urged several bases upon which the contractor's negligence should be imputed to the United States, but the Court rejected all. The Court decided any negligence on the part of the United States in the award of the contract could not serve as a basis for liability, for the award of the contract was a discretionary function. 28 U.S.C.A. 2680(a).

Staff: United States Attorney Justin Mahoney and
Assistant United States Attorney Frank A. Dziduch (N.D. N.Y.)
Melford O. Cleveland and Eugene N. Hamilton (Civil Division)

MALPRACTICE

No Medical Malpractice Found Where Intravenous Feedings and Injections of Drug Caused Skin Necroses to Develop at Injection Sites; Action Also Held Time-barred. Riley v. United States, et al. (D. Md., Civil No. 15261, December 20, 1965). DJ File 157-35-383. Plaintiff was admitted to Bethesda Naval Hospital on December 27, 1961 for treatment of a serious calcium deficiency. Intravenous injections and feedings of calcium chloride were given in the emergency room and later after plaintiff's admission. Necroses developed around the injection sites on December 29th, which were surgically removed on February 6, 1962. The Court found that such tissue breakdown was likely to result if there was leakage of calcium into the tissues, but plaintiff did not prove the leakage was caused by negligence. The Court also found that plaintiff knew the extent of her injury before January 10, 1962, and, citing state law, held that her cause of action accrued more than two years before February 4, 1964, the date the complaint was filed.

Staff: Assistant United States Attorney Paul R. Kramer (D. Md.);
Denis E. Dillon (Civil Division)

* * *

CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

RIGHT TO COUNSEL

Objection by Defendant's Counsel Based on Supreme Court's Decisions in Massiah and Escobedo Must Be Specified and Grounds Upon Which Objection Based Must Be Made Accurately. United States v. Benjamin Indiviglio (S.D. N.Y.). D.J. File No. 12-51-732. Defendant was convicted for violating the bail-jumping statute, 18 U.S.C. 3146. The sole issue raised on appeal was that a post-indictment statement made without counsel to an agent of the Federal Bureau of Investigation was erroneously admitted into evidence at his trial in violation of his rights under the rules set forth in Massiah v. United States, 377 U.S. 201 (1964) and Escobedo v. Illinois, 378 U.S. 478 (1964).

Defendant's counsel did not state in his pre-trial motion, during the trial, or in his post-trial motion that Indiviglio was deprived of his Sixth Amendment right to counsel. The testimony clearly showed that Indiviglio was advised of his right to counsel and of his right to remain silent.

The Court of Appeals for the Second Circuit sitting en banc affirmed the conviction "on the ground that the failure to make proper objection before the trial court to the admission of the challenged evidence forecloses review of the asserted error."

The Court stated further that appellant had experienced counsel, and that since appellant's trial occurred after the United States Supreme Court's decisions in Massiah, supra and Escobedo, supra, it can be expected that counsel had "evaluated their relevance to defendant's post-indictment statements." In light of the above facts, the Court held that an objection based on the Massiah and Escobedo decisions must be specific and state accurately the grounds upon which it is made. The Court reasoned that otherwise the trial judge would have no opportunity to correct his error if he had made one or, in the alternative, conduct a voir dire to ascertain the facts surrounding the statement.

Staff: United States Attorney Robert M. Morgenthau;
Assistant United States Attorneys Howard L. Jacobs
and Martin R. Gold (S.D. N.Y.).

BANK ROBBERY

Theft by False Pretenses From Bank in Violation of 18 U.S.C. 2113(b). Thomas L. Thaggard v. United States (C.A. 5, December 6, 1965). Thaggard was convicted under Section 2113(b) in a jury trial in the Middle District of Alabama for withdrawing $43,000, which had been erroneously credited to the bank account of his used car business, and sentenced to five years' imprisonment.

The Court of Appeals for the Fifth Circuit, citing United States v. Turley, 352 U.S. 407 (1957), and disapproving of United States v. Rogers, 289 F. 2d 433

(C.A. 4, 1961), held that the words "steal and purloin" in Section 2113(b) encompass more than the common law crime of larceny. In affirming defendant's conviction, the Court viewed this section as being applicable to thefts by false pretenses.

The Fifth Circuit's interpretation of Section 2113(b) would appear to broaden its scope to include not only the withdrawal of money mistakenly credited to bank accounts, but also such matters as "flim-flam" operations, and forgery if the bank pays on the forged instrument. However, since all of these matters are generally state violations, federal prosecutions would not be desirable unless the amount of money involved is significant or the violations by the subject are widespread.

Staff: United States Attorney Ben Hardeman;
Assistant United States Attorney J. O. Sentell
(M.D. Ala.).

FHA FRAUD

Violation of 18 U.S.C. 1010; Proof of Intent to Influence Action of Federal Housing Administration. United States v. Woods (W.D. Pa.). Defendants were convicted of knowingly making false statements with intent to obtain federally insured loans and to influence the action of the Federal Housing Administration.

On motion for acquittal and new trial, counsel for defendants argued that the proof did not show that the false statement documents were passed with the necessary intent of obtaining an F.H.A. loan or influencing the action of the F.H.A. They argued that the testimony of a witness from the lending bank disclosed that the bank actually relied on telephone calls from defendants' office in issuing commitments, and that the written applications subsequently submitted to the bank were mere formalities which were checked only for completeness and not for the reliability of their content.

In denying the motions, the District Court held that the written documents in question were transmitted to the bank before the work was performed. It was clear to the Court that without the physical presence of the necessary documents the bank would not disburse a loan even though as a practical matter it made a commitment on telephoned information, supplemented by such credit checks as it might wish to make. The Court found that everyone involved knew that F.H.A. loans were involved in these transactions. Further, F.H.A. regulations contemplated issuance of commitments by banks only after they received the credit applications. Hence, if the lending institution chose to make a premature commitment at its own risk, the prescribed routine would not be thus disrupted to the extent that parties furnishing false statements in credit applications subsequently supplied could convincingly contend that these documents were not furnished for the purpose and with the intent of effecting an F.H.A. improvement loan.

Staff: Assistant United States Attorney Robert E. Tucker
(M.D. Pa.).

GAMBLING

Wagering Taxes; Rules Expressed in Massiah and Escobedo Not Applicable to Pre-Arrest Situation and Cannot Exclude Testimony of Informant Concerning Wagers Placed With Defendant. United States v. Massiano (D. Del., December 14, 1965). D.J. File 160-15-43. After a nonjury trial, defendant was convicted of wilful failure to pay the special gambling occupational tax, 26 U.S.C. 7203, and with wilful failure to register, 26 U.S.C. 4412.

In his motion for acquittal, defendant argued that the protection of Massiah regarding incriminating statements by a defendant, when combined with Escobedo's right to counsel, rendered the informer's testimony as to his admissions in accepting the wagers placed by the informer inadmissible on the ground that they were involuntary because made at a stage of the case which under Escobedo required the presence of his lawyer. The District Court in denying the motion stressed the factual differences between this case and Massiah, where the incriminating testimony was elicited from defendant after he had been indicted, and also Escobedo, where the defendant had been taken into police custody at the time of the confession. The Court emphasized that there must be some identifiable criminal proceeding, such as the indictment in Massiah and the arrest in Escobedo, before defendant can assert the application of these protections.

The District Court also pointed out that defendant's statements were not given during the accusatory stage of the proceeding as contemplated by Escobedo. The Court distinguished the investigative techniques employed in Escobedo from this wagering tax violation case. In Escobedo, a murder case, the confession was subsequent to other investigation which indicated defendant's guilt and defendant's statements were secured to "wrap the case up". In wagering tax violations, the requisite proof necessitates the investigative technique of bets placed by undercover agents or informers. The Court stated it usually isn't until a subsequent raid reveals the corroborating evidence that the Government has sufficient evidence against the defendant. The Court concluded by emphasizing the impossible task of obtaining convictions in wagering cases if Escobedo were extended to require a warning to defendant of his right to remain silent after the first two or three bets had been placed by the informer through defendant.

Staff: United States Attorney Alexander Greenfeld;
Assistant United States Attorney Stanley C. Lowicki
(D. Del.).

GAMING

Device When Attached to Cigarette Vending Machines Dispensed Free Package of Cigarettes at Irregular Intervals Declared Gambling Device Under Gambling Devices Act of 1962. United States v. 11 Star-Pack Cigarette Merchandiser Machines (E.D. Pa., January 3, 1966). D.J. File No. 159-62-167. The Government instituted a libel for the forfeiture of eleven cigarette machine sales "stimulating" devices which had been transported in interstate commerce. After ruling from the bench that the devices were designed and manufactured primarily for use in connection with gambling, the Court issued an order of forfeiture and an opinion substantially as follows:

Respondents are metal cabinets designed by claimant with the intent to stimulate sales of claimant's cigarette vending machines, but which can be adapted to fit on top of any coin-operated vending machine. The Star-Pack machines were manufactured and designed to operate so that when coins are inserted into a cigarette machine with claimant's device attached, the cigarette machine will dispense a package of cigarettes, then the light in claimant's device will flash in irregular sequence. If the light remains lit under the Star-Pack picture, the cigarette machine will dispense a free package of cigarettes. Whether or not purchaser receives a free pack is determined by the internal mechanism of claimant's device by a process of random selection. The Star-Pack unit may be adjusted to vary both the number of free packages of cigarettes to be delivered as well as the frequency of the occasions on which free packs will be delivered.

The Court stated the function of the Star-Pack unit was to cause cigarette vending machines to deliver free merchandise by the application of the element of chance. In discussing whether 15 U.S.C. 1171 applied to the Star-Pack unit the Court said: "Thus, the necessary elements of consideration (patronizing the machine), prize (free package of cigarettes), and chance are present and the definition of gambling device will be satisfied if the device was designed and manufactured primarily for use in connection with gambling." In rejecting claimant's argument that the Star-Pack unit was designed solely to stimulate the sales of claimant's cigarette vending machines, the Court declared that claimant confuses cause and effect. Sales stimulation may be an indirect effect but the only function of the Star-Pack unit is to furnish the element of chance. The Court also emphasized that the gambling characteristics of the device cannot be altered by claimant's intention to use the machine to attract more business.

Claimant also contended the legislative history of the 1962 amendment shows Congressional intent to exclude this device from the provisions of 15 U.S.C. 1171. The Court answered that there is no necessity to resort to legislative history because the language of the statute is clear and requires no explanation. The Court stated, moreover, that a review of the legislative history reflects sufficient reasons to bring claimant's device within the definition expressed in 15 U.S.C. 1171.

Staff: United States Attorney Drew S. T. O'Keefe;
Assistant United States Attorney F. Ross Crumlish (E.D. Pa.).
Philip Wilens, (Criminal Division)

NOTICE

The opinion in Driscoll, et al. v. United States, reported on Page 502, Number 24, Volume 13 of the Bulletin, was withdrawn by the Court of Appeals on November 18, 1965 and judgment vacated. A rehearing was held on December 7, 1965; decision pending.

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Denial of Stay of Deportation Reviewable by Court of Appeals Under 8 U.S.C. 1105a. Melone v. INS (C. A. 7, No. 15,047, January 5, 1966); Roumeliotis v. INS (C. A. 7, No. 15,207, January 6, 1966).

Both of the above deportation cases involved the issue of whether the denial of a stay of deportation by a District Director of the Immigration and Naturalization Service was reviewable by the Seventh Circuit under Section 106(a) of the Immigration and Nationality Act as amended (8 U.S.C. 1105a) which provides for the review of final deportation orders by filing a petition in a court of appeals. Respondent contended that it was not reviewable because the granting of a stay of deportation would not set aside the deportation order but merely delay temporarily its execution.

The Seventh Circuit rejected the argument of respondent upon the basis of the rulings in Skiftos v. INS, 332 F.2d 203 (C. A. 7, 1964); Romoumeliotis v. INS, 304 F.2d 453 (C. A. 7), cert. denied, 371 U.S. 291 (1962); Foti v. INS, 375 U.S. 217. The Court went on to express the opinion that the more recent Supreme Court decision in Giova v. Rosenberg, 379 U. S. 18, fortified their conclusion. There the Court reversed a Ninth Circuit decision holding that a court of appeals has no jurisdiction under Section 106(a) to review a denial of a motion to reopen a deportation proceeding.

The Court passed on the merits of the petition and held that the District Director did not abuse his discretion in denying the application for a stay of deportation. The petition for review was denied.

Staff: Melone: United States Attorney Edward V. Hanrahan; Assistant United States Attorneys John Peter Lulinski and Lawrence Jay Weiner, (N.D. Ill.) of Counsel

Roumeliotis: United States Attorney Edward V. Hanrahan; Assistant United States Attorneys John Peter Lulinski and Arthur D. Rissman, (N.D. Ill.) of Counsel

* * *

LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

LANDS MATTERS

Condemnation, Fixtures, Evidence of Value, Sales in Area to Government and Demands by Government for Rent of Property Taken Properly Rejected. Certain Land in the City of Washington v. United States (C.A. D.C., December 23, 1965) D.J. File No. 33-9-623-20. The United States condemned the Houston Hotel in Washington, D. C., for part of the site of the new F.B.I. Building. The District Court rejected claims for the hotel furnishings and permitted the Government to deduct the value of the furnishings from its valuation of the hotel reached by capitalizing the actual income. The District Court also rejected evidence of a demand from the Government after the taking that the former owner pay $7,000 a month so long as he stayed in possession and operated the hotel. A jury returned a verdict of $700,000 (almost exactly the amount of the Government's testimony of value).

The Court of Appeals affirmed on the grounds that (1) the furnishings, being personal property, were not taken and their value need not be included in the compensation, even though the furnishings may be depreciated by removal, because that loss is consequential; (2) sales to the Government of other property in the area and the Government's demand for rent were properly rejected as evidence of value; and (3) the verdict was within the range of the testimony.

Staff: Edmund B. Clark (Land and Natural Resources Division).

* * *

TAX DIVISION

Acting Assistant Attorney General Richard M. Roberts

SPECIAL NOTICE

REORGANIZATION OF THE GENERAL LITIGATION SECTION

The General Litigation Section, which is responsible at the trial level for all civil tax litigation in both the federal and state courts throughout the country, except suits for the refund of taxes paid, has been reorganized with a reduction in the number of units. The Section is now divided into three units with each unit headed by an Assistant Chief. Two of the units will handle cases and matters on a geographical basis, and one will handle federal immunity cases and matters involving local and state taxation.

The geographic breakdown and line of responsibility is as follows:

(1) Northern & Eastern Unit
John J. Gobel, Asst. Chief
John G. Penn, Reviewer

Connecticut
Delaware
District of Columbia
Illinois
Indiana
Iowa
Kentucky
Maine
Maryland
Massachusetts
Michigan
Minnesota
Missouri
Nebraska
New Hampshire
New Jersey
New York
North Dakota
Ohio
Pennsylvania
Rhode Island
South Dakota
Vermont
West Virginia
Wisconsin

(2) Southern & Western Unit
Norman E. Bayles, Asst. Chief
George F. Lynch, Reviewer

Alabama
Alaska
Arizona
Arkansas
California
Colorado
Florida
Georgia
Guam
Hawaii
Idaho
Kansas
Louisiana
Mississippi
Montana
Nevada
New Mexico
North Carolina
Oklahoma
Oregon
Puerto Rico
South Carolina
Tennessee
Texas
Utah
Virginia
Washington
Wyoming

CRIMINAL TAX MATTERS

Assistance of Counsel After Arrest--Escobedo Distinguished. Sophia C. Miller v. United States (C.A. 8, January 5, 1966). Appellant, convicted of

income tax evasion, urged on appeal that certain admissions she had made while in police custody should have been excluded under the rule of Escobedo v. Illinois, 378 U.S. 478, because she was not represented by counsel at the time she made them. The Court of Appeals rejected the contention and affirmed the conviction. Appellant, an abortionist, was arrested under a warrant (held to be valid) for the state crime of abortion. A search of the room in which she was arrested, incidental to the arrest, turned up two diaries in which appellant had listed the names of many persons together with amounts of money. Taken to the courthouse immediately after her arrest, appellant admitted to the local police that the names in the diaries were those of her clients; that the amounts represented fees she had collected from them; and that during the pertinent years she had performed about 200 abortions from which she had realized income of between $40,000 and $50,000. These admissions, together with the diaries, were used against appellant at her trial for tax evasion.

The Court of Appeals held that the admissions were properly admitted and that Escobedo did not apply for the following reasons: (1) The Escobedo point was not raised at the trial; (2) the record is silent as to whether appellant was apprised of her rights prior to making the admissions; (3) Escobedo must be limited, in some degree, to its peculiar facts and should not be automatically applied "in the light of a strong policy to enforce an effective system of criminal justice"; (4) this case does not involve a confession, as Escobedo did, but merely admissions relating to the interpretation of figures in the diaries; (5) the income tax case had not entered the accusatory stage at the time appellant made these statements to the police; and (6) there was no showing that appellant, like Escobedo, had requested and had been denied an opportunity to consult with her lawyer.

Staff: United States Attorney Richard D. FitzGibbon, Jr.
Assistant United States Attorney Robert J. Koster (E.D. Mo.)

CIVIL TAX MATTERS
District Court Decisions

Bankruptcy; Notice of Levy Served to Reach Bankruptcy Dividend Awarded to Creditor of Bankrupt Held Ineffective. In the Matter of Quakertown Shopping Center, Inc. (E.D. Pa., September 8, 1965). (CCH 65-2 U.S.T.C. Par. 9681). Taxpayer in this case was a creditor of the bankrupt. The Government served a notice of levy on the receiver of the bankrupt's assets which purported to attach taxpayer's right to a dividend from the bankruptcy estate. The referee in bankruptcy decided to award so much of taxpayer's dividend as would be sufficient to satisfy the tax liability, including interest, directly to the Government, and on a petition for review the District Court reversed the referee's decision on the ground that the notice of levy served on the receiver was ineffective because it was made without the permission of the bankruptcy court, and that the Treasury Regulation which permitted such a levy was equally invalid.

Although no application was made to the bankruptcy court for permission to levy either before or after the levy was made, the referee found as a fact that the levy did not interfere with the work of the bankruptcy court, and that

the levy was therefore proper under Treasury Regulation 301.6331-1(a)3, which provides that "...Taxes cannot be collected by levy upon assets in the custody of a court, ...except where the proceeding has progressed to such a point that the levy would not interfere with the work of the court or where the court grants permission to levy." But the District Court held that the regulation was invalid as contrary to a prevailing federal statute, the Bankruptcy Act. The Court stated that the Bankruptcy Act includes the doctrine of in custodia legis by necessary implication, and concluded that the Treasury Regulation was in conflict with the Bankruptcy Act because it was contrary to that doctrine.

The Solicitor General has authorized appeal of this adverse decision to the United States Court of Appeals for the Third Circuit.

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

Injunction; Suit Seeking Injunctive Relief Against Collection of Tax and Damages From Internal Revenue Officials Dismissed for Lack of Jurisdiction. J. Darel Stone, et al v. Lee Phillips, et al. (D. Colo., July 6, 1965). (CCH 65-2 U.S.T.C. Par. 9575). Taxpayers instituted this suit against the District Director of Internal Revenue and a Revenue Officer both in their official and individual capacities because of alleged wrongful assessment of taxes. They sought injunctive relief against further collection of the tax assessments and damages for slander of credit, humiliation, libel, slander and loss of income. Punitive damages also were sought.

In granting a motion to dismiss the suit the District Court, relying on Section 7421(a) of the Internal Revenue Code of 1954 and Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, ruled that it was without jurisdiction to consider the claim for injunctive relief. The Court concluded that the claim for damages also should be dismissed with leave to amend to set forth a jurisdictional basis for such a cause of action and to plead facts essential to show the claim without seeking injunctive relief or a refund of the amounts collected, since the latter relief was available in a refund suit.

Staff: United States Attorney Lawrence M. Henry (D. Colo.).

Federal Tax Liens; District Court Rules That Ohio Liquor License Was Not "Property" to Which Tax Lien Attaches. Paramount Finance Co. v. S & C Tavern, Inc., et al, (N.D. Ohio, September 22, 1965). (CCH 65-2 U.S.T.C. Par. 9677). The Government seized the assets of the corporate taxpayer which operated a tavern, including its right, title and interest in a liquor permit under which the tavern operated. The assets were sold and an application for transfer of the license to the purchaser was approved on the condition that delinquent sales taxes be paid and these taxes and incidental fees were treated as expenses of sale. Notices of tax liens had been filed on May 18, 1964, but the business assets had been mortgaged and the mortgage had been recorded prior thereto.

The Government claimed that the only item of value involved in the sale was the liquor license, which, under Ohio law, cannot be subjected to attachment, levy or mortgage. Therefore, the mortgage was nugatory with respect to

the license and the tax liens should prevail since the liquor license was "property" subject to execution for tax deficiencies under federal law.

The Court properly looked to state law to determine whether the license was "property" to which the tax liens could attach, and relying thereon, ruled that it was not property but only a personal privilege. The Court concluded that the proceeds of the sale represented the business assets of the taxpayer subject to the prior mortgage and that the Government could not seize an Ohio liquor license in an attempt to satisfy a tax lien.

Staff: United States Attorney Merle M. McCurdy (N.D. Ohio); and Carl Miller (Tax Division).

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