Schulman

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UNITED STATES ATTORNEYS
BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 14 April 15. 1966 No. 8

MONTHLY TOTALS

During February, the pending caseload rose by 404 cases over the preceding month, and reached a new high. This marks the sixth time that the caseload has risen in the first eight months of fiscal 1966. The cumulative increase since June 30, 1965 totals 2,230, or approximately 279 cases a month. The greatest increase has been in criminal cases pending, which have increased by 12.1%, compared to a 3.5% increase in civil cases pending. The prospects for achieving the Deputy Attorney General's requested caseload reduction appear dim at this point - in fact, even to get the caseload down to what it was at the outset of the year would require a reduction of over 500 cases a month during the remaining four months of the fiscal year, in addition to the termination of all new cases received during that four-month period. In view of the rate of terminations so far this year, the probability of accomplishing such a task does not seem very strong.

	First 8 Months Fiscal Year 1965	First 8 Months Fiscal Year 1966	Increase or Decrease Number	%
Filed				
Criminal	21,603	21,481	- 122	- .57
Civil	18,575	19,099	+ 524	+ 2.82
Total	40,178	40,580	+ 402	+ 1.00
Terminated				
Criminal	19,604	19,968	+ 364	+ 1.86
Civil	17,559	17,990	+ 431	+ 2.45
Total	37,163	37,958	+ 795	+ 2.14
Pending				
Criminal	12,021	12,603	+ 581	+ 4.83
Civil	24,186	24,944	+ 758	+ 3.13
Total	36,207	37,546	+1,339	+ 3.70

February saw the second highest number of cases terminated in any of the first eight months of the fiscal year. As the number of cases filed, however, was also the second highest total, no inroads were made on the pending caseload. The 7.0% gap between filings and terminations was down somewhat from the 10.6% of January, but was still above the 6.4% average for all eight months.

	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
Dec.	2,534	2,310	4,844	2,688	2,028	4,716
Jan.	2,823	2,542	5,365	2,501	2,349	4,850
Feb.	2,863	2,469	5,332	2,576	2,377	4,953

For the month of February, 1966, United States Attorneys reported collections of $7,164,054. This brings the total for the first eight months of this fiscal year to $45,405,313. This is $188,340 or .41 per cent less than the $45,593,653 collected in the first eight months of fiscal year 1965.

During February $9,588,574 was saved in 117 suits in which the Government as defendant was sued for $11,212,131. 48 of them involving $1,874,403 were closed by compromises amounting to $443,693 and 37 of them involving $4,282,289 were closed by judgments amounting to $1,179,864. The remaining 32 suits involving $5,055,439 were won by the government. The total saved for the first eight months of the current fiscal year was $104,185,857 and is an increase of $30,438,343 or 41.27 per cent over the $73,747,514 saved during the first eight months of fiscal year 1965.

The cost of operating United States Attorneys' Offices for the first eight months of fiscal year 1966 amounted to $12,901,523 as compared to $12,356,198 for the first eight months of fiscal year 1965.

DISTRICTS IN CURRENT STATUS

Set out below are the districts in a current status as of February 28, 1966.

CASES

Criminal

Ala., N.	Ark., W.	Fla., N.	Idaho	Iowa, S.
Ala., M.	Calif., N.	Fla., S.	Ill., N.	Kan.
Ala., S.	Calif., S.	Ga., N.	Ill., S.	Ky., E.
Alaska	Colo.	Ga., M.	Ind., N.	Ky., W.
Ariz.	Conn.	Ga., S.	Ind., S.	La., E.
Ark., E.	Dist. of Col.	Hawaii	Iowa, N.	La., W.

Criminal (Cont.)

Me.
Md.
Mass.
Mich., E.
Mich., W.
Minn.
Miss., N.
Miss., S.
Mo., E.
Mo., W.
Mont.
Nev.
N.H.
N.J.
N.Mex.
N.Y., N.
N.Y., E.
N.Y.. S.
N.C., E.
N.C., M.
N.C., W.
N.D.
Ohio, N.
Ohio, S.
Okla., N.
Okla., E.
Okla., W.
Ore.
Pa., M.
Pa., W.
P.R.
R.I.
S.C., E.
Tenn., E.
Tenn., M.
Tenn., W.
Tex., N.
Tex., E.
Tex., S.
Tex., W.
Va., E.
Va., W.
Wash., E.
Wash., W.
W.Va., N.
Wis., E.
Wyo.
C.Z.
Guam

CASES

Civil

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

MATTERS

Criminal

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

MATTERS

Civil

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

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ADMINISTRATIVE DIVISION

Assistant Attorney General Ernest C. Friesen, Jr.

Amendments to the Federal Rules of Civil and Criminal Procedure

Significant changes in the Rules of Civil and Criminal Procedure will be made if the amendments transmitted to the Congress by the Supreme Court on February 28, 1966, receive favorable Congressional action. The effective date of the amendments is July 1, 1966.

United States Attorneys should forward requisitions to the Department for copies of the amended Rules so that they may be mailed immediately after approval.

The following Memoranda applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 7 Vol. 14 dated April 1, 1966:

MEMOS	DATED	DISTRIBUTION	SUBJECT
453	3/21/66	U.S. Attorneys & Marshals	OFFICE SPACE
455	3/25/66	U.S. Marshals	REGISTER OF SEIZED PROPERTY
256-S3	3/29/66	U.S. Attorneys	REVISION OF FORM USA-35 COVERING FHA TITLE I CASES
456	3/29/66	U.S. Attorneys & Marshals	USER CHARGES RELATING TO SERVICES RENDERED BY U.S. MARSHALS
457	4/ 1/66	U.S. Marshals	DETERMINATION OF VETERAN PREFERENCE; DEPUTY U.S. MARSHAL APPLICANTS
459	4/ 5/66	U.S. Attorneys & Marshals	WITHHOLDING FEDERAL INCOME TAX

ORDERS	DATED	DISTRIBUTION	SUBJECT
355-66	3/25/66	U.S. Attorneys & Marshals	AUTHORIZING DIRECTOR OF BUREAU OF PRISONS TO EXTEND LIMITS OF PLACE OF CONFINEMENT OF PRISONERS FOR CERTAIN PURPOSES

ORDERS	DATED	DISTRIBUTION	SUBJECT
356-66	3/25/66	U.S. Attorneys & Marshals	ASSIGNING TO ASST. ATTY. GEN. IN CHARGE OF ANTITRUST DIV. THE FUNCTION AND AUTHORITY TO DESIGNATE ATTORNEYS TO APPEAR BEFORE GRAND JURIES
357-66	3/31/66	U.S. Attorneys & Marshals	PLACING ASSISTANT ATTORNEY GEN. MITCHELL ROGOVIN IN CHARGE OF TAX DIVISION

* * *

CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURT OF APPEALS

AGRICULTURAL ADJUSTMENT ACT

Sixth Circuit Holds That Wheat Grown on State Penal Farm Solely for Purposes of Internal Consumption, Agricultural Training, and Rehabilitation Does Not Substantially Affect Interstate Commerce and Is Not Subject to Federal Regulation Under Agricultural Adjustment Act. United States v. State of Ohio (C.A. 6, No. 16143, October 9, 1965). D.J. File 106-58-175. The United States filed a complaint seeking a judgment declaring the State of Ohio liable for penalties under the Agricultural Adjustment Act of 1938 for growing wheat on state-owned penal farms in excess of federally-established acreage allotments, and seeking a money judgment for penalties for the years 1954 through 1957. It appeared that the wheat had been grown on the State's land solely for consumption in the State's penal institutions and for rehabilitation purposes. The Ohio Constitution specifically prohibited the sale or release of that wheat into the general economy.

The Sixth Circuit reversed the district court's entry of judgment for the Government and dismissed the action. It held that for the wheat to be subject to federal regulation, it had to affect interstate or foreign commerce. And, in order for it to affect interstate or foreign commerce, the Court held that it had to be available to the economy. The Court rejected the Government's contention that interstate commerce was affected since, by growing the wheat itself, the State did not have to purchase this commodity on the market. In answer, the Court of Appeals merely said that it was conjectural whether the State would have appropriated funds for wheat, but that even if it were not conjectural, it would be unrealistic to say that this purchase factor, standing alone, would exert any substantial effect on interstate commerce.

In a petition for rehearing, the Government raised two issues which had not been discussed in the original briefs: (1) that the district court and the Court of Appeals lacked jurisdiction to entertain the State's defense against the penalties sought to be enforced since the State had not followed the statutory procedure for review; and (2) that a disputed question of fact existed as to whether the wheat harvested by the State had a substantial effect on interstate commerce and, therefore, the case should be remanded for the taking of proof on that issue.

The Sixth Circuit denied the petition for rehearing. With respect to the first point raised, the Court held that the State was not challenging the amount of its acreage allotment but rather whether it was subject to the provisions of the Act, and on this question "the State was not required to resort to the Statutory administrative procedure for testing marketing quotas as a prerequisite to interposing its defense under the facts of this case." On the second point, the Court held there was no "genuine issue of material fact" for "the amount of wheat that Ohio otherwise might have purchased necessarily would be conjectural."

Staff: Morton Hollander and Max Wild (Civil Division)

AGRICULTURAL MARKETING AGREEMENT ACT

Persons Not Subject to Act May Nevertheless Be Subpoenaed Under Section 610(h) of Act. Orville L. Freeman, etc. v. Brown Brothers Harriman & Co. (C.A. 2, No. 30335, March 8, 1966). D.J. File 233-279-104. In this action the district court entered an order enforcing an administrative subpoena duces tecum served on defendant, a private banking company, for the records of a customer's acoount. The underlying issue in the case was whether the Secretary of Agriculture has authority to subpoena, under Section 10(h) of the Agricultural Marketing Agreement Act, 7 U.S.C. 610(h), witnesses who are not themselves subject to the regulatory provisions of that Act.

The Court of Appeals affirmed, holding that Section 610 (h) does authorize the Secretary to subpoena witnesses who are not themselves subject to the Act. At Brown Brothers' request, the Second Circuit entered a stay pending an application for a writ of certiorari.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorneys Alan G. Blumberg and Arthur S. Olick (S.D.N.Y.).

CIVIL SERVICE DISCHARGE

Where Issue of Voluntariness of Resignation Is Raised, Employee Must Be Afforded Full Evidentiary Hearing by Civil Service Commission on Issue. Glynn H. Goodman v. United States (C.A.D.C., No. 19654, March 10, 1966). D.J. File 151-16-531. Plaintiff, who had submitted his resignation from the Bureau of Standards rather than face charges against him, changed his mind and attempted to rescind his resignation. When unsucessful at this attempt, he appealed to the Civil Service Commission, alleging that the resignation had not been voluntary but coerced. Solely on the basis of a documentary record, the Board of Appeals and Review determined that his resignation had been voluntary. In plaintiff's suit to review that determination, the district court granted summary judgment for the Government.

The Court of Appeals reversed with instructions to remand to the Commission for a full evidentiary hearing with opportunity for all parties to testify, such as had been given in Dabney v. Freeman, ____F. 2d____(C.A.D.C.). The Court indicated that this was the proper procedure to be followed in the future in cases where the issue of voluntariness of the resignation is raised.

Staff: United States Attorney David G. Bress; Assistant United States Attorneys Frank Q. Nebeker, Ellen Lee Park, and Charles L. Owen.

CONTRACTS

Meaning of Contract Specifications Held to Be Issue of Law. Floyd L. Crowder, etc. v. United States (C.A. 9, No. 19,798, March 10, 1965). D.J. File 78-11-104. Contractual specifications required plaintiff contractor to perform rehabilitation work on a number of sections on building 475, including section

"475" of the building. The section so designated bore signs on its exterior reading "475F." The contractor claimed an additional amount for work on the section as not being within the contract. The Armed Services Board of Contract Appeals, designated as arbiter of factual disputes arising under the contract by the standard disputes clause, denied the claim on the ground that the work was clearly called for by the specifications. The district court treated the issue of the meaning of the specifications as one of law and, upon its own analysis of the contract, held for the Government, i.e., that the section was required to be rehabilitated under the contract. The Ninth Circuit affirmed "for the reasons set forth in the district court's memorandum and order."

Staff: J. F. Bishop (Civil Division).

FEDERAL RULES OF CIVIL PROCEDURE

Dismissal of Suit Against Secret Service Agents, on Ground That Plaintiff Failed to Effect Adequate Service on Defendants, Affirmed. William Rabiolo v. Myron Weinstein, et al. (C.A. 7, No. 15,263, February 23, 1966). D.J. File 145-3-606. Plaintiff sought to recover damages from four Secret Service agents for allegedly invading his rights under the Fourth and Fifth Amendments during a search of his home and his arrest. The district court dismissed the complaint for failure to state a claim on which relief could be granted, without ruling on defendants' claim that the suit should be dismissed for lack of personal jurisdiction over them.

The Seventh Circuit affirmed the dismissal on the ground that defendants had not been served either personally under Rule 4, F.R. Civ. P., or by certified mail, under 28 U.S.C. 1391(a). With respect to plaintiff's attempt to excuse his failure to serve on the ground that he did not know the agents' whereabouts and he had offered to serve them by certified mail if the Government would give him that information, the Court stated: "We know of no legal obligation on the part of the government to comply with plaintiff's request in this respect."

Staff: Martin Jacobs (Civil Division).

FEDERAL TORT CLAIMS ACT

Feres Doctrine Extends to Drowning of Serviceman in Base Swimming Pool. Chambers v. United States (C.A. 8, No. 18,021, March 3, 1966). D.J. File 157-43-296. Plaintiffs alleged that their son, while on active duty with the Air Force drowned at the base swimming pool on a weekend because of Air Force negligence. The district court granted summary judgment, partly on the basis of affidavits that may have been inadmissible under Rule 56, F.R. Civ. P.

The Court of Appeals affirmed on the ground that, under the doctrine of Feres v. United States, 340 U.S. 135, the Government was immune from this suit. Under the Feres doctrine, "[t]he Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are incident to service." Referring to a suggestion in the record that plaintiffs'

decedent may have had a weekend pass or furlough at the time of his death, the Court stated "the significant fact here is that Chambers was assigned to duty at the Whiteman Base, subject to the control of his military superiors. Even though he might have had a furlough order in his pocket or might have been engaged in swimming for recreation, his claim would be subject to the Feres rule and no recovery permitted."

As to the admissibility of the affidavits relied on by the district court, the Eighth Circuit pointed out that since plaintiff had made no objection to their admissibility their consideration by the district court was proper despite Rule 56. Nevertheless, the Court of Appeals disregarded an affidavit of an Assistant United States Attorney, on information and belief, which the district court had considered. That affidavit, the Court held, violated the personal knowledge requirement of Rule 56(e).

Staff: Harold Reis (Executive Assistant to the Attorney General) and Robert V. Zener (Civil Division)

Substantial Physical Injury Not Necessary to Recover for Nervous Disorder Resulting From Automobile Accident. Parrish v. United States (C.A.D.C., No. 19493, March 9, 1966). D.J. File 157-16-1645. Plaintiff was riding in an automobile driven by her husband when a Post Office truck collided with their automobile. Plaintiff alleged that as a result of the accident she suffered a bruised shoulder and some small cuts from flying glass, and further alleged that the accident resulted in a conversion neurosis, which rendered her unable to work. While the district court found the Government negligent, it denied recovery for the conversion neurosis on the ground that plaintiff had suffered no "substantial" physical injury in the accident. In so doing, the district court relied on Perry v. Capital Traction Co., 32 F. 2d 938 (C.A.D.C. 1929), in which recovery for the emotional consequences of an automobile accident was denied on the ground: (1) that the physical injuries received in the accident were not "substantial", and (2) that there was no showing that the nervous disorder resulted from the physical injury as opposed to the general shock of the accident.

On appeal, the Court of Appeals concluded that "We think it undesirable to dispose of the claim by drawing a legal conclusion in terms of what is at best a difficult and shadowy distinction between substantial and insubstantial physical injury, instead of finding whether appellant had established by a preponderance of the evidence that her nervous troubles were attributable to the injuries sustained in the accident." Accordingly, the Court remanded the case for the district court to consider whether plaintiff's psychiatric disorders "are a proximate result of the physical injuries sustained by her."

The requirements of the Perry case were more restrictive than those of any other jurisdiction in this country. In overruling the requirement of Perry that the emotional injury be accompanied by "substantial" physical injury, the Court of Appeals has brought the law in the District of Columbia more closely in accord with the rest of the nation. However, the Court apparently would still require a showing of physical injury (which only a minority of jurisdictions still require) and a showing that the nervous disorder results from the physical injury (which is not a requirement in any other jurisdiction), rather than the general shock of the accident.

Staff: Robert V. Zener (Civil Division).

Judgment, Awarding Damages to Employee of Independent Contractor Injured at Government-owned, Contractor-Operated Ordnance Plant, Affirmed. United States v. Mary Martin (C.A. 5, January 5, 1966). D.J. 157-75-87. Plaintiff was seriously injured in an explosion at a Government-owned ordnance plant, operated by an independent contractor. After receiving workmen's compensation benefits from the contractor, she instituted this suit under the Tort Claims Act. The district court found the Government negligent in furnishing cardboard trays containing metal particles for holding explosive caps and that this was a proximate cause of plaintiff's injuries. The court alternatively held for plaintiff "on the theory of res ipsa loquitur."

The Government appealed on the ground that the court's findings on negligence and causation were "clearly erroneous," and that the doctrine of res ipsa loquitur was inapplicable because the "instrumentality of harm" had not been in the Government's exclusive control or management. The Court of Appeals affirmed per curiam, holding that the "determinations of the district court reflected in its findings and conclusions justify the judgment which was entered" and stating that the "developments of the law would not be advanced by an extended opinion discussing the application of legal principles to the facts as developed by the evidence."

Staff: Lawrence R. Schneider (Civil Division).

JUDGMENTS

Entry of Judgment and Charging Lien, Based on Stipulation Entered in Bankruptcy Court, Affirmed. United States v. Transocean Air Lines, Inc., et al. (C.A. 5, No. 21877, February 23, 1966). D.J. File 77-11-1838. Plaintiff possessed an unliquidated claim against the United States arising out of an air ferry contract, on which it brought an action in the District Court for the Southern District of Florida. Before the amount of that claim had become liquidated, plaintiff was declared a bankrupt in the District Court for the Northern District of California. Because the Government also had provable claims against the bankrupt, the trustee and the Government entered into a stipulation, approved by the referee, under which the trustee agreed to dismiss the bankrupt's action on its claim in Florida and the United States would set off against its claim the sum of $75,000. The District Court in Florida refused to permit the trustee to dismiss the action and, at the behest of the bankrupt's attorneys who were on a contingent fee retainer, entered judgment for the bankrupt in the amount of $75,000, utilizing the amount of the stipulated set-off in the bankruptcy court. The District Court also placed a $25,000 charging lien on the judgment in favor of the attorneys.

On our appeal, the Fifth Circuit affirmed, holding that the attorneys' charging lien arose with the unliquidated right to recover and thus preexisted the bankruptcy; that the preexisting lien could be enforced by the district court and was not subject to the jurisdiction of the bankruptcy court; and that the monetary amount of the judgment could be based on a stipulation in the bankruptcy court.

Staff: Harvey L. Zuckman (Civil Division)

LONGSHOREMEN'S AND HARBOR WORKERS' ACT

Deputy Commissioner May Infer Causal Relationship Between Accident and Claimant's Disability Without Any Direct Medical Evidence in Support Thereof. Independent Stevedore Co., v. J. J. O'Leary, Deputy Commissioner (C.A. 9, NO. 20, 198, March 3, 1966). D.J. File 83-61-24. Claimant had been injured in a work-connected accident in 1957 and alleged that his disability became permanent and total in 1960. The district court upheld the Deputy Commissioner's award of permanent total disability benefit payments under the Longshoremen's Act.

Upon the employer's appeal, the Ninth Circuit held that the Deputy Commissioner may infer a causal relationship between the accident and the disability without any direct medical evidence in the record on the matter. By so holding, the Court relied on Sentilles v. Inter-Caribbean Shipping Co., 361 U.S. 107, in which the Supreme Court acknowledged the jury's power to draw an inference of causal relationship in a Jones Act suit even in the complete absence of any supporting medical evidence. The Court of Appeals further held that a workmen's compensation award may be sustainable even where, as here, the work-connected injury was not the sole cause of the employee's disability. In addition, the Court noted that if the injury accelerates the employee's disability, this acceleration is enough to entitle him to benefits.

Staff: Lawrence R. Schneider (Civil Division)

PRIORITY OF GOVERNMENT CLAIMS

Debtor of Insolvent Corporation May Offset Claims It Holds Against Corporation, and United States Could Not Invoke Statutory Priority to Prevent Such Offset. A.C. Bulls, Sr., v. United States (C.A. 5, No. 22109, February 8, 1966). D.J. File 130-2-244. The stockholders of the Bulls Realty Company held claims against Simmons Gardens, Inc., which had defaulted on a Federal Housing Administration mortgage. The Bulls Realty stockholders were also Simmons Gardens shareholders and had been loaned approximately $26,000 by Simmons Gardens. In addition, Simmons Gardens owed approximately $37,000 to Bulls Realty for management and maintenance fees. This action was brought to require the Bulls Realty stockholders to pay the deficiency resulting from the foreclosure of the Simmons Gardens property.

Reversing the district court, the Court of Appeals held that defendants could properly offset against their debt to Simmons Gardens the management and maintenance fees due Bulls Realty by Simmons Gardens. The Court held that the priority of the United States under 31 U.S.C. 191-192 could not be invoked to prevent this offset because there had been no "payment" of a "debt" to any other persons prior to the United States even after the United States acquired the mortgage from the private company which issued it. During the year prior to the appointment of a receiver, and while Simmons Gardens was insolvent, Bulls Realty had collected rents from Simmons' tenants and applied this sum against the fees they claimed Simmons owed Bulls Realty. The Court stated "finding themselves in the position of bankers for Simmons Gardens, Inc., and holding $35,373.00, belonging to Simmons Gardens, it would normally be entirely proper for them to set off their claimed

/fees/ for management and maintenance services * * * against their obligation to pay Simmons the amount of their notes plus the balance of cash on hand." The Court's decision appears to turn upon the defendants' physical possession of assets of Simmons Gardens in the name of Bulls Realty Company, an advantage they seemingly would not have received had the entire operation been carried out under one corporate name. Judge Gewin dissented.

Staff: United States Attorney Ben Hardeman; Assistant United States Attorney Rodney R. Steele (M.D. Ala.)

SOCIAL SECURITY ACT

To Sustain Denial of Disability Benefits to Claimant Unable to Return to Usual Work, Secretary Must Show That Claimant Can Perform Other Types of Work Available Within Range of Ordinary Local Transportation. Hodgson v. Celebrezze (C.A. 3, No. 15,180, March 23, 1966). D.J. File 137-63-37. In this action for disability benefits, the Third Circuit reversed the Secretary's denial of benefits on the ground that the Secretary had failed to show what type of work was reasonably open to someone in claimant's condition. The Court explained that for it to uphold the denial of benefits, a "reasonable possibility of work which a claimant could undertake must exist in his home region," i.e., Scranton, Pennsylvania, and "there was no use of speaking of employment for/a claimant for disability insurance benefits/ somewhere out in the national labor market which he could not reach by ordinary local transportation from home." The Third Circuit has thus joined the Fourth and Sixth Circuits in holding that, when a claimant is unable to engage in his former occupation, work which he can do must be reasonable available to him in the area in which he resides in order to sustain the Secretary's determination that he is able to engage in "any substantial gainful activity."

Staff: Jack H. Weiner (Civil Division).

Secretary's Denial of Disability Benefits Affirmed but Case Remanded for Consideration by Secretary of Effect of 1965 Amendments. Walton J. Byrd, Jr. v. Gardner (C.A. 5, No. 22738, March 18, 1966). D.J. File 137-41-96. In this case the Fifth Circuit held that substantial evidence supported the Secretary's conclusion that claimant's high blood pressure and herniated disc were remediable by surgery and hence were not a sufficient basis for the award of disability benefits. The Court accordingly affirmed the Secretary's decision. However, on our suggestion, the Court remanded the claim to the Secretary for consideration of claimant's entitlement to benefits under the 1965 amendments to the Social Security Act.

Staff: Florence Wagman Roisman (Civil Division)

DISTRICT COURT

FALSE CLAIMS ACT

Applications for Emergency Feed Payments Are "Claims" Within Meaning of

Act; Government Cannot Recover on Theory of Mistake Where County Committee Knew Facts and Conditions. United States v. R. W. Beeley, et al. (D. Kansas, November 4, 1965, as amended January 26, 1966). D.J. File 120-29-174. In this civil suit under the False Claims Act, 31 U.S.C. 231, defendants were alleged to have submitted false applications for drought emergency feed to the Commodity Credit Corporation. The Emergency Feed Program was designed to enable eligible farmers to maintain their foundation herds by permitting the purchase of certain designated surplus feed grains. The Government claimed that defendants had falsely certified that without assistance it would be unable to maintain its basic foundation herds and continue livestock operations, since defendants' net worth was ample to meet the cost of feed without assistance. The Government also contended that it was entitled to recover the cost of feed obtained by defendants on the theory of mistake since defendants were ineligible for assistance. In a memorandum opinion the Court, on the basis of stipulated facts, found for defendants, holding that no distinction existed between this case and United States v. Robbins Ranch, 207 F. Supp. 799 (D. Kansas, 1962), in which it was held by the same judge that an application for emergency feed was not a "claim" within the meaning of the False Claims Act. Further, the opinion stated, even if it were a claim, the Government had failed to prove its falsity. Recovery was also denied on the theory of mistake since the Government had not proved that the County Committee which approved the applications misunderstood its responsibilities or the applicability of the regulations.

The Government filed a motion to alter or amend the judgment and in the alternative for a new trial; in a supporting brief it pointed out that in Sell v. United States, 336 F. 2d 467 (C.A. 10), the Court of Appeals held that an application for emergency feed is a "claim" within the meaning of the False Claims Act. It further argued that the making of a false claim will subject the claimant to liability and that such claim need not also be fraudulent, citing Fleming v. United States, 336 F. 2d 475 (C.A. 10).

In its memorandum denying the Government's motion, the Court acknowledged that one portion of the holding in Robbins (i.e., as to a claim) no doubt has been overruled by Sell, but determined nevertheless that Sell and Fleming do not require a different result; in Sell the claims were demonstrably false, whereas here there had been no showing that defendants in fact had an adequate feed supply or that they did not require assistance, and while Fleming holds that fraud or intent to defraud is not an absolute element under the False Claims Act, in this case the Government failed to prove that defendants filed a "false, fictitious or fraudulent" claim.

Staff: United States Attorney Newell A. George; Assistant United States Attorney Elmer Hoge (D. Kansas).

FEDERAL TORT CLAIMS ACT

Insurance Company Which Settled Suit Not Entitled to Indemnity or Contribution From United States. Anna Jennings, etc. v. United States (D. Md., Civil No. 10305, March 10, 1966). D.J. File 157-35-219. An automobile accident on a highway owned and maintained by the United States resulted in lawsuits in a state court by the occupants of one vehicle against the estate of the driver of the

other vehicle. The estate, in turn, filed a wrongful death suit under the Tort Claims Act alleging Government negligence in the maintenance of a faultily-designed roadway. Thereafter, the insurance company representing the defendant estate in the state court actions settled those suits without giving notice to the United States. The suit by the estate against the United States thereafter resulted in a finding that the deceased was free of negligence and a judgment for the estate.

Subsequently, the insurance company filed suit against the United States for indemnity or contribution for the amount of the settlement in the state court actions. The Government moved for summary judgment, arguing that since the insurance company had settled the suits without notice to the United States it had to prove that the defendant's decedent in the original action was liable to the plaintiff in that action (i.e., that the deceased was negligent). However, the Government further argued, since in the Tort Claims Act suit the Federal court had determined that the defendant's decedent was free of negligence, there was no basis either for indemnity or contribution. The District Court granted the Government's motion for summary judgment.

Staff: United States Attorney Thomas J. Kenney; Assistant United States Attorney Ronald T. Osborne (D. Md.)

Plaintiff Voluntarily Dismissed Action, Alleging Negligence in Acquiescing in Sale and/ or Failure to Require Withdrawal of Birth Control Pill From Market, Voluntarily Dismissed. Marilyn Meyer v. United States, et al. (E.D.N.Y., Civil No. 65-C-1251, March 16, 1966). D.J. File 157-52-1386. For approximately 18 months plaintiff consumed birth control pills prescribed by a physician. She alleged in this tort suit against the Government and the drug manufacturer that as a result of such consumption she experienced various disabling side effects, including coronary artery disease resulting in angina pectoris. The cause of action against the Government was based on alleged negligence on the part of officials of the Food and Drug Administration in acquiescing in the marketing of "Enovid" notwithstanding notice of the potential harmful nature of the drug, and further, in failing to withdraw the drug from the market despite knowledge of its dangerous propensities.

A motion to dismiss was filed under Rule 12(e), F.R. Civ. P., for failure to state a claim upon which relief could be granted. It was the Government's position that plaintiff's claim, if any, fell within the discretionary function and misrepresentation exceptions to the Federal Tort Claims Act. 28 U.S.C. 2680(a) and (h). After receipt of a copy of the Government's Memorandum in Support of Its Motion to Dismiss, plaintiff's counsel entered into a stipulation for voluntary dismissal of the action with prejudice.

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

ALLOWANCE OF ATTORNEYS' FEES IN TITLE II LITIGATION UNDER SOCIAL SECURITY ACT

This supplements the information contained in the United States Attorneys'

Bulletin of October 29, 1965, Volume 13, p. 458, et seq. and the Bulletin of March 4, 1966, Volume 14, p. 86, concerning the allowance of attorneys' fees in Title II litigation under the Social Security Act. The United States District Court for the Northern District of Indiana by its order dated March 14, 1966, entered in the case of Raymond Hopkins v. Gardner, Civil No. 282, has adopted the view of this Department that contingent fee contracts entered into prior to the amendment to the Social Security Act (Section 332 P.L. 89-97) 42 U.S.C. 406(b)(1) are subject to the provisions of Section 332. The Court in pertinent part stated as follows:

> The plaintiff and his attorney entered into a contingent fee contract pertaining to this litigation. That contract was executed and this action was filed before the Social Security Act was amended to provide for the court's determination of counsel fee. However, the words of the statute provide for such determination "whenever a court renders a judgment favorable to a claimant" in a case of this nature. 42 U.S.C.A. § 406 (b)(1) (Supp. 1965). It was apparently the intent of Congress to have such attorney's fees determined by the court in all appropriate judgments rendered by the court, not just in judgments entered in cases filed or relating to contracts executed subsequent to the effective date of the amendment to 42 U.S.C. § 406. Such legislation is unquestionably valid. Fleming v. Rhodes, 331 U.S. 100, 67 S. Ct. 1140 (1947); Calhoun v. Massie, 253 U.S. 170, 40 S. Ct. 474 (1920). United States district courts had validly exercised such power even before the congressional enactment of express authorization to determine attorney's fees. Celebrezze v. Sparks, 342 F. 2d 286 (5th Cir. 1965) affirming Sparks v. Celebrezze, 228 F. Supp. 508 (E.D. Texas 1964) and Folsum v. McDonald, 237 F. 2d 380 (4th Cir. 1956). The plaintiff's attorney himself has represented to this court that he was familiar with the decision in the two Sparks cases, supra.

The General Litigation Section, Civil Division, will forward, upon request, a certified copy of the Court Order entered in the Hopkins case. The request may be made by telephone to Harland F. Leathers, Chief, General Litigation Section, Civil Division, Area Code 202, Justice Code 187, Ext. 3312 or 3311.

* * *

CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

WAGERING PROSECUTIONS

Constitutionality of Registration Requirement of Wagering Tax Laws (26 U.S.C. 4412). On March 21, 1966, the Supreme Court in the case of Frank Costello v. United States (352 F. 2d 848), granted certiorari limited to the following question.

> "Do not the federal wagering tax statutes here involved violate the petitioner's privilege against self-incrimination guaranteed by the Fifth Amendment? Should not this court, especially in view of its recent decision in Albertson v. Subversive Activities Control Board, ____U.S.____(1965), overrule United States v. Kahriger, 345 U.S. 22 (1953) and Lewis v. United States, 348 U.S. 419 (1955)?"

It is anticipated that the constitutionality of the statute will now be raised in virtually all pending and future prosecutions under this statute until such time as the Costello case is decided. While the mere fact that certiorari has been granted on this issue must raise some question as to the validity of these prosecutions, nevertheless, no change should be made with regard to the processing of referrals for prosecution and with the scheduling of such cases for trial. On the other hand, where failure to register and pay the occupational taxes imposed on wagering are the sole issues involved, applications for setting of minimum bail and enlargement on minimum bail pending appeal should not be opposed.

If a trial court appears inclined to postpone the trial of wagering tax cases because of this grant of certiorari, the court should be advised that in the view of the Department the statute is presumptively constitutional and that the rights of all concerned can be adequately protected by expeditious trial of these cases and by noting an appeal in the event of conviction. This procedure will also have the advantage of preventing a considerable backlog of wagering tax cases on the district court dockets.

CONTINUANCE

Application for Continuance of Trial Because of Ill Health Granted Under Condition Defendant Submit Monthly Diary of Daily Activities. United States v. Colozzo (E.D. N.Y., March 10, 1966). On February 1962, a three-count information was filed charging defendant with filing false labor reports under Section 431(a) and (b), L.M.R.D.A., 1959. Since that time he has avoided trial on the ground of serious heart ailment, but has continued to be active as President of Local 1277, I.L.A. and Vice President of the I.L.A. Atlantic Coast District Council.

In September 1965, the Government moved for trial and defendant countered with a motion for continuance because of ill health. At that point, the Government asked for an open hearing, with an offer of proof that defendant's activities contradicted his claim of physical disability.

The Court granted the hearing and permitted the Government to call witnesses, who testified that defendant continued to be active as a labor leader, had travelled to various parts of the United States on union business, held eleven different union affiliated posts, acted as a principal waterfront negotiator, attended numerous union meetings, drove a car, and climbed a full flight of stairs at his home on a daily basis. Medical evidence by Court-appointed physicians was unanimous that defendant suffered from heart disease to the extent of 80 to 95% disablement. At the outset of the hearing, the Court advised defendant that he could leave the courtroom at any time. Defendant however remained in the courtroom with his personal physician.

At the close of the hearing, the Court granted a continuance of trial until the Fall Term 1966, upon condition that defendant maintain a detailed diary of his activities, to be submitted each month at the Criminal Calendar Call. The diary shall note dates and hours of all conferences, meetings relating to any business or activity; dates and hours engaged in any activity involving Local 1277 or related locals; dates and hours of other commercial or financial activity, dates and length of travel including driving an automobile, dates of medical attendance and confinement at home.

The action of the Court is explained in a thirty-three page opinion.

Staff: United States Attorney Joseph P. Hoey (E.D. N.Y.);
John J. Mullaney and Thomas J. McKeon (Criminal Division)

WAGERING TAX

Jury Instruction in Absence of Defendant and His Counsel; Admission in Evidence of Exhibits Procured in Illegal Searches and Seizures; Possessory Interest in Property Seized Illegally; Arrest without Warrant Followed by Search; Constitutionality of Wagering Tax Law. In his appeal upon conviction on twenty counts of an indictment charging violations of the Gambling Tax Act of 1954 (26 U.S.C. 4401 and 4411) and the related provisions of 26 U.S.C. 7203, appellant in United States v. Grosso, C.A. 3, decided March 25, 1966, raised several questions: (1) whether defendant's substantial rights were abridged by the action of the trial judge in responding to an unrecorded note from the jury in the absence of defendant and his counsel, without notice and without calling the jury to the courtroom. The Court, citing cases, held it was obvious error for the trial judge to instruct the jury in the absence of defendant and his counsel, and without notice to them. It was likewise error to convey these instructions to the jury by the bailiff. But the court held that these errors did not warrant reversal in the absence of prejudice to defendant's substantial rights. Furthermore, if defendant's counsel, when informed of the action of the trial judge, believed the errors prejudicial it was his obligation to object and seek corrective action by the court, and this he failed to do. The Court also found that it was not a situation which would result in manifest miscarriage of justice if it did not exercise its discretionary power to consider these errors, as evidence of defendant's guilt was overwhelming and there was no reasonable likelihood that the instruction influenced the verdict;

(2) Internal Revenue Service Agents, with a search warrant raided the home of a person with whom defendant had gambling transactions and seized a notebook with a daily record of these transactions which was a significant

item of proof in the Government's case. There was nothing in the record to show that defendant had any legal interest either in the premises searched or in the notebook. Defendant, relying upon Jones v. United States, 326 U.S. 257 (1960), contended that he was not required to show such an interest as a condition precedent to his right to challenge the constitutionality of the search and seizure. The Court held that the decision in the Jones case did not apply here for the reason that defendant's guilt would not be based solely upon proof of possession, and if he sought to challenge the legality of the search he must establish that he, himself, was the victim of an invasion of privacy;

(3) Police investigating gambling obtained information that a cemetery was used as the place where lottery wagers were delivered to representatives of the "bank". With this "numbers drop" under surveillance the police observed a Chevrolet arrive and park. Shortly after, several other cars arrived and their occupants (known to the police as "runners" or numbers operators) deposited envelopes and paper bags in the Chevrolet. The police then arrested the driver of the Chevrolet, searched the car, and found envelopes and bags containing thousands of lottery slips. The arrest and search were made without a warrant. Defendant argued that the arrest and search without a warrant was unlawful. The Court held the urgency of the situation which confronted the police was sufficient to excuse their failure to obtain a warrant, and even assuming the illegality of the search defendant lacked the standing to challenge it as in his pretrial motion he neither alleged nor established the requisite interest in either the automobile searched or the property seized.

(4) Defendant challenged the constitutionality of 26 U.S.C. 4401 on the ground that the filing of a tax return stating the amount of the wagers he received violated his constitutional privilege against self-incrimination, and exposed him to prosecution under local law. The Court rejected the contention on the authority of Lewis v. United States, 348 U.S. 422 (1955), and held that if defendant believed the return called for the disclosure of potentially incriminatory information he could have raised his objection on the return.

Staff: United States Attorney Gustave Diamond; Assistant United States Attorneys Samuel J. Reich and Nick S. Fisfis (W.D. Pa.).

FEDERAL FOOD, DRUG, AND COSMETIC ACT

21 U.S.C. 351(c) Relating to Adulteration Covers "Devices" as Well as Drugs, and Defective Prophylactics Come Within its "Quality" Protection Provision, Which Is Not Void for Vagueness; FDA's "Water Test" for Determining Defective Prophylactics, and Its Use of "Working Tolerance" of 1% Before Reporting Case for Prosecution Upheld. Dean Rudder Manufacturing Company v. United States (C.A. 8). D.J. File 21-43-267. Defendant was convicted by a jury, and fined on five counts of a criminal information charging interstate shipment of "adulterated" prophylactics, within the meaning of 21 U.S.C. 351(c), in violation of 21 U.S.C. 331(a). The evidence established that in each of five shipments of latex rubber prophylactics, labeled "An aid in the prevention of venereal disease", three prophylactics when subjected to a water test were found to contain holes. FDA inspectors selected, as a representative sample, 288 prophylactics from each shipment (the number of prophylactics in each shipment ranging from 3,600 to 28,800), and three prophylactics out of each sample of 288 had holes. The Court of Appeals, in affirming the judgment of conviction, rejected the various grounds for reversal advanced by defendant.

(1) The Court held that 21 U.S.C. 351 defining conditions of adulteration is not limited to drugs, as defendant contended, but that subsection (c) thereof applies to "devices" as well, and thus covers prophylactics. Section 351 begins with the provision that, "A drug or device shall be deemed to be adulterated --", and the four subsections which follow define the various situations of adulteration. Except for subsection (c), three of the subsections explicitly limit their application to drugs. Subsection (b) applies to any "drug the name of which is recognized in an official compendium, and its strength differs from, or its quality or purity falls below, the standard set forth in such compendium", and subsection (c) "If it is not subject to the provisions of subsection (b) of this section and its strength differs from, or its purity or quality falls below, that which it purports or is represented to possess." The Court reasoned that, since the first sentence of the statute embraces both drugs and devices and nothing on the face of subsection (c) limits its application to drugs, it is improbable that Congress would have intended, contrary to the purposes of the Act, to exclude devices from the purview of the adulteration statute.

(2) The Court labeled as "hypertechnical" defendant's argument that since the representation, "An aid in the prevention of venereal disease", is not an expression of measurable component parts, it was not a claim of "quality" within the meaning of subsection 351(c), but rather constituted a therapeutic claim warranting only that the prophylactic has a tendency to prevent venereal disease. The Court noted that while the term "quality" admits of a quantitative description of the organic composition of a substance, the general understanding is that it is also definitive of the character, nature, and degree of excellence of an article. It also noted that even the bare name of the device, "prophylactic", connotes a guard against or prevention of disease, which is manifestly impossible with a leaking device. Consequently, the Court concluded that interstate shipment of prophylactics containing holes "violates subsection 331(a) by having a lower quality than that professed through written expression and inherent meaning."

(3) The Court upheld FDA's administrative adoption of the practice (in effect since 1957) of a "working tolerance" of 1% in the shipment of defective prophylactics before reporting a case for prosecution. It held that such a practice, which benefits the industry manufacturing billions of prophylactics annually as well as the FDA, is not only a valid exercise by the Secretary of Health, Education, and Welfare of a statutory discretion (21 U.S.C. 336) to refrain from prosecuting a minor violation whenever he believes that the public interest will be adequately served by a suitable warning, but, since Section 331(a) makes unlawful the interstate shipment of a single adulterated device, the allowance of any tolerance whatever might be deemed a matter of "administrative grace".

Concerning defendant's suggestion that the statute is vague and that the method of enforcing it operates ex post facto, the Court observed that there can be no vagueness in a statute which prohibits interstate shipment of "any" defective device, especially when no claim is made that defendant was not apprised by the information of the precise conduct constituting the violation charged; and that the tolerance practice suggested no retrospective operation, nor did it increase the malignity of the crime or narrow the rules of evidence so as to make the conviction easier.

(4) The Court also upheld FDA's customary "water test" for prophylactics (which was demonstrated to the trial jury) consisting of filling each sample prophylactic with 300 cc. of water and observing for leaks or breakage, and counting such defects only if the test is completed within the period of one minute after the introduction of the water.

Staff: United States Attorney F. Russell Millin and Assistant United States Attorney Joseph P. Teasdale (W.D. Mo.).

GOLD VIOLATION

Smuggling U.S. Gold Coins Into U.S. Without Treasury License Violated 18 U.S.C. 545 Despite No Legal Sanctions in Licensing Regulation; 31 U.S.C. 442 Makes All Importations of Gold Illegal, Treasury Being Authorized to Create Exceptions. United States v. Robert Leroy Rubin (E.D. Mich., February 28, 1966). Convicted for violation of 18 U.S.C. 545, defendant moved for a new trial. He had been charged with knowingly and fraudulently importing merchandise "contrary to law" in that he brought U.S. gold coins into the United States without the Treasury license required by 31 C.F.R. 54.20. /The coins not being dutiable, the seriousness of the offense lay in defendant's violation of the Gold Laws./ Defendant argued, in part, that no offense was stated: that nowhere are criminal penalties authorized for violation of regulations promulgated under the Gold Reserve Act; and that no criminal penalty can be imposed for violation of an affirmative duty required solely by administrative regulation, absent express statutory provision. The Court held, however, in view of the blanket prohibition against gold importations set out in 31 U.S.C. 442, that the charges did not rest solely on administrative regulations. In effect, the Court construed the criminal information as charging a violation in the importation and that defendant failed to save himself under the administratively created exception. The Court also held that 18 U.S.C. 545 applies to importations that are "contrary to" laws other than tariff and customs laws. Defendant was denied a new trial; he has filed notice of appeal.

Staff: United States Attorney Lawrence Gubow; Assistant United States Attorney Robert J. Grace (E.D. Mich.).

BANKRUPTCY

Admissibility of Evidence Illegally Obtained by Representatives of Trustee in Bankruptcy. United States v. C. Parke Masterson and Joseph Lavorata, 65 Cr. 224 (S.D. N.Y., 1966). D.J. File 49-51-971. Defendants were indicted on March 12, 1965, for violations of the National Bankruptcy Act (18 U.S.C. 152) and conspiracy (18 U.S.C. 371). The charge was that, while Twin Lock, Inc. (of which Masterson was president and Lavorata Treasurer) had been operating as a debtor in possession under Chapter XI of the Bankruptcy Act, defendants submitted to the Referee in Bankruptcy false accounts containing fictitious sales by Twin Lock, made false invoices, and overstated accounts receivable by $12,000.

Defendants moved to suppress as evidence corporate records of Twin Lock, Inc. which they alleged had been improperly removed from the firm's premises by a law associate of the trustee in bankruptcy of that corporation and a

representative of the court-appointed accountant who entered the offices of Twin Lock, Inc. without the permission of its officers and without a court order. F.R. Cr. P. 41(e). The Government responded that the manner in which a representative of the trustee in bankruptcy secured possession of the records was not binding on the prosecuting arm of the Government.

The Court accepted defendant's version of the facts as true stating: "This conduct amounted to a trespass," and was "obviously improper," but question whether the Trustee's impropriety, bearing in mind that he was an officer of the court, precluded the Government from introducing the seized materials into evidence at the trial of the action.

In resolving its own question the Court briefly reviewed the history of the exclusionary rule, concluding that its scope had expanded, but its purpose had remained unchanged, namely, "the discouragement of misconduct by enforcement officials." The Court observed that a trustee in bankruptcy serves for the benefit of the bankrupt's creditors and although he derives his power from the District Court, "his situation is not unlike that of an attorney who, while an officer of the court, certainly cannot bind the Federal Government by any errant conduct on his part." Since the Government cannot control the conduct of private parties, it has been held that evidence illegally secured by a private party, in which the Government did not directly or indirectly participate, is not suppressible. See, e.g. United States v. Goldberg, 330 F. 2d 30, 35 (C.A. 3, 1964), cert. denied 377 U.S. 953 (1964); Burdeau v. McDowell, 256 U.S. 465 (1921). The Court found that rationale applicable to the acts of the trustee in bankruptcy and therefore denied the motion to suppress.

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

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

By Remaining Silent Alien Fails to Establish Nondeportability. George Sideropoulos v. INS (C.A. 6, No. 16,472, March 16, 1966) D.J. File 39-58-36. Petitioner, a native and citizen of Greece, sought review of an order for his deportation predicated on the charge that he entered the United States with a visa that was procured by fraud in that it was obtained upon the basis of a marriage to a United States citizen entered into less than two years prior to entry and terminated within two years subsequent to entry in violation of 8 U.S.C. 1251(a)(1), 1182(a)(19), and 1251(c).

Petitioner contended that the findings upon which the order of deportation and denial of voluntary departure were entered were based upon statements taken when he had no legal counsel and that because deportation proceedings resemble criminal proceedings the statements should have been excluded from the deportation record under the rules laid down in the cases of Massiah v. U.S., 377 U.S. 201 and Escobedo v. Illinois, 378 U.S. 478. In the statements he admitted that the marriage upon which he obtained his vasa was fraudulent and that he had never lived with the woman to whom he was purportedly married. At the deportation hearing, he remained silent and rested his case entirely on his objections to the introduction of the statements.

The Court found it unnecessary to pass on the issue of whether the rules of the Massiah and Escobedo cases applied to deportation proceedings because, apart from the statements the deportability of petitioner had been established. It was undisputed that the marriage was terminated by divorce within two years after petitioner's entry and, therefore, under the provisions of 8 U.S.C. 1251 (c) the burden was upon him to establish that his marriage with a United States citizen was not contracted for the purpose of evading the immigration laws. Because he remained silent at the deportation hearing, the Court decided that he had not borne the burden of proof imposed by the statute. The Court further held that there was no basis to his contention that he had been improperly denied the privilege of voluntary departure. The decision of deportability was upheld.

Staff: United States Attorney, Joseph P. Kinneary;
Assistant U.S. Attorney, Charles G. Heyd (S.D. Ohio)

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Suits to Enjoin Enforcement of Communist Exclusion Provisions of Medicare Hospital Insurance Program. Gratia E. Short v. John W. Gardner, Secretary, Department of Health, Education and Welfare (S.D. Calif., Civil No. 66-282-TC; D. J. File 146-1-12-7372) and Alice C. Evans v. John W. Gardner, Secretary, Department of Health, Education and Welfare (D.D.C., Civil No. 436-66; D.J. File 137-16-135. Members of Communist organizations ordered to register under the Internal Security Act of 1950 are excluded from entitlement to the free hospital insurance benefits provided by the Social Security Amendments of 1965. P.L. 89-97 (79 Stat. 286). Such individuals are not, however, excluded from entitlement to the contributory medical insurance benefits. Plaintiffs filed separate suits attacking the constitutionality of this exclusion provision and the validity of a non-Communist membership disclaimer contained in the HEW-SSA hospital insurance application forms.

Neither plaintiff filed an application for insurance benefits, but instead sought injunctive relief to have the membership inquiry stricken from the form and the Secretary enjoined from enforcing the exclusion provision.

Under the mistaken assumption that the March 31, 1966 deadline for filing for medical insurance benefits also applied to hospital insurance benefits, each plaintiff moved for a preliminary injunction.

Short's motion for preliminary injunction was denied on March 17, 1966. Evan's motion for a three-judge court was denied and the Government's motion to dismiss Evan's case for failure to exhaust administrative remedies was granted on March 21, 1966. Thereafter on March 25 Short's case was dismissed without prejudice on the stipulation of the parties.

Two similar cases are still pending in other Districts. These are: Weiss and Pollitzer v. Gardner (S.D. N.Y., Civil No. 66-Civ.-698; D.J. File 146-1-51-19424) and Frankel v. Gardner (E.D. Pa., Civil No. 40,007; D.J. File 146-1-62-3153).

Staff: Assistant United States Attorney M. Morton Freilich (S.D. Calif.) and Benjamin C. Flannagan and Garvin L. Oliver (Internal Security Division)

* * *

LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

Condemnation: Appointment of Rule 71A Commission and Review of Findings; Cumulative Evidence; Harmful Error; Government Appraisals. Mills v. United States (C.A. 5, No. 21670, Mar. 11, 1966, D.J. File 33-45-897-384). In this case a commission appointed under Rule 71A(h), F.R. Civ. P., excluded the testimony of a witness for the landowners who was called to testify to the value of the land involved, separate from the value of the improved property as a whole. The commission also prohibited cross-examination of a Government witness regarding appraisals of adjacent property by another Government appraiser.

On the landowners' appeal, the Court of Appeals affirmed. Although both parties had requested a jury trial, it held that "error in the appointment of a commission does not require reversal." Noting record support for the commission's findings, it stated that the "clearly erroneous" standard governs review, pursuant to Rules 71A and 52(e)(2). The Court concluded that the testimony excluded was cumulative, other witnesses having testified to the value of the property as a whole, and that its exclusion, if error, was not harmful. It also approved the commission's restriction of inquiry into Government appraisals of adjacent property.

Staff: Raymond N. Zagone (Land and Natural Resources Division)

Condemnation: Valuation; Failure to Instruct Jury to Give Consideration to Effect on Sales of Decrease in Land Values Due to Government's Project Held to Be Error. United States v. 74.60 Acres, Miami County, Indiana, and J. Bart Conn (C.A. 7, No. 15245, Mar. 8, 1966, D.J. File 33-15-287-1). The United States condemned a 74.60-acre tract of farmland improved by a house about 100 years old and several other farm buildings. Some of the land was under cultivation, some in pasture, and some in timber. The valuation of the landowner and his witnesses ranged between $23,000 and $39,000, and the Government's between $14,500 and $15,500. The jury verdict was for $17,500. One of the Government's witnesses used as comparable sales lands located within the area to be flooded when the project was completed, the sales having been made after it became a matter of public knowledge in the area that the dam was to be built. The landowner appealed.

The Court of Appeals reversed the judgment and remanded for a new trial. It stated that such evidence should not have been admitted or, if received, the jury should have been properly instructed as to the weight to be given to it. It stated that the court did instruct that the Government is not required to pay for increases in market value which it has itself created either by virtue of the project or by virtue of its demand for property in the area, but it did not caution the jury as to its consideration of evidence of the farmland values which had been decreased by said taking. "We believe that the failure of the court to instruct on both effects of the taking by the government produced an unfair advantage for the government and a corresponding disadvantage to

defendants." The Court stated that this injustice can be remedied only by reversing the judgment and remanding the cause for a new trial.

Staff: Elizabeth Dudley (Land and Natural Resources Division)

Condemnation: Effect of Use of Previously Condemned Property on Area Remaining After Present Taking Held Not Properly Before Condemnation Jury. United States v. 92.42 Acres, Etc. (Civ. No. 8412, E.D. S.C., Feb. 15, 1966, D.J. File 33-42-188-3). In an action to acquire additional lands for U.S. Naval Base at Charleston, S.C., the Government left a 55-acre strip which was separated from an ammunition storage area by a road. The storage area had been under Government ownership for some time and had only a small amount of ammunition on it. Defendant claimed that his use of the 55-acre strip was restricted because of the proximity to the storage area and asked for a verdict of $128,350. The Government's testimony was in the amount of $45,000 and the jury returned a verdict for $71,400. Defendant filed a motion for a new trial.

In denying the motion, the Court held that it had no jurisdiction to consider damages to a remainder of a tract resulting from a use to which land by a prior taking is put. The issue of whether or not the use to which the United States put the property across the road restricted defendant's use of the remaining 55 acres was not properly before the court and it was therefore proper to exclude testimony relating to it.

Staff: Assistant United States Attorney Thomas P. Simpson (E.D. S.C.).

Condemnation: Removal and Relocation Costs of Public Utility Lessee Held Noncompensable. United States v. Certain Land in City of Newnan, Georgia and Henry N. Payton, et al., (Civ. No. 724, N.D. Ga., Feb. 11, 1966, D.J. File 33-11-469.) In the trial of a condemnation case, filed to acquire a Post Office and Court House site at Newnan, Georgia, in fee simple, the Western Union Telegraph Co., a lessee on premises acquired by the U.S., asserted a claim in a condemnation proceeding for removal and relocation costs on the ground that, being a public utility under a requirement to provide continuous and uninterrupted service, at all time, it could be distinguished from and was not controlled by the ruling in United States v. Petty Motor Company, 327 U.S. 372 (1946). The District Court ruled, however, that no such distinction exists, that the Petty Motor case did control, and moving expenses could not be obtained in the condemnation proceeding. The Government's motion to strike defendant's answer seeking removal costs, therefore, was sustained by the Court's order of February 14, 1966.

Staff: Assistant United States Attorney Slaton Clemmons (N.D. Ga.)

Public Lands; Oil and Gas Leases; First Qualified Applicant Superseded by Reinstatement of Terminated Lease. Keans v. Udall, et al. (Civ. No. 2648-ND, S.D. Cal., Dec. 10, 1965, D.J. File 90-1-18-702). After failure of the former

lessees to appeal from dismissal of a protest to the termination of the original lease, the local land office listed the land involved as available for further leasing. A considerable number of offers to lease the land were filed simultaneously, but as the result of a public drawing plaintiff became entitled to first priority. Thereafter, but before any lease issued to plaintiff, the Congress on October 15, 1962, enacted an amendment to the mineral leasing laws providing for reinstatement of a lease terminated for nonpayment of rental, when no other valid lease has issued, where it is shown to the satisfaction of the Secretary of the Interior that such nonpayment was justifiable or not due to lack of reasonable diligence and certain other conditions are met, 30 U.S.C. 188(c). The former lessees filed a petition for reinstatement of their lease which was granted and their lease reinstated. Plaintiff's offer was thereafter rejected.

Plaintiff, first through administrative proceedings and then in the District Court, unsuccessfully contended that as a result of having first priority through the drawing, and being otherwise qualified, he had a vested right to a lease pursuant to the provision of the minteral leasing laws specifying that as to lands not within a known geological structure of a producing oil or gas field "the person first making application *** shall be entitled to a lease." 30 U.S.C. 226(c). The interpretation of the October 15, 1962 amendment whereunder he was divested of this right was, he urged, contrary to the requirements of the Fifth Amendment.

The District Court granted the Government's motion to dismiss the complaint on the ground that it did not state a claim upon which relief could be granted. No written opinion was rendered. However, in its order the Court stated, "Although plaintiff acquired a right superior to other offerors to receive a lease, his right is not superior to the former lessee's right to have the lease reinstated under section 31 of the Mineral Leasing Act as Amended."

Staff: Assistant U. S. Attorney, Richard J. Dauber (S.D. Cal.)

Tucker Act; Limitations; Test of Taking Correlated With Diminution in Value. Gustine Land and Cattle Co., Inc., et al. v. United States (C.Cls. No. 99-55, Feb. 18, 1966, D.J. File 90-1-23-502). This case was instituted in 1955 to recover $6,028,646 as alleged damage to 35 parcels of land totaling more than 20,000 acres in the San Joaquin Valley in California. Plaintiffs alleged their damages arose because of (1) the construction of Friant Dam which controls the floods and the regimen of the river, (2) the construction of Friant-Kern Canal and the diversion of water from the San Joaquin watershed and (3) the construction and operation of the Delta-Mendota Canal and, thereby, the introduction of a foreign, inferior grade, water in lieu of the San Joaquin River water.

The Central Valley Project was planned originally in 1935. It envisioned a dam constructed at the location of Friant on the San Joaquin River in the foothills of the Sierra Mountains, and the diversion of the San Joaquin River water south through the valley toward Bakersfield. Sufficient water was to be released from Friant Dam to serve water users downstream to a point called Mendota, where the San Joaquin River turned from its western direction to flow

north toward San Francisco. Water from the Sacramento River was to be pumped into the Delta-Mendota Canal and delivered at Mendota to replace the San Joaquin River water from that point down.

Friant Dam was constructed in 1944 and was sufficiently completed by 1948 so that it cut off the natural flood flows and controlled the regimen of the river. Friant-Kern Canal was put into operation in 1950. The Delta-Mendota Canal was put into operation in 1951. The Court found that the operation of the project began as a unit in 1953.

Plaintiffs contended that under the decision in the Dickinson case, 331 U.S. 745, the "final accounting" did not occur until the entire project was put into operation as a unit and that, therefore, they were not barred by limitation from showing damages due to the loss of the flood waters by reason of the construction of Friant Dam (see Gerlach Livestock Co. v. United States, 111 C.Cls. 1, 76 F. Supp. 87, aff'd., 339 U.S. 725), damages to their riparian rights by the diversion of the San Joaquin waters in Friant-Kern Canal, and damages to their land by the introduction of foreign, poor quality, water through the Delta-Mendota Canal. They relied on Slattery Co. v. United States, 231 F. 2d 37 (C.A. 5, 1956), in support of their position.

The Court held that there was a taking of the flood waters at the time they were controlled by Friant Dam and that this was more than six years before plaintiffs filed their case and, therefore, they could not recover any damage for the loss of flood waters. In relationto the claim of the loss of riparian rights by the diversion of water in the Friant-Kern Canal and the introduction of foreign water, the Court reiterated the position it had stated in Wolfsen v. United States, 142 C.Cls. 383, 162 F. Supp. 403, cert. den., 358 U.S. 907. The opinion stated that, in the absence of showing actual damage, plaintiffs could not recover for a technical loss of riparian rights. Finally, the Court found that plaintiffs had failed to prove any actual diminution in value of any of the lands involved. The properties included a large assortment of parcels, some of which were large grass land ranches and some of which were small highly cultivated and intensely irrigated crop lands. The Court found that there had been no diminution in value after 1950, that, in fact, the value had appreciated considerably since 1953 and that, therefore, there was no taking.

This is the last of a long line of cases which were instituted contemporaneously with the start of the Central Valley Project. Several cases involved claims for the loss of beneficial flood waters, see Gerlach Live Stock Co. v. United States (supra); some cases involved claims for the loss of technical riparian rights, see Wolfsen v. United States (supra); some cases involved suits to enjoin the federal officer from operating the dam in accordance with the plan of the project, see Dugan v. Rank, 372 U.S. 609; and finally some suits attempted to exempt the lands involved from the effects of Federal Reclamation laws and the 160-acre limitation, see Ivanhoe Irrig. Dist. v. McCracken, 357 U.S. 275.

Staff: Howard O. Sigmond (Land and Natural Resources Division)

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TAX DIVISION

Assistant Attorney General Mitchell Rogovin

CIVIL TAX MATTERS
District Court Decisions

Federal Tax Liens; Priority; Federal Tax Liens Superior to Attachment Lien Filed by Attaching Creditor in State Court Proceeding Where Government's Liens, Although Recorded Before and After Date of Attachment, Were Recorded Prior to Date Attaching Creditor Obtained Judgment. United States v. Coleman, et al. (S.D. Cal., December 6, 1965). (CCH 66-1 U.S.T.C. Par. 9256). The United States instituted a lien foreclosure action in which it named as defendants the taxpayer, a judgment creditor, and a bank in which taxpayer had deposited sums of money. On various dates between August 1952 and July 1960, federal taxes were assessed against taxpayer and notices of lien were filed between April 1956 and December 1960. In September 1959, a corporate creditor instituted an action in a California state court against taxpayer for a money judgment; a writ of attachment was issued and served upon the bank. In July 1961, the state court entered judgment in favor of the creditor and a writ of execution was served upon the bank. Thereafter, in August 1964, the federal district court entered judgment in the instant case in which it found and held that taxpayer was indebted to the United States for taxes in an amount exceeding that held by the bank; that the United States had a valid and subsisting lien against the fund which was prior and paramount to the claim of the judgment creditor; that the United States was entitled to recover the fund in question; and that it was entitled to a deficiency judgment for the balance of its taxes.

Staff: United States Attorney Manuel L. Real; Assistant United States Attorneys Loyal E. Keir and James S. Bay (S.D. Cal.); Howard A. Weinberger, (Tax Division).

Tax Liens: Government's Tax Lien Superior to California Homestead Exemption and Trust Deed Liens on Property of Delinquent Taxpayers; Since Taxpayer-Husband Did Not Execute Deeds of Trust, Homestead Executed by Taxpayer-Wife for Joint Benefit of Herself and Husband Was Bar to Deeds of Trust, but not to Government's Tax Claim. United States v. Tressler, et al. (S.D. Cal., 1966). (CCH 66-1 U.S.T.C. Par. 9228). The United States sought to foreclose its tax liens on certain real property of the taxpayers, husband and wife, to satisfy their income tax liability. The property in question was the separate property of the wife which she declared as a homestead "for the joint benefit of myself and my husband." Thereafter, the wife executed two notes secured by deeds of trust on the property; the husband did not join in executing either instrument. The Court found that, by its terms, the homestead was for the joint benefit of the husband out of the wife's separate estate; that by the homestead declaration, the wife gave her husband an interest in her property which protected him from both his and his wife's creditors; and that the wife could not convey or encumber it without his signature. Accordingly, the Court ruled that the homestead was a bar to the deeds of trust, (Cal. Civ. Case, Sections 1240 and 1241), but not to the tax claim of the United States (United States v. Heffron, 158 F. 2d 657 (C.A. 9)), and that, while the deeds of trust were valid, they could not be

enforced against the homestead, whereas the tax line of the United States could be foreclosed against the property and the property sold to satisfy its prior lien.

Staff: United States Attorney Manuel L. Real; Assistant United States Attorney Robert T. Jones, (S.D. Cal.); Sherin V. Reynolds, (Tax Division).

Tax Liens: Property Subject to Liens: Government's Tax Lien Did not Attach to Certain Real Property Where Taxpayer Only Had Bare Legal Title and Another Was Equitable Owner. United States v. White, et al. (E.D. Ark., 1965). (CCH 66-1 U.S.T.C. Par. 9249). This was an action by the United States to foreclose its tax liens on certain real property consisting of 1234 acres located in Chicot County, Arkansas, and to obtain a judgment against the estate of the taxpayer. In January 1955, an income tax deficiency for the year 1951 in the amount of $74,134.82, plus interest of $12,736.96, was assessed against taxpayer. Upon the latter's death in October 1965, his executor was substituted as defendant. Prior to the trial, it was stipulated between counsel that judgment could be entered against the executor for the amount of the deficiency ($135,209.98, plus interest until paid), and the Court entered judgment accordingly. However, the Court ruled that the United States had no lien on some 1234 acres of lands and, hence, that it could not order foreclosure. In 1944, a lumber company had purchased this land with its own funds. On the advice of its attorney, title to the land was placed in the name of the taxpayer, a company officer, who executed a statement that the company had provided the purchase money and was the equitable owner. From its acquisition in 1944 until its disposition in 1960, the land was carried on the company's books as a company asset; it paid the real estate taxes and cut timber as owner. About two weeks after the taxes were assessed, taxpayer quitclaimed his interest in the land to the company. The Court held that at the time of the assessment, taxpayer had only naked legal title to the land and that his quitclaim conveyance was not made with any intent to defraud the United States.

Staff: United States Attorney Robert D. Smith, Jr. (E.D. Ark.); Sherin V. Reynolds, (Tax Division).

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