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UNITED STATES ATTORNEYS

BULLETIN

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MONTHLY TOTALS

For the month of May 1960, United States Attorneys reported collections of $3,116,690. This brings the total for the first eleven months of fiscal year 1960 to $28,196,042. Compared with the first eleven months of the previous fiscal year this is a decrease of $2,004,584 or 6.6 per cent from the $30,200,626 collected during that period.

Cases pending in United States Attorneys' Offices as of May 31, 1960 amounted to 28,086 or 14 cases more than the 28,072 pending as of May 31, 1959. Following is a table showing the number of cases filed, terminated and pending during the first eleven months of fiscal years 1959 and 1960.

	1st 11 Months F. Y. 1959	1st 11 Months F. Y. 1960	Increase or Decrease Number	%
Filed				
Criminal	28,819	28,496	- 323	- 1.1
Civil	21,903	22,607	/ 704	/ 3.2
Total	50,722	51,103	/ 381	/ 0.8
Terminated				
Criminal	27,534	27,643	/ 109	/ 0.4
Civil	21,340	20,898	- 442	- 2.1
Total	48,874	48,541	- 333	- 0.7
Pending				
Criminal	8,603	8,369	- 234	- 2.7
Civil	19,469	19,717	/ 248	/ 1.3
Total	28,072	28,086	/ 14	/ 0.1

During May $6,215,358 was saved in 148 suits in which the government as defendant was sued for a total of $7,888,257. 81 of them involving $2,618,623 were closed by compromises amounting to $522,496 and 34 involving $1,887,683 were closed by judgments against the United States amounting to $1,150,403. The remaining 33 suits involving $3,381,951 were won by the government. The total saved for the first eleven months of the fiscal year amounted to $40,267,060, a decrease of $3,921,018 or 8.9 per cent from $44,188,078 saved during the first eleven months of fiscal year 1959.

DISTRICTS IN CURRENT STATUS

As of May 31, 1960, the districts meeting the standards of currency were:

CASES

Criminal

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

Civil

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

MATTERS

Criminal

Ala., M.	Calif., N.	Idaho	Iowa, S.	Me.
Ala., S.	Colo.	Ill., E.	Kan.	Md.
Ariz.	Conn.	Ind., N.	Ky., E.	Mass.
Ark., E.	Ga., S.	Ind., S.	Ky., W.	Mich., W.
Ark., W.	Hawaii	Iowa, N.	La., W.	Minn.

MATTERS

Criminal (continued)

Miss., N.	N. C., M.	Okla., W.	S. D.	W.Va., N.
Miss., S.	N. C., W.	Pa., E.	Tenn., W.	W.Va., S.
Mont.	Ohio, N.	Pa., W.	Tex., E.	Wyo.
N. J.	Ohio, S.	P. R.	Tex., S.	C. Z.
N. Y., E.	Okla., E.	R. I.	Tex., W.	Guam
N. C., E.	Okla., N.	S. C., W.	Utah	V. I.

Civil

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

JOB WELL DONE

The Solicitor, Department of Interior, has commended former Assistant United States Attorney Robert S. Wham, District of Colorado, for his contributions to a recent large lands case in which a compromise settlement most favorable to the Government was negotiated. The Solicitor stated that, in addition to this case, Mr. Wham had handled a substantial amount of litigation referred from the Department of Interior and that such agency is most appreciative of his fine work and cooperation.

Assistant United States Attorneys Jack K. Anderson and Richard P. Matsch, District of Colorado, have been commended by the District Postal Inspector in Charge, for their fine work in the preparation and trial of a recent knitting machine mail fraud case. The letter stated that the evidence was presented clearly and thoroughly, and that the closing arguments summarized the Government's case very capably.

The Deputy District Director, Immigration and Naturalization Service, has expressed his thanks for the outstanding services of Assistant United States Attorney Charles H. Hoens, Jr., District of New Jersey, in a recent

case involving an application for permanent residence as a non-quota immigrant. The dismissal of the case by the Court completely supported the position of the Service. The letter further stated that the wholehearted and capable interest of Mr. Hoens and other members of the staff at all times in representing the Service in litigation is sincerely appreciated.

The Chief Postal Inspector has expressed to the Assistant Attorney General, Criminal Division, his appreciation for the excellent and successful manner in which Assistant United States Attorney William C. Martin, Eastern District of Missouri, presented a recent mail fraud case. The defendant was convicted by the jury of making a false statement concerning the material contained in certain mail sacks presented for mailing at the St. Louis Post Office, in an attempt to evade payment of proper postage. The Chief Inspector observed that the case was both difficult and unusual in that there are no known previous convictions for such a violation in the St. Louis Area.

Assistant United States Attorney John J. Grady, Northern District of Illinois, has been commended by the Special Agent in Charge of an association of casualty and surety companies for his very able representation of the Government in the two trials of a mail fraud case in which the last trial resulted in a conviction. The letter stated that Mr. Grady was opposed by two of Chicago's most able and prominent defense attorneys, and that his performance against such counsel was outstanding. The letter observed that the reason for Mr. Grady's success in this and other cases has been the long hours he has spent in preparing the evidence, in reviewing the law, in interviewing the witnesses, and in spending night after night in preparation for trial. In thanking Mr. Grady for his splendid work, the letter characterized his efforts on behalf of the Government as able, zealous and sincere.

United States Attorney William B. West, III, and his staff, Northern District of Texas, have been commended by the Deputy Solicitor, Department of Interior, for the particularly diligent attention and effort they gave to a recent case and for the very competent manner in which they handled the trial. The letter stated that the trial and the extensive press coverage in the oil producing areas will have a significant deterrent effect on future violations.

United States Attorney Hubert I. Teitelbaum and Assistant United States Attorney W. Wendell Stanton, Western District of Pennsylvania, have been commended by the Chief Postal Inspector, for their fine work in the successful prosecution of a recent mail fraud case involving the sale of knitting machines for work at home purposes. The letter stated that the prosecutions instituted in this type of case have resulted in the virtual discontinuance of this particular kind of fraud, and that the success of Messrs. Teitelbaum and Stanton in this instance is sincerely appreciated.

The District Director, Food and Drug Administration, has commended Assistant United States Attorney Thomas Stueve, Southern District of Ohio, on his excellent handling of a recent case. The letter stated that the prosecution was the culmination of a long investigation following one of the most sensational cases of wide-spread injury to poultry under baffling circumstances, which was finally traced to the introduction into poultry feeds of a chemical which was not previously tested to determine its safety, and that the outcome of the case was of great interest to the whole feed manufacturing and poultry industries. The letter further stated that the case was a most complicated one with many difficult technical aspects and some obscure legal angles, but by dint of great patience, shrewd argument, knowledge of his facts, and unyielding conviction, Mr. Stueve achieved complete victory for the Government and a most substantial penalty, and that his adroit handling of this case is of a piece with his management of previous cases under the Food, Drug and Cosmetic Act.

Former Assistant United States Attorney Harold E. Patterson, District of Oregon, has been commended by the Acting Regional Counsel, Small Business Administration, for the efficient way in which he has handled legal matters for that agency throughout the State of Oregon. The letter stated that all cases have been resolved without the necessity of instituting foreclosure action and in no case has the Small Business Administration suffered a loss.

The executive vice president of a security bureau, has congratulated Assistant United States Attorney Alfred Sawan, Eastern District of New York, on his successful prosecution of a recent case involving theft of a large amount of drugs from a ship. The letter stated that the industry and ability displayed by Mr. Sawan, both in the preparation and trial of this case, are a credit to the United States Attorney's office, and that such office is to be complimented upon the efforts and expense expended in effecting the conviction. The letter further observed that without the testimony of witnesses from distant States and South America, the intricate chain of evidence needed to spell out the identity of the recovered drugs would have failed.

The District Director, Food and Drug Administration, has expressed his appreciation for the efficient handling of a recent case by Assistant United States Attorney Thomas S. Schattenfield, Southern District of Ohio, which resulted in a total fine of $9000. The District Director stated that after the conclusion of the case one of the defendants had told him that he considered that the Government had presented the case thoroughly, that he had been properly impressed, and that he would do all in his power to see to it that neither he nor his firm has occasion again to stand before a federal judge for a Food and Drug Law violation.

The Associate Solicitor, Territories, Wildlife and Parks, Department of the Interior, has gratefully commended United States Attorney Leon P. Miller, Virgin Islands, for his expeditious action in instituting a suit to recover damages under a lease before the defendant left the jurisdiction and for the excellent manner in which he handled the litigation.

ANTITRUST DIVISION

Acting Assistant Attorney General Robert A. Bicks

SHERMAN ACT

Restrictive Practices - Fresh and Processed Meat; Complaint Under Section 1. United States v. Los Angeles Meat and Provision Drivers Union. (S.D. Calif.). A civil antitrust case was filed on June 17, 1960, against the Los Angeles Meat and Provision Drivers Union, Local 626, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, of Los Angeles, California, charging violation of Section 1 of the Sherman Antitrust Act in connection with the purchase, sale and distribution of fresh and processed meat in the Los Angeles area.

Defendant Union includes within its membership approximately 250 meat vendors, who are self-employed individuals engaged in the purchase of fresh and processed meats from packing houses and other wholesalers and the resale of such meats to retail markets, butcher shops, and restaurants. The meat vendors' sales are approximately $50,000,000 per year and over 50 per cent of that amount is traceable to livestock or dressed carcasses shipped into the State of California in interstate commerce.

The complaint names as co-conspirators but not as defendants the following:

Meat Distributors, Inc., a trade association to which most of the meat vendors belong;
Meyer Singer, business agent for defendant Union; and all of the meat vendor members of defendant Union.

The complaint alleges that defendant has combined and conspired with the co-conspirators to limit and restrict the sale of fresh and processed meat by packing houses and other wholesalers to meat vendors who are members of defendant Union; to boycott non-Union vendors; to eliminate competition among the vendors; and to prevent solicitation of each other's accounts.

The complaint asks that the Union be required to terminate membership in the Union of all meat vendors and that no vendors be permitted into the Union in the future. It also seeks other injunctive relief designed to eliminate the restraints alleged.

Staff: George B. Haddock and Maxwell M. Blecher (Antitrust Division)

Price Fixing - Prestone Antifreeze; Complaint Under Section 1. United States v. Union Carbide Corp. (W.D. Mo.). A civil antitrust case was filed on June 28, 1960, charging Union Carbide Corporation with engaging in combinations and conspiracies with its marketers, i.e., oil companies, truck manufacturers, and automotive supply jobbers and dealers, to fix the resale price of Prestone antifreeze and to control its marketing through classes of customers approved by Carbide.

The complaint charges that since 1950 Carbide has unlawfully used so-called agency contracts and fair trade contracts as devices to maintain the resale price of Prestone antifreeze not only in states where fair trade contracts are authorized but also in such states as Missouri where resale price maintenance agreements are not made lawful.

The action seeks injunctions restraining Carbide from continuing to use fair trade contracts in the distribution of Prestone, from consigning Prestone to so-called agents, from compelling customers to sell only through specified outlets, and from suggesting or indicating the resale price of Prestone in any manner.

Staff: Earl A. Jinkinson, Harold E. Baily, Robert L. Eisen, and Joseph E. Paige (Antitrust Division)

CLAYTON ACT

Elimination of Competition; Acquisition of Drug Store Chain; Complaint Under Section 7. United States v. Cunningham Drug Stores, Inc. (E.D. Mich.). On June 30, 1960, a civil antitrust complaint was filed against Cunningham Drug Stores, Incorporated, charging that Cunningham's acquisition of the Kinsel Drug Company in August 1958 violated Section 7 of the Clayton Act, and asks that the Court require Cunningham to divest itself of all the assets, business, and good will of Kinsel.

The complaint states that Cunningham began business in the Detroit area in 1889; that it has been the largest drugstore chain in the area for many years; that it operated approximately 106 drug stores in the area in 1958 under the names "Cunningham's," "Schettler's", and "Shapero's"; and that the combined sales of these outlets in health products were alleged to be approximately $9,900,000 in that year.

The complaint further states that Kinsel began business in the Detroit area in 1888, and at the time of the acquisition was in direct competition with Cunningham; that Kinsel was the second largest drug store chain in the area, operating 23 drug stores there in 1958; and that its health product sales are alleged to have been approximately $2,000,000 for an eleven month period ending June 30, 1958.

It is alleged that the effect of this acquisition may be to lessen competition substantially or to tend to create a monopoly in the distribution of health products in the Detroit area, because competition between Cunningham and Kinsel has been eliminated, competition generally may be

substantially lessened, Cunningham's increased advantage over its remaining competitors may deprive them of a fair opportunity to compete, and concentration among health product retailers has been increased to the detriment of manufacturers and wholesalers of these products.

Staff: Robert B. Hummel, Norman H. Seidler, John D. Shaw, and Dwight B. Moore (Antitrust Division)

Elimination of Competition; Acquisition of Steel Company; Complaint Under Section 7. United States v. Bliss & Laughlin, Inc. (S.D. Calif.). A civil antitrust suit was filed on June 28 against Bliss & Laughlin, Incorporated of Harvey, Illinois, charging that its acquisition of the business and substantially all of the assets of Sierra Drawn Steel Corp. violated Section 7 of the Clayton Act.

The complaint asks that Bliss & Laughlin be required to establish a new corporation and to transfer to said new corporation all of the business and assets acquired from Sierra Drawn Steel Corp., and to divest itself of all interest in or control over the new corporation, to the end that the new corporation shall become an independent competitive factor in the production and sale of cold finished steel bars.

According to the complaint, both Bliss & Laughlin and Sierra were important sellers of cold finished steel bars and products in California, Oregon, Washington, and Arizona; as a result of the acquisition, Bliss & Laughlin now possesses the largest total annual capacity for the production of cold finished steel bars in the United States; in 1959, 54,732 tons of cold finished steel bars were sold to purchasers within the Four State Area, and of this amount, Bliss & Laughlin sold 7.9 per cent, and Sierra sold 22.4 per cent.

The complaint alleges that subsequent to the acquisition the two leading sellers of cold finished steel bars in the Four State Area account for 61 per cent of sales within that area and the four leading sellers now account for 91.4 percent of sales within the area, thus evidencing a high degree of concentration in the production and sale of cold finished steel bars within the relevant market area; that as a result of the merger, competition between Bliss & Laughlin and Sierra has been eliminated; that competition generally in the cold finished steel bars industry may be substantially lessened; that Sierra Drawn Steel Corporation has been eliminated as an independent competitive factor in the production and sale of cold finished steel bars; that the acquisition by Bliss & Laughlin may enhance its competitive advantage in the cold finished steel bar industry to the detriment of actual or potential competition; and that concentration in the cold finished steel bar industry has been increased.

Staff: George B. Haddock and Maxwell M. Blecher (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General George Cochran Doub

COURTS OF APPEAL

COMMODITY CREDIT CORPORATION

Form Indicating Desire to Repay Loan Is Admissible to Prove Defendant Had Sold Grain Rather Than Delivered It on Behalf of Commodity Credit Corporation. United States v. Skolness (C.A. 8, June 14, 1960). Defendant borrowed $12,889.32 from the Commodity Credit Corporation under the latter's 1954 Barley Loan and Purchase Agreement, 7 U.S.C. 1032. The note was secured by a chattel mortgage on 11,612 bushels of barley raised by defendant. Under the agreement defendant could deliver the barley to the CCC at $1.11 per bushel or he could sell it himself and pay off the loan. When defendant reported to the CCC that the grain was heating, he was authorized to move 8,200 bushels to a grain terminal qualified to receive grain for the CCC. This was done, the terminal to which it was moved collapsed, and the barley was lost. When the United States sued the defendant grower, he insisted that the grain had been delivered to the terminal on behalf of the CCC and that he should receive credit on his loan. The district court held that there was no sale to the terminal by defendant and dismissed the complaint.

In the district court a form which defendant had filled out indicating that he would repay his loan and deliver the 4,000 bushels still on hand to the CCC was excluded when offered in evidence. The Court of Appeals held that the disputed form was an "admission against interest" and that its exclusion was reversible error, since it indicated a desire to repay the loan, a position inconsistent with the defendant's claim that he had not sold the 8,200 bushels delivered to the terminal.

Staff: United States Attorney Fallon Kelly and Assistant United States Attorney Connor F. Schmid (D. Minn.)

GOVERNMENT CONTRACTS

Suit for Alleged Breach of Contract by Government Must Be Brought in Court of Claims if Amount Exceeds $10,000. Ove Gustavsson Contracting Co. v. Floete (C.A. 2, May 25, 1960). After plaintiff contractor failed to finish a building on time, the General Services Administration terminated the contract. Plaintiff sued in the district court, naming the GSA contracting officer and the Administrator as defendants and alleging jurisdiction under Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009. His suit seeking an injunction to prevent letting of a contract to complete the building, a declaratory judgment that his contract was still in effect, and damages was dismissed on the theory that the Administrator was an indispensable party, as to whom venue was improperly placed and that as to

the contracting officer, there was no diversity of citizenship, no other ground of federal jurisdiction appearing.

The Court of Appeals affirmed, but on different grounds. The Court held that the suit was in fact against the United States, the two named defendants not being personally liable, and since damages were sought the suit was one to collect a debt owed by the Government, citing Mine Safety Co. v. Forrestal, 326 U.S. 371. Under the Tucker Act, 28 U.S.C. 1491, when the amount sought for an asserted breach of contract exceeds $10,000, suit must be brought in the Court of Claims. The Court rejected plaintiff's attempt to characterize his suit, not as contract, but as one "to review, judicially the action of an agency of the United States" pursuant to Section 10 of the Administrative Procedure Act. "The purpose of Section 10 is to define the procedures and manner of judicial review of agency action, rather than to confer jurisdiction upon the courts." The Court further held that plaintiff had not exhausted his administrative appeal process under the "disputes" clause in the contract. (See William S. Happel v. United States in this Bulletin.)

Staff: United States Attorney S. Hazard Gillespie and Assistant United States Attorney Stephen Kurzman (S.D. N.Y.)

Under Standard Form Government Construction Contract Disputes Concerning Adjustments Are Questions of Fact to Be Resolved by Contracting Officer and Decision Adverse to Contractor Must Be Appealed to Board of Contract Appeals Prior to Judicial Review. William S. Happel v. United States (C.A. 8, June 14, 1960). The standard form construction contract between plaintiff contractor and the Government provided that disputes concerning questions of fact "not disposed of by agreement * * * shall be decided by the Contracting Officer." The contract further required the contractor, if dissatisfied with the ruling, to appeal it to the Board of Contract Appeals within 30 days. A dispute arose concerning an adjustment of compensation after the completion of the work for what the contractor claimed was extra borrow pit fill. The Contracting Officer ruled that there was not more than 20% variance from the estimates, as required by the contract, and that the contractor was entitled to no additional compensation.

The contractor did not appeal this decision to the Board within 30 days and an appeal filed thereafter was dismissed as not being timely. Suit was brought to recover the amount claimed and summary judgment was granted to the Government. The Court of Appeals affirmed, agreeing with the court below that the amount of work performed and the quantity of borrow pit fill was a question of fact properly determined by the contracting officer. See United States v. Callahan Walker Construction Co., 317 U.S. 56. Hence, the contractor had failed to exhaust his administrative remedies as provided by the contract "and, in the absence of some clear evidence that this procedure is inadequate or unavailable, it must be pursued and exhausted before a contractor can be heard to complain in a court." United States v. Joseph A. Holpuch Co., 328 U.S. 234.

Staff: United States Attorney William H. Webster and Assistant United States Attorney W. Francis Murrell (E.D. Mo.)

VETERANS' AFFAIRS

Attorneys' Fees Not Allowable Against Large Class of Veterans for Obtaining Judgment That Class Members' Claims are Valid; Mandamus an Improper Method for Determining Pecuniary Liability of United States; Proper Venue for Suit to Recover Amounts Wrongfully Withheld from NSLI Dividends to Satisfy Separate Government Claim Is District Court of Plaintiff's Residence. Whittier v. Emmet (C.A. D.C., June 23, 1960). The Administrator of Veterans' Affairs collected over $1,640,000 from approximately 8,400 veterans whose private insurance premiums were paid by the Government under the Soldiers' and Sailors' Relief Act from 1940 to 1942. This was done on the theory that the amounts were a debt owed to the United States and was accomplished by deducting the debts of the veterans from dividends due them under their NSLI policies. In 1957, in United States v. Plesha, 352 U.S. 202, the Supreme Court held the insured servicemen were not obligated to reimburse the Government for its payment of premiums on their account. Because there were certain administrative difficulties in disbursing the funds, Congress enacted Public Law 85-586, which made available money for the refunds and authorized their disbursement upon timely application. Suits were subsequently brought by three plaintiffs, asking not only for the principal sums due them, but also for interest on delayed dividends and for the allowance of attorneys' fees to cover services rendered to the named parties and to all persons similarly situated. One plaintiff sought a writ of mandamus from the District Court for the District of Columbia, and the other two suits were transferred to that court from other jurisdictions and consolidated with the first suit. The district court granted a preliminary injunction forbidding the disbursement of more than 90% of the payments authorized. On preliminary hearing the attorneys were allowed 5% attorneys' fees on the total fund and also the claimants were awarded interest of 3% on the dividends.

The Court of Appeals held that mandamus is not a proper method to adjudicate the pecuniary liability of the United States. It also held that the Tucker Act, 28 U.S.C. 1402(a) required that venue in these actions be laid in the district of plaintiff's residence, since basically there was no "disagreement" concerning dividends. If there had been a "disagreement," suit could have been brought in the District Court for the District of Columbia under the provisions of the National Service Life Insurance Act of 1940.

Despite the improper venue below the Court nevertheless considered the merits of the case, since plaintiffs had chosen the venue, and since, if the Government prevailed on the merits on appeal, the misplacing of venue was harmless error. The Court held that, despite the fact that the Plesha decision authoritatively established the rights of all the claimants, it was merely an application of law which was available to other litigants under the doctrine of stare decisis, and also it was P.L. 85-586 that waived many of the technical defenses which the Government might have interposed against the other claimants. Hence, the allowance of attorneys' fees as against all the claimants was improper. Further, the Court held that the imposition of interest on the refunds was error since prejudgment interest may not be assessed against the Government in the absence of a

specific provision authorizing it. United States v. Rayon Importing Co., 329 U.S. 654 (1947).

Staff: Lionel Kestenbaum (Civil Division)

WALSH-HEALEY ACT

Agreement Entered Into in Form of Six Contracts May Be Considered One Contract in Excess of $10,000 and Therefore Subject to Act. R. C. George, d/b/a Capitol Coal Sales, et al. v. Mitchell (C.A. D.C., June 23, 1960). Capitol Coal Sales was in the business of bidding on Government contracts for coal, obtaining the coal from small marginal mines in eastern Tennessee. In response to a single invitation by the AEC, Capitol submitted six bids in the aggregate of $57,312, each of which was intended to be slightly under $10,000. The Act applies to "any contract * * * in any amount exceeding $10,000." 41 U.S.C. 35. Although Capitol signed the bids as contractor, each bid named a separate coal mine as the source of supply. The bids were accepted on one day as six formal contracts. None of the six mine operators paid their employees the minimum wage prescribed by the Secretary of Labor, and at least one of the mines, Asbury Coal, failed to meet the minimum safety standards prescribed by the Federal Mine Safety Code. Administrative proceedings in the Department of Labor resulted in a ruling that the six agreements were one contract in a sum of $57,312, and the names of Capitol and Asbury Coal were placed on the list of ineligible bidders under the provisions of section 3 of the Act, 41 U.S.C. 37. Capitol and Asbury Coal brought this action for a declaratory judgment that the Secretary of Labor was without jurisdiction because the agreements were six separate contracts, each in an amount of $10,000 or less. The district court assumed jurisdiction and granted a temporary injunction restraining the Secretary and the Comptroller General from placing plaintiffs' names on the list. 164 F. Supp. 161. Subsequently, however, the Government's motion for summary judgment on the administrative record was granted.

The Court of Appeals affirmed. It held that the district court properly assumed jurisdiction, rejecting the Government's arguments that the plaintiffs had no standing, Perkins v. Lukens Steel, 310 U.S. 113; and that the United States was an indispensable party. Reynolds Corp. v. Morse, 174 F. 2d 159. The Court held that Congress had granted standing by Section (c) of the Fulbright Amendment, 41 U.S.C. 43a(c); and that in view of that Amendment, Reynolds must be limited to its facts. On the merits, the plaintiffs urged that Capitol was merely an agent for each of the producers, so that in substance as well as in form the six agreements were six separate contracts. The Court rejected this argument and held that the signer of a public contract is presumptively the contracting principal, that Capitol here was in fact the principal, and that, therefore, the Secretary properly disregarded the form of the agreement and considered the six documents as one contract in an amount in excess of $10,000, subject to the Act. In reaching this conclusion, the court

relied upon the general public policy of the Act that the Government should procure only goods produced under safe and fair working conditions. In discussing the Act's $10,000 minimum, the Court said that the Congress " * * * certainly did not intend to encourage the development of a group of shielding middlemen who earn a significant portion of their livelihood by facilitating avoidance of a fundamental public policy -- fair wages and safe working conditions."

Staff: David L. Rose (Civil Division)

DISTRICT COURTS

ADMIRALTY

Ocean Freight Rates; Carrier's Agent Has Burden of Proving Rates Charged Government Are Lowest Available; Certification on Public Voucher That Rates Charged Are Lowest Available in Ignorance of Existing Lower Tariffs Is Tortious Act. United States v. Garcia & Diaz, Inc., (S.D. N.Y., June 13, 1960). The Government sued to recover ocean freight overcharges, the public voucher (paid before audit) containing certification by the carrier's agent that the rate charge was "not in excess of the lowest net rates available for the Government, based on tariffs effective at the date of service." The contention that defendant, as an agent who had remitted to its principal, was not liable was rejected by the Court which held that the certification was negligent (citing Glanzer v. Shepard, 233 N.Y. 236 and Int'l Products Co. v. Erie R.R. Co., 244 N.Y. 331). The Government put only one lower tariff in evidence and did not attempt to show that such tariff was available within the language of the certification. The burden of proof was held to be upon defendant (following United States v. N.Y., N.H. & H.R.R. Co., 355 U.S. 253), and judgment in the amount of the overcharge plus interest from 1944 was granted.

Staff: William H. Postner and Clare E. Walker
(Civil Division)

Damages; Permanent Collision Repairs Held Reasonable Although Only Small Fraction of Detention Claim. United States v. Standard Oil Company of New Jersey and Tank Vessel Fred W. Weller (S.D. N.Y., June 3, 1960). The Government's claim for damages arose from a collision between respondents' vessel and the Government vessel SS CLARKE'S WHARF while the latter vessel was at anchor. The CLARKE'S WHARF sustained minor damage permanently repaired at a cost of only $1,799. Respondents contended that temporary repairs were indicated but the Government's agents viewed permanent repairs as necessary and had such repairs effected, even though the vessel was thereby detained for over ten days. Respondents' liability was settled by an interlocutory consent decree and the issue on damages referred to a Commissioner. Following a hearing, it was held that the Government acted reasonably in undertaking permanent repairs and full recovery was awarded both for the repairs and the detention expenses in the amount of approximately $28,000. In estimating detention expenses,

the Commissioner utilized the per diem average of prior and subsequent vessel earnings (as outlined in Moore-McCormack Lines, Inc. v. The Esso Camden, 244 F. 2d 198), rather than the per diem earnings on the basis of the average of each voyage prior and subsequent to the collision voyage. The Commissioner reasoned that the former method was "fairer under the circumstances and more nearly approximated the average daily net earnings of the vessel."

Staff: Gilbert S. Fleischer (Civil Division)

TORT CLAIMS ACT

Employee of Non-appropriated Fund Activity Limited to Administrative Benefits for Fatal Injury Incurred During Course of Employment. Dorothy May Flood Lowe v. United States (N.D. Miss., June 7, 1960). Plaintiff's decedent, while an employee of the Non-commissioned Officers Open Mess, Columbus Air Force Base, Mississippi, sustained a fatal injury allegedly by reason of negligence on the part of the Mess. The latter had in effect a workmen's compensation insurance policy which conformed to the laws of the State of Mississippi. Plaintiff pursued the claim before the Mississippi Workmen's Compensation Commission, and when the claim was denied upon the merits, carried successive appeals to the Circuit Court of Lowndes County, Mississippi and the Mississippi Supreme Court, respectively, to no avail. Plaintiff thereupon initiated suit against the United States under the Federal Tort Claims Act. Citing Aubrey v. United States, 254 F. 2d 768 (C.A. D.C.) and United States v. Forfari, 268 F. 2d 29, the Court dismissed the complaint. It held that where "there is a system of compensation set up for a particular class of employees, then that system is the exclusive source of compensation for that class."

Staff: United States Attorney Thomas R. Ethridge (N.D. Miss.); Stanley L. Rose (Civil Division)

National Guardsman on Two-week Active Training Duty Not Federal Employee Within Meaning of Federal Tort Claims Act. Elsworth L. Spangler v. United States (S.D. Ohio, June 9, 1960). Plaintiff was injured by a motor vehicle being operated by a member of the Ohio National Guard on active two-week training duty. When plaintiff sued the United States under the Tort Claims Act, the latter moved for summary judgment contending that the Guardsman was not a federal agent, employee or servant at the time of the accident, and that the two-week training tour performed by state guardsmen did not constitute being in "active federal service." The Court sustained the Government's motion.

Staff: United States Attorney Hugh K. Martin and Assistant United States Attorney H. Donald Hawkins (S.D. Ohio); Stanley Rose (Civil Division)

No Liability for Damage Caused to Premises by Flood Waters, Wasco Hedrick, d/b/a Million Auto Parts v. United States (D. N.M., June 9, 1960). Plaintiff owned two tracts of land in Albuquerque, New Mexico. The easterly portion of his property was bounded by a small irrigation ditch known as the Gallegos Lateral. The United States, through a contract with a political subdivision of the State of New Mexico, was responsible for the construction and maintenance of this ditch. East of the Gallegos Lateral lies the Hahn Arroyo, a natural formation, which carries large quantities of rain water from the Sandia Mountains into the area of plaintiff's property.

On July 27, 1959, plaintiff found his property flooded and discovered a break in the west bank of the Gallegos Lateral. On the same day he reported the break to the Government and requested that it be fixed immediately. On the next day the plaintiff again found his property flooded. At the trial the Government showed that the water in the ditch was shut off from 7 p.m., July 21 until 7 p.m., July 28. The Court noted that it rained on July 26, 27, and 28, and concluded that "the water which flooded the plaintiff's premises was that of flood waters." In finding the Government not liable for the plaintiff's damages the Court cited 33 U.S.C. 702(c) which provides in pertinent part: "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place."

Staff: United States Attorney James A. Borland and Assistant United States Attorney J. C. Ryan (D. Mex.)

POSTAL MONEY ORDERS

United States Not Liable to Assignee of Postal Money Order for Loss Caused by Alteration of Instrument by Purchaser-Payee. First National Stores, Inc. v. United States (D. Conn., June 9, 1960). Plaintiff sued under the Tort Claims Act for losses sustained when plaintiff's bank charged back the amount of postal money orders which had been altered by raising the issued amounts thereof. The charge of negligence was that the forms used, and the manner in which they were filled out by the postal clerks, made it possible for forgery and altering to be committed. The Court held that the restrictions placed upon postal money orders by statute made them non-negotiable, citing Bolognesi v. United States, 189 Fed. 335 (C.A. 2), and that since the plaintiff was neither purchaser nor payee of the orders, the United States had assumed no duty to it to use any particular degree of care in the operation of the money order system. The case was distinguished from United States v. Citizens and Southern National Bank, 144 F. Supp. 601 - where reimbursement of fraudulently issued money orders was denied the United States on the ground that the Government negligently supervised the employees who fraudulently issued and cashed the orders. The Court commented that in its opinion, any "change in the nature and function of the [postal money orders] instruments should be left to legislation * * *", and dismissed the action on the ground that the complaint did not state a claim upon which relief could be granted.

Staff: United States Attorney Harry W. Hultgren, Jr. and Assistant United States Attorney W. Paul Flynn (D. Conn.); M. M. Heuser (Civil Division)

POSTAL POLICY ACT OF 1958

Postmaster General's Reformation of Fourth-class Rates Held Within Scope of Statutory Duty and Therefore Sovereign Act. Summerfield v. Parcel Post Association, Inc., et al. (C.A. D.C., June 16, 1960). A trade association and three of its members, users of the parcel post, charged that the Postmaster General's order promulgating new fourth-class mail rates failed to give effect to standards established by Congress in the Postal Policy Act of 1958, 39 U.S.C. 270. The district court refused to grant an injunction staying the new rates from going into effect but denied the Government's motion to dismiss which was based on a claim of sovereign immunity and which relied on Doehla Greeting Cards v. Summerfield, 227 F. 2d 44 (C.A. D.C.). The district court considered the Doehla case not controlling since it was decided before enactment of the Postal Policy Act of 1958.

The Court of Appeals, its jurisdiction based on 28 U.S.C. 1292(b), reversed with instructions to dismiss the complaint on the basis of the Doehla case. It held that the action of the Postmaster General in promulgating the new rates, and of the Interstate Commerce Commission in consenting to them, were within the scope of the statutory duties imposed on them by virtue of 39 U.S.C. 247. Accordingly, their action in the name of the sovereign was "inescapably the action of the United States." Larson v. Domestic & Foreign Corp., 337 U.S. 682, 703; cf. Perkins v. Lukens Steel, 310 U.S. 113, 131-2. Since the Act contains no consent to sue the sovereign and since no provision is made for judicial review of the Postmaster General's rate order, the case comes within the Doehla doctrine.

Staff: Arthur H. Fribourg (Civil Division)

* * *

CIVIL RIGHTS DIVISION

Acting Assistant Attorney General Joseph M. F. Ryan, Jr.

Circulation of Anonymous Political Leaflets. United States v. Frank Goldberg and Earl N. Anderson (D. Ariz.)

As previously reported (see U.S. Attorneys Bulletin for March 13, 1959), defendants Goldberg and Anderson were indicted in February, 1959, on two counts for violating 18 U.S.C. 612. They were charged with having published and distributed in Arizona an anonymous political cartoon showing a picture of Joseph Stalin with the caption "Why Not Vote For Goldwater."

The case went to trial June 10, 1960, and each defendant was found guilty on both counts. Sentences of $1,000 were imposed on each defendant for each count, to run concurrently.

Staff: United States Attorney Jack D. H. Hays, Assistant United States Attorney Ralph G. Smith, Jr. (D. Ariz.)

Voting, Production of Records; Civil Rights Act of 1960. United States v. Association of Citizens Councils of Louisiana, Inc., et al. (S.D. La.). On June 7, 1960, the Government filed suit in the District Court for the Western District of Louisiana (United States v. Association of Citizens Councils of Louisiana, Inc., et al., Civil No.7881-S) alleging removal of 560 registered Negroes from the rolls of Bienville Parish, Louisiana, because of racially discriminatory practices by the Citizens Councils of Arcadia and Gibsland, and the Bienville Parish registrar. The Government seeks an injunction, under the Civil Rights Act of 1957, against continuance of these practices, and is also seeking a court finding, under Title VI of the Civil Rights Act of 1960, of a pattern or practice of discrimination and the appointment of a federal voting referee.

Prior to the bringing of this suit the registrars of the Parishes of East Carroll (Cecil Manning), Ouchita (Mae Lucky), and East Feliciana (Henry Palmer) had brought suit in the District Court for the Western District of Louisiana to enjoin the Government's inspection of voting records in any parish in Louisiana. Manning v. Rogers, W.D. La., Civil No. 7865, DJ 72-33-47. Demands had been made upon these registrars for production of voting records under the 1960 Act. On June 6, 1960 the Government moved to dismiss for lack of service of process and improper venue. On June 10 this motion was granted.

After the dismissal, the Bienville registrar, Mrs. Culpepper, filed a counterclaim as a class action, raising the same issues presented in Manning--i.e., the constitutionality of Titles III and VI--although no demand for records had been made upon her. Thereafter,

all of the voting registrars of Louisiana moved to intervene in the suit, and that motion was granted. One of those who successfully moved to intervene in the action is the registrar in East Feliciana Parish on whom a demand for records had been made and against whom an enforcement application was filed in the District Court for the Eastern District of Louisiana. In re Henry Earl Palmer, Sundry No. 10, E.D. La., DJ 72-32-42. The Government is arguing both in the Eastern District and in the Western District that the only court having jurisdiction is that in which our application for enforcement of the records demand was filed.

On June 21, 1960 the United States filed a motion to dismiss and to strike the counterclaim for lack of jurisdiction, and thereafter filed motions to vacate the intervention order and to dismiss the complaint in intervention.

Staff: United States Attorney T. Fitzhugh Wilson (W.D. La.)
Harold H. Greene, Henry Putzel, Jr., David L. Norman and D. Robert Owen (Civil Rights Division)

* * *

CRIMINAL DIVISION

Assistant Attorney General Malcolm Richard Wilkey

CIVIL RIGHTS ACT OF 1960

Violations Involving Labor Disputes. By the Civil Rights Act of 1960 Congress considerably broadened the authority of the Department in the area of civil rights. A complete statement of the nature of the Act and the procedures to be employed with respect to alleged violations will be set forth in Title 10 of the United States Attorneys' Manual. Insofar as alleged violations of this Act arise out of labor disputes or statutes now assigned to the Criminal Division, no investigation or prosecution should be authorized without prior authority from the Criminal Division.

FHA TITLE I LOAN TRANSACTIONS

Repurchase of Loans by Dealers from FHA-approved Lending Institutions. In the past, when a dealer repurchased a loan from an insured lending institution, all of the loan documents (copy of the contract, credit application, completion certificate and note) were returned to the dealer. When this was done in a case wherein the dealer may have perpetrated a fraud, possession of the vital documents necessary for prosecution was lost and attempts at prosecution were frustrated.

As a result of a suggestion by the Criminal Division, the Federal Housing Administration has issued instructions to all Property Improvement Lending Institutions not to return the originals of these vital documents to the dealer, with the exception of the note, when an FHA-insured loan is re-purchased.

SEARCHES AND SEIZURES

"Silver Platter" Doctrine Abolished; Validity of State Search Must Be Determined Under Federal Standards. Elkins v. United States, No. 126, and Rios v. United States, No. 52 (Supreme Court June 27, 1960). In these cases the Court, by a vote of 5-4, abolished the so-called "silver platter" doctrine. In an opinion by Mr. Justice Stewart, the Court held that "evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant's timely objection in a federal criminal trial", even though federal officers in no way participated in the search. These decisions are likely to have their greatest impact in the fields of liquor and narcotics cases, where state officers have frequently turned evidence over to the federal government.

Mr. Justice Frankfurter, for himself and Clark, Harlan, and Whittaker, JJ., wrote a vigorous dissent. Mr. Justice Frankfurter, for himself alone, was of the opinion that, as a matter of comity, the federal courts should not admit evidence obtained by state officers which has been suppressed by a state court.

The Court did hold, however, that the federal courts must make an independent appraisal of the facts to determine whether a state search was unconstitutional under federal standards. As a result, in both Rios and Elkins, the cases were sent back for reconsideration of the validity of the searches by the state officers.

MAIL FRAUD

School Tax Fraud; Mailing of Tax Bills Not Shown to Have Been in Execution of Scheme to Defraud. In Parr v. United States, No. 391, decided June 13, the Supreme Court reversed the mail fraud conviction of George Parr and others. Although recognizing that the defendants had participated in a brazen scheme to defraud by gaining control of a local Texas school district and misappropriating substantial amounts of school funds by cashing hundreds of fictitious checks, the Court held that the mailings were not shown to have been in execution of the scheme. The mailings charged were the sending out of tax bills by the school district and their payment by various taxpayers. The Court reasoned that these tax bills and the mailings thereof were not affected by the scheme and would have been the same even if the money had not been embezzled. It said that the indictment did not charge and the proof did not show that the taxes assessed were excessive or in any way illegal.

Mr. Justice Frankfurter, joined by Harlan and Stewart, JJ., dissented. His view was that the proof showed that defendants carried out their scheme by getting control of the school district; that the fixing of a tax rate which ultimately assured an excess of funds over expenditures was essential to the scheme; and that therefore the process of collection of taxes was an inseparable element of the scheme.

HUSBAND AND WIFE

Conspiracy. In Dege v. United States, No. 14, decided June 27, 1960, the Supreme Court held that a husband and wife could be jointly indicted for conspiracy to commit a crime. Chief Justice Warren and Black and Whittaker, JJ., dissented.

ARMED SERVICES

Procedure on Claims of Conscientious Objections. Gonzales v. United States (No. 416, Supreme Court, June 27, 1960), involved important questions with respect to the procedure on claims of conscientious objections to military service. The Court, in a 5-4 decision, reaffirmed the ruling of United States v. Nugent, 346 U.S. 1, that a claimant is not entitled to copies of the F.B.I. reports before his hearing. It further held that the registrant is not entitled to such reports at the trial, except where some special showing is made. It ruled that the hearing officer's notes and preliminary recommendation need not be sent to the Appeal Board nor produced at the trial. The dissent did not reach these questions but related only to a more special question presented by the particular facts of the case, where the Department's recommendation was based on material in

the registrant's file not referred to by the hearing officer, which the registrant claimed was inaccurate. The majority were of the view that the Department could rely on the file, whereas the minority through the registrant should have been permitted to contest before the Department the accuracy of the statements relied on.

NATIONAL STOLEN PROPERTY ACT
(18 U.S.C. 2314)

Wording of American Express Company Money Order Held to Provide Sufficient Notice or Foreseeability of Interstate Transportation. United States v. Nelson, 273 F. 2d 459 (C.A. 7, 1960). In affirming defendant's conviction for interstate transportation of forged and falsely made securities under 18 U.S.C. 2314, the Seventh Circuit held that the wording of an American Express Company money order indicated that the money order was payable at American Express Company offices in New York so as to provide notice or foreseeability of interstate transportation as indicated by United States v. Sheridan, 329 U.S. 379, 391 (1946), to be requisite to violation of the Act.

In this connection, reference is made to the memorandum entitled "Interstate Transportation of Forged Travelers Checks under 18 U.S.C. 2314", transmitted to all U. S. Attorneys with the Bulletin dated October 26, 1956 (Vol. 4, No. 22). In addition to outlining Department policy in the prosecution of these violations, the requirement of knowledge or foreseeability of interstate transportation and proof of knowledge were discussed. That memorandum at page 3 referred to an unreported Florida District Court decision which held, in dismissing an information, that an American Express Company travelers check failed to provide sufficient notice of interstate transportation.

The Seventh Circuit, in the Nelson opinion at page 460, states: "Each of the money orders bears the printed legend: 'American Express Company, New York, New York, agrees to transmit and pay.'" In our opinion this clearly indicated that the securities were payable at the American Express Company, in New York, New York. Defendant must have known that the money orders, when forged and uttered, would have to be sent across state lines to New York for collection. We can only conclude that defendant did intend and cause the money orders to be transported in interstate commerce. . . .

The form of the American Express money order has been recently changed (subsequent to issuance of the money orders involved in the Nelson case) to read: "American Express Company agrees to transmit, and to pay at 65 Broadway, New York, N. Y., the sum of . . .". Inasmuch as the Nelson decision is a direct holding that the money orders as formerly worded provided sufficient notice of interstate transportation, the wording of the money orders now in use would seem a fortiori to provide sufficient notice.

Staff: United States Attorney Robert Tieken; Assistant United States Attorneys John Peter Lulinski and Robert N. Johnson (N.D. Ill.)

MAIL FRAUD

Fraud by Wire; Securities Act of 1933; Conspiracy. United States v. Francis Peter Crosby, et al. (S.D. N.Y.). In July 1958, as a result of a two-year probe conducted by the Post Office Department and the Securities and Exchange Commission, a fifty count indictment was returned against nine individuals and two corporate defendants charging mail fraud, fraud by wire, violations of the registration provisions of the Securities Act of 1933 and conspiracy to violate such Act. A superseding indictment naming one additional individual was returned on October 8, 1958. The indictment charged that Crosby, a socialite financier, and William McCarthy, brother of Texas oil man Glenn McCarthy, together with others, assumed control of Texas-Adams Oil Company in 1955 by buying 283,000 shares of stock with $51,000 of the firm's money. Thereafter, they increased the outstanding shares from 750,000 to 5,900,000 and boosted authorized capitalization to 20,000,000 shares. They misrepresented the company as a new industrial empire worth $16,000,000 when it was in fact insolvent. Texas-Adams, with offices in New York and Denver went into bankruptcy in 1957. Defendants collusively and by manipulation maintained and inflated the value of the stock in excess of its true market value, ramifications of the fraud extending to Alabama, Pennsylvania and Colorado.

Trial commenced on February 15, 1960 and three days thereafter defendant McCarthy pleaded guilty to all counts. The trial of the remaining defendants concluded on May 25, 1960 when a jury returned guilty verdicts against Crosby, seven individuals and the two corporations. The remaining defendants were acquitted.

On June 17 sentences were imposed as follows: McCarthy, president and director of Texas-Adams, was sentenced to 3 1/2 years in prison; placed on probation for a similar period and fined $10,000; Crosby, secretary-treasurer and also a director of the firm, was sentenced to 5 years in prison; placed on probation for a similar period and fined $10,000; Worth Pettit, vice president and a director of Texas-Adams, was sentenced to three years in prison and was placed on probation for a similar period. Defendants Mittleman and Meredith received prison terms of 5 years each, Mittleman was fined $10,000 and each was placed on probation for five years. Defendants Gordon, Goldberg and Reicher each received a two year prison sentence, were fined $10,000 and placed on probation for two years. The defendant corporations were fined $1 each remitted.

Staff: United States Attorney S. Hazard Gillespie, Jr.; Assistant United States Attorney John C. Lankenau (S.D. N.Y.)

FALSE STATEMENTS

False Statements to Postal Clerk re Bulk Mail. United States v. John V. Duzer, President, Catalog Direct Sales Corp. (E.D. Mo.) In the first known conviction of its type in the St. Louis, Missouri area John V. Duzer, President of the Catalog Direct Sales Corporation, was

convicted after a 13-day jury trial of violating 18 U.S.C. 1001 by making a false statement concerning material contained in sacks which he presented for mailing at the St. Louis Post Office.

Duzer presented 364 mail sacks, labeled and filled with printed circulars, to be rated at the third class bulk rate and destined for out-of-town mailing. On inquiry by the Postal Clerk, Duzer told him that all pieces of the mailing were identical and the clerk computed the charges on this basis. This computation is made by obtaining the ratio of pieces of mail per pound, multiplying this by the net weight of the mail. Duzer opened a sack on top of the nearest truck and handed the clerk two bundles of circulars for obtaining the ratio. The clerk found that there were 6.75 pieces per pound and that there were 8,380 pounds in the mailing. He thus computed that there were 56,565 pieces for mailing, resulting in a total charge of $848.48 at the third class bulk rate of 1.5 cents apiece. Duzer signed the Statement of Mailing form showing this total of pieces in the mailing.

After the mailing had been cleared through the weigher's office the mail clerk observed that one sack did not have a label. Opening it to learn its destination he noted that the circulars were not the same as those displayed in the top of each truck, the circulars of the opened sack being much smaller. Thereupon the sacks which had not already been dispatched were checked and it was discovered that the trucks were loaded with two double rows of sacks containing small circulars and the single top row of sacks containing the larger catalogs. The ratio of the small circulars was found to be 67 pieces per pound, about one-tenth the weight of the catalogs which Duzer had submitted as samples. Since the postage on both types of mail is 1.5 cents, Duzer's scheme, if successful, would have defrauded the Postal Service of approximately $5,000 through representing that the sacks contained the less numerous and heavier catalogs.

Defendant contended it was a mistake by his employees and that the small catalogs had not been intended for mailing but the investigation by the Postal Inspection Service completely refuted his contention.

Staff: United States Attorney William H. Webster;
Assistant United States Attorney William C. Martin
(E.D. Mo.)

BANKING VIOLATIONS

Unauthorized Issuance of Bank Check in Exchange for Fictitious Note in Violation of 18 U.S.C. 1005 and 1001. Kemp A. Harrison v. United States (C.A. 5). In a decision dated May 31, 1960, the Court of Appeals upheld the conviction of appellant and a co-defendant, Dreyfus Fountain, who did not appeal, for the unauthorized issuance of a bank check in exchange for a fictitious note in violation of 18 U.S.C. 1005 and 1001. Harrison was Mayor of the City of Warner Robins, Georgia and a director of the Citizens State Bank of Warner Robins; Fountain was president of the bank. Appellant was heavily indebted to the bank and overdrawn in his account. Harrison

signed a fictitious note for $20,000 in the name of the City and Fountain issued a bank check for the note which was used to off-set the indebtedness of Harrison to the Bank.

The Court of Appeals held that under the first two paragraphs of Section 1005, it was not necessary to allege and prove a specific intent to injure or defraud the bank for the acts proscribed were criminal per se. In contesting his conviction under Section 1001, Harrison stated there was no false entry in the books of the bank for the transaction was shown as it occurred. The Court stated the charge was not a false entry but rather the concealment of the fact that the note in the name of the City was fictitious and not what it purported to be.

Staff: Assistant United States Attorney Floyd M. Buford (M.D. Ga.)

BRIBERY

Commission for Procuring Loans. John Alexander Ryan v. United States (C.A. 9). Appellant was convicted on six counts of a twenty-one count information charging him with violations of 18 U.S.C. 220. In his appeal, Ryan contended the trial judge committed prejudicial error by instructing the jury that the appellant violated the statute even though the bank loan to the borrower was completed before the appellant received the loan from the borrower. The Court of Appeals, in an opinion dated May 13, 1960 affirming the conviction, stated the phrase in the statute "for procuring or endeavoring to procure" has no tense and "is grammatically compatible with whatever verb tense is chosen." It was held that since it was the congressional intent to prohibit the acts described in the statute, the offense occurs upon receipt of the fee or gift, regardless of when the loan was granted.

Staff: United States Attorney Laughlin E. Waters; Assistant United States Attorneys Robert John Jensen and Bruce A. Bevan, Jr. (S.D. Calif.)

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Joseph M. Swing

DEPORTATION

Expungement of Foreign Conviction - Effect on Immigration Law. Zgodda v. Holland, (E. D. Pa., June 20, 1960). Petition for review of order of deportation.

Plaintiff was convicted in Germany in 1944 of two separate offenses of larceny and, in deportation proceedings in 1959, was found deportable as an alien who had been convicted of crimes involving moral turpitude and was therefore excludable when she last entered the United States in 1957 (sec. 241(a)(1), 1952 Act; 8 U.S.C. 1251(a)(1)) despite the fact that the convictions had been expunged under German law on September 30, 1954.

The Court held that the expungement of the convictions by the German authorities does not operate to relieve an alien from the effect of a conviction insofar as the immigration law is concerned; that even a foreign pardon does not so operate (appropriate decisions cited).

Respondent's motion for summary judgment was granted.

Habeas Corpus - Important That Certified Record of Deportation Proceedings Be Before Court. U. S. ex rel. Lovric v. Pilliod, (C. A. 7, June 16, 1960). Appeal from denial of petition for writ of habeas corpus.

In denying relator's petition for habeas corpus the district court found that it did not state a ground upon which relief could be granted.

By examination of the proceedings below and by the admission of Government counsel on oral argument, the Court of Appeals was convinced that the petition did state a ground for relief but that the court did not have before it a transcript of the proceedings nor the record of the deportation proceedings.

Government counsel joined relator in requesting remand to the district court so that the certified record of the deportation proceedings could be placed before the court.

Reversed and remanded.

Habeas Corpus - Review of Deportation Hearing; Alienage; Fairness of Deportation Hearing; Discretionary Relief. U. S. ex rel. Dentico v. Esperdy, (C. A. 2, June 24, 1960). Appeal from order dismissing writ of habeas corpus sought to obtain relator's release from detention for deportation.

After a deportation hearing at McNeil Island Penitentiary, where he was serving a ten year sentence for violation of the federal narcotic laws, relator was ordered deported as an alien who had been sentenced more than once to imprisonment for a term of a year or more because of convictions in this country of crimes involving moral turpitude committed after entry (robbery, 3d degree; conspiracy to extort money) and violating and conspiring to violate a federal statute prohibiting the sale of heroin. His petition for a writ of habeas corpus challenged the fairness of his hearing and asserted that his alienage had not been established.

In affirming the dismissal of his petition the Court of Appeals found no unfairness in the hearing procedure despite his claim that he was denied assistance of counsel, because he was given opportunities to obtain counsel but expressly waived that right. It also found that his convictions were shown not only by his admissions but by certificates of conviction. His alienage was established by his own testimony and failure to present any evidence that he might have derived citizenship through his father.

His contention that he, as the spouse of a United States citizen, was denied an opportunity to establish his eligibility for discretionary relief from deportation because of his convictions was summarily disposed of on the ground that his narcotic conviction made him excludable under 8 U.S.C. 1182(a)(23) which precludes the grant of the relief sought. The Court found it unnecessary to consider whether such relief is available to aliens under an order of deportation (Puig-Garcia v. Murff, 168 F. Supp. 890 (S.D.N.Y. 1958).

Staff: Special Assistant United States Attorney Charles J. Hartenstine, Jr. (S.D.N.Y.) (S. Hazard Gillespie, Jr., United States Attorney, on the brief).

NATURALIZATION

Pardon - Effect of for Naturalization Purposes Where Crime Pardoned Is Murder; Good Moral Character (murder). Matter of Siacco, (D. Md., June 28, 1960).

A petitioner for naturalization had been convicted of second degree murder in two separate cases in a Maryland state court in 1930. He received an executive pardon for one offense in May, 1958, and a corrected pardon covering both cases in January, 1960.

8 U.S.C. 1101(f)(8) provides that no person who at any time has been convicted of murder shall be regarded as, or found to be, a person of good moral character. The Court concluded that, in view of that specific language, and the fact that Congress did not include in the sections dealing with naturalization any provision similar to that in

8 U.S.C. 1251(b), the deportation section, with respect to the effect of a pardon, Congress must have intended that a conviction of the crime of murder should be an absolute and perpetual bar to naturalization, despite a pardon, unless the pardon is based upon a finding that the defendant was improperly convicted at his original trial.

The petition for naturalization was denied.

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Contempt of Congress. Alden Whitman v. United States (C.A.D.C.) On July 7, 1960, the Court of Appeals affirmed the contempt of Congress conviction of Alden Whitman, a copyreader for the New York Times, who had refused to identify former fellow Communists during the course of testimony before the Senate Internal Security Subcommittee. In his testimony before the Subcommittee, Whitman had testified that he was a member of the Communist Party from 1935 to approximately 1949 and that he had belonged to Party cells in Bridgeport, Connecticut, Buffalo, New York and New York City. He also testified that one of the New York cells to which he belonged was a newspaper cell. He declined, however, to answer questions as to the identity of other persons he had known as members of the Communist Party, as well as certain other questions, on the grounds that his private affairs, beliefs and associations were not proper subjects for investigation, that their pertinency to a valid legislative purpose was in doubt, and that it was doubtful as to whether Congress has the right to investigate the press. Whitman relied on the First Amendment and disclaimed any reliance on the Fifth Amendment. He was found guilty by the District Court on all nineteen counts of the indictment and was sentenced to pay a fine of $500 and to serve six months imprisonment, execution of which was suspended. The Court of Appeals pointed out that the questioning of Whitman was similar to that of Robert Shelton and William Price, two other New York newspapermen whose contempt convictions were affirmed by the Court on June 18. (U.S. Attorneys Bulletin, Vol. 8, No. 14)

Staff: Assistant United States Attorneys William Hitz and Doris H. Spangenburg (Dist. Col.)

Constitutionality of Military Personnel Security Program Sustained; Discharge of Naval Reserve Officer and Army Enlisted Reservist Upheld. Robert O. Bland v. William B. Franke, Secretary of the Navy; Neil F. Davis v. Wilber M. Brucker, Secretary of the Army (D.C.) Bland, a Naval Reserve Officer, received a discharge other than honorable and brought this action to direct the defendant to issue him an honorable discharge and to declare void the proceedings under the Navy and Marine Corps Military Personnel Security Program which resulted in his receiving the other than honorable discharge. Defendant interposed a defense of res judicata based on an action Bland had instituted for a temporary restraining order and injunctive relief and which had been finally adjudicated by the Court of Appeals for the Ninth Circuit. (Bland v. Hartman, 245 F. 2d 311) The District Court on June 7, 1960 granted defendant's motion for summary judgment, upheld the defense of res judicata and dismissed the complaint. In the Davis case, which involved the issuance of a general discharge to a member of the Army Ready Reserve for conduct occurring while on active duty and later while a member of a reserve component, the District Court had previously granted defendant's motion for summary judgment. The Court of Appeals remanded the case to the District Court with instructions to include administrative findin

in the record, to consider whether the applicable statutes and regulations were complied with, and whether the regulation was in any relevant respect invalid or without authority of law, citing Greene v. McElroy, 360 U.S. 474; Vitarelli v. Seaton, 359 U.S. 535; Harmon v. Brucker, 355 U.S. 579 and note 69 Yale Law Review 474. Following the remand the District Court on June 27, 1960 granted defendant's motion for Summary Judgment. These cases are among the first to uphold the constitutionality of the Military Personnel Security Program. Implicit in the decisions is that members of the U.S. Naval Reserve and reserve components of the Army are members of their respective military establishment and are not civilians.

Staff: Oran H. Waterman, Samuel L. Strother and Herbert E. Bates (Internal Security Division)

Forfeiture of Veterans Benefits. Robert G. Thompson v. Sumner G. Whittier (D.C.) Robert G. Thompson, one of the national leaders of the Communist Party who was convicted in the Dennis case in 1949, and who is presently serving a sentence in the Federal Penitentiary at Atlanta, Georgia for violation of the Smith Act, filed suit seeking restoration of his veterans disability compensation payments which, after hearing, had been declared forfeited by the Administrator of Veterans Affairs on the ground that the veteran had rendered assistance to an enemy of the United States during the Korean conflict. Thompson alleged that the action of the Administrator lacked statutory authority and unconstitutionally deprived him of due process of law and his rights under the First Amendment and that the statute was unconstitutional as a bill of attainder. On June 27, 1960, a three-judge District Court denied plaintiff's motion for summary judgment and granted defendant's cross-motion for summary judgment. The Court's opinion, written by Judge Holtzoff and concurred in by Judge Keech, stated that the forfeiture statute authorized the Administrator's action, that the statute was not a bill of attainder, that plaintiff was not deprived of his First Amendment rights nor of due process of law and that the Administrator's findings of fact and the conclusions of law were fully supported by substantial evidence. It further stated that the finality statute, 38 U.S.C. 211(a) barred judicial review of the action of the Veterans Administration. Judge Fahy dissented, stating that the Administrator's action was not authorized by statute and that the Administrator's action was reviewable.

Staff: Homer H. Kirby, Jr. and Cecil Heflin (Internal Security Division)

Issuance of Passports. Fred Jerome v. Christian A. Herter (D.C.) This case presented another instance in which this Division has successfully defended the authority of the Secretary of State to place certain world areas off limits for travel by United States citizens in the interests of our foreign relations. In the summer of 1955, Jerome had traveled in Poland to the Fifth World Youth Festival in Czechoslovakia and in the U.S.S.R. at the invitation of a Soviet Joint Anti-Fascist group in violation of restrictions then contained in his passport. Renewal of his passport in 1958 was denied by the Secretary of State unless and until Jerome would assure him that he would not again violate passport restrictions. Although the

issues of the Jerome case were largely determined by the Worthy, Frank and Porter cases, this case, in addition to reaffirming the Secretary's authority to so proscribe travel, specifically empowers the Secretary, especially in the case of a past violation, to require firm assurances of an applicant that he will not again violate passport restrictions. In granting the Government's motion for summary judgment, the Court said that it was at a complete loss to understand why plaintiff, who avowedly did not intend to again violate present restrictions would not so assure the Secretary of State.

Staff: Anthony F. Cefferky and F. Kirk Maddrix (Internal Security Division)

Proceedings Before Subversive Activities Control Board. William P. Rogers v. American Committee for Protection of Foreign Born. In accordance with the provisions of the Internal Security Act of 1950, a petition was filed with the Subversive Activities Control Board alleging that respondent was a Communist-front organization and as such must register pursuant to Section 7 of the Act. Hearings were held before a hearing examiner of the Board during which the Attorney General presented 18 witnesses and 281 exhibits, and respondent presented 9 witnesses and 237 exhibits. On September 10, 1957 the Hearing Examiner issued a Recommended Decision that the Board order respondent to register as a Communist-front organization. Exceptions to the Recommended Decision were filed by respondent, but because of the remand proceedings in the Communist Party case further consideration of this proceeding was postponed until March 2, 1959 when the proceeding was reactivated to consider credibility factors and questions concerning production of documents upon which respondent wished to be heard. On February 11, 1960, oral argument was had on the sufficiency of the evidence of record and on June 27, 1960 the Board issued an order finding that the respondent is a Communist-front organization and that it should register as such pursuant to the Act.

Staff: F. Kirk Maddrix, Malcolm Knight, James L. Weldon, Jr., and Joseph M. Wysolmerski (Internal Security Division)

* * *

LANDS DIVISION

Assistant Attorney General Perry W. Morton

Reorganization of Lands Division - Establishment of General Litigation Section. By order of June 28, 1960, there was established a General Litigation Section of the Lands Division, composed of two units to be known as the General Trial Unit and the Water Resources Unit. The order provides in part:

> David R. Warner is hereby designated as Chief of the General Litigation Section. Walter H. Williams is designated as Assistant Chief in charge of the General Trial Unit, and Walter Kiechel, Jr. is designated as Assistant Chief in charge of the Water Resources Unit.
>
> 4. The Trial Section and the Water Resources Section of the Lands Division are hereby abolished.

Navigable Streams; Obstructions; Discharge of Industrial Waste; Availability of Injunctive Remedy; Proof of Administrative Construction. United States v. Republic Steel Corporation, (S. Ct. No. 56): The Republic Steel Corporation, International Harvester Company and Interlake Iron Corporation have plants located on the Calumet River south of Chicago. That river, which is actually more like a canal, is a busy waterway used by lake and foreign ships as large as 600 feet in length and up to 21 feet in draft. The companies use vast quantities of water from the river totaling more than six billion gallons a month. When they return the water to the river industrial solids, composed of fiber dust, etc., in fine particles, are discharged. These are deposited on the river bottom, causing shoaling which interfered with navigation. The district court, after a lengthy trial, sustained the claim of the United States that the companies were responsible for interference with navigation and that the United States was entitled to an injunction compelling removal of the obstruction and enjoining creation of future obstructions.

The court of appeals reversed with directions to dismiss. It held that the discharge of industrial solids by the companies was not a violation of the Rivers and Harbors Act of 1899 as claimed by the Government, placing great emphasis on the fact that because of the great quantity of water involved, the particles of solids were microscopic. Alternatively, "as a matter of precaution," because this conclusion "might be erroneous" it held that the court could not grant injunctive relief and, therefore, the complaint should be dismissed.

The Supreme Court reversed by a 5-4 vote, Mr. Justice Douglas writing for the majority. The opinion first concluded that the

deposits constituted an obstruction to navigable capacity of the waters prohibited by section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403. Rejecting an argument that only such obstructions were forbidden as were created by structures or fills and the like referred to by two subsequent clauses of section 10, it was held that the broad first clause was aimed at protecting navigable capacity even though it was adversely affected in ways other than those specified in the other clauses. The opinion dealt in some detail with Sanitary District Co. v. United States, 266 U.S. 405 which it considered decisive.

The Court next concluded that section 13 of the Act, which barred the discharge into navigable streams of refuse matter "other than that flowing from streets and sewers and passing therefrom in a liquid state," did not affect this case because the exception referred to sewage, not to these industrial wastes. In this connection the Court relied upon administrative construction represented by a series of transactions commencing in 1909 wherein the Army Engineers required steel companies to remove deposits from the Calumet River and they did so. While references were made to this history in some published documents, it was brought to the attention of the Court primarily by an appendix to the Government's brief wherein letters between the District Engineer for the Army and representatives of the steel companies were printed.

The Court held that injunctive relief was available even though section 12 of the Act specifically providing for injunctive relief referred only to removal of "structures." Here again, the Sanitary District case was held to be controlling. The opinion concluded: "Congress has legislated and made its purpose clear; it has provided enough federal law in § 10 from which appropriate remedies may be fashioned even though they rest on inferences. Otherwise we impute to Congress a futility inconsistent with the great design of this legislation. This is for us the meaning of Sanitary District Co. v. United States, supra, on this procedural point."

Justice Harlan's dissenting opinion asserted (1) that "obstruction" in section 10 covered only specifically enumerated obstructions, (2) that the discharges of this liquid matter was not specifically forbidden by the Act, (3) that injunctive relief was not authorized and (4) that the Sanitary District case does not control. Justice Frankfurter filed a short memorandum saying that absent comprehensive legislation "I would go a long way to sustain the power of the United States, as parens patriae, to enjoin a nuisance that seriously obstructs navigation," but that was precluded by the 1899 Act.

Staff: Solicitor General J. Lee Rankin

Federal Commerce Control of Non-navigable Streams; Lack of Obligation to Compensate for Frustration of Hope of Private Power Development; Appropriative Rights; Burden on Claimant to Prove Grant from

United States in Western States; Strict Construction of Federal Grants. United States v. Grand River Dam Authority, (S. Ct. No. 503 reversing Ct. Cls.). The Grand River in Oklahoma is a non-navigable tributary of the navigable Arkansas River. In 1935 the Grand River Dam Authority was created by the State to develop hydro-electric power on the river. The Army Engineers had made surveys of the river and both its reports and the plans of the Authority related to three dam sites on the river over a 50-mile stretch. The farthest upstream was Pensacola as a storage reservoir project and the other two were "run-of-the-river" dams at Markham Ferry and Fort Gibson, the latter site being some 8 miles above the junction of the Grand and Arkansas Rivers. The Authority built the Pensacola Project under federal financing and pursuant to a Federal Power Act license which required operation for flood control purposes. The United States has built the Fort Gibson dam for use for power production and for flood control purposes. Congress has provided for a structure to be built and operated by the Authority at the Markham's Ferry site. In this case the Authority asserted in the Court of Claims and that court, by a divided vote, sustained claims to compensation for the alleged taking from the Authority of water power rights and its "franchise" to develop water power at the Fort Gibson site. All claims for the taking of physical properties, easements, severance damage and the like had been otherwise settled.

The Supreme Court unanimously reversed holding that there had been no compensable taking of property. It first stated that the question whether the rule of United States v. Twin City Power Co., 350 U.S. 222 --- that the United States need not compensate private interests for depriving them of the opportunity of utilizing the flow of a navigable stream to produce power --- extends to non-navigable streams need not be decided here. It reasoned that the Fort Gibson project designed to protect the navigable capacity of the Arkansas River was within the power of Congress and that "When the United States appropriates the flow either of a navigable or a non-navigable stream pursuant to its superior power under the Commerce Clause, it is exercising established prerogatives and is beholden to no one. Plainly under our decisions it could license another to build the project and operate it. If respondent sued for damages for failure of the Federal Government to grant it a license to build the Ft. Gibson project, it could not claim that something of right had been withheld from it. So it is when the United States exercises its prerogative by building the project itself." At this point in a footnote the opinion stated that no riparian land was involved.

Turning to the Authority's argument that it had a vested interest in the waters of the Grand River, it stated that "the Federal Government was the initial proprietor in these western lands and any claim by a State or by others must derive from this federal title. See United States v. Gerlach Live Stock Co., 339 U.S. 725, 747; Federal Power Comm'n v. Oregon, 349 U.S. 435. Congress has made various grants or conveyances or by statute recognized certain appropriations of lands or waters in the public domain made through machinery of the States."

The opinion continued that the only statute referred to by the Authority here was a section of a 1906 Act authorizing light and power companies to construct dams across non-navigable streams in Cherokee Indian Territory for light and power purposes. This Act, the opinion states, was no more than a regulatory measure; it did not purport to grant title to waters and appurtenant lands. The Court also said that the Authority's construction would be precluded by the rule "that all federal grants are construed in favor of the Government lest they be enlarged to include more than what was expressly included."

The opinion then said that the Court of Claims confused appropriation of property and frustration of an enterprise by reason of the exercise of a superior governmental power. It concluded: "In conclusion, the United States did not appropriate any business, contract, land, or property of respondent. It had the superior right by reason of the Commerce Clause to build the Ft. Gibson project itself or to license another to do it. The frustration of respondent's plans and expectations which resulted when the United States chose to undertake the project on its own account did not take property from respondent in the sense of the Fifth Amendment."

Staff: Solicitor General J. Lee Rankin

"Wherry" Housing; Instructions to Jury; Measure of Value; Control of Rents; Treatment of Reserve for Replacement Fund. Buena Vista Homes, Inc. v. United States, (C.A. 10, No. 6201). This action was brought by the United States to condemn defendant's interests in a "Wherry" housing project at the White Sands Proving Grounds, New Mexico. The issue of just compensation was tried to commissioners. The instruction to the commissioners with respect to market value stated that "Reasonable market value is generally determined by several methods, which in the order of importance are the following: * * * " and thereafter listed "Market data" and "Income method" with some explanation of those reasons. Concerning rentals the commissioners were instructed that because under the law rents were controlled by the FHA, the schedule of rentals in effect as of the date of taking as approved by the FHA "must be considered by you as defendant's basis of rental value." With respect to the reserve for replacements fund deposited under applicable requirements with the mortgages, the commissioners were originally instructed, inter alia, "Since that amount is returnable to defendant, it should be deducted from the amount you feel to be the reasonable market value of defendant lessee's interest in the Wherry Housing Project." Defendant moved to strike or amend such instructions and its motion was denied by the district court. In the proceedings before the commissioners considerable valuation testimony was adduced, including the market or comparable sales approach, various capitalization of income approaches, and, over the Government's objections, the reproduction cost new less depreciation approach. In arriving at their estimates of value, because of the varying manner in which they treated depreciation and maintenance and repairs, some witnesses deducted the reserve for replacements fund while others

added that fund or noted that it was not taken into consideration in the estimate of value. The commissioners determined a net award to the defendant in the amount of $383,332.38, arrived at by subtracting an amount representing the reserve for replacements fund from $440,000 which the commissioners had concluded was the fair market value of defendant's interests. A supplemental report by the commissioners adhered to that view. The district court became persuaded by the defendant that the commissioners should be called on for their decision "without any regard to the reserve fund and with full knowledge that it will not be deducted from the value determined them." Accordingly, the district court inquired of the commissioners whether their valuation of $440,000 remained unchanged under the revised instruction or whether they desired to change or modify it in the light of the withdrawing of the instruction that the reserve fund would be deducted from the valuation determined by the commissioners. The commissioners submitted a second supplemental report noting that the reserve fund had been taken into consideration in arriving at their original findings and conclusions, that under the new instruction "there is a complete void in considering the cost of repairs and replacements which we did consider in our original report," and finding the fair market value of defendant's interest to be $385,000, which the district court adopted.

Defendant appealed challenging the instructions discussed above and the adequacy of the award. The Court of Appeals affirmed. In doing so, it expressly approved the opinion in United States v. Benning Housing Corporation, (C.A. 5, March 25, 1960), (See U.S. Attys. Bulletin No. 8, p. 244), concluding that the reproduction cost less depreciation method was not a proper basis of valuation in Wherry housing cases. The Court of Appeals in the instant case also reached the same conclusion on the Benning case concerning control over rents and rate of return, holding that the appellant's objection that the Commissioners had not been told about the possibility of adjustment of rentals was not well taken. The Court said that adjustments were permissible relating to operation, maintenance and the like but "It did not permit an increase in rate of return." With respect to the reserve for replacement fund, the Court of Appeals notes the varying ways in which that fund had been treated by the witnesses and, upon analysis, concluded that "The objections of Buena Vista with regard to the treatment and effect of the reserve fund are without merit." With respect to the adequacy of the award the Court of Appeals noted, inter alia, that "We may not reweigh that evidence in a de novo review or reverse because the commission adopted a value nearer that of the Government experts than that of the appraisers for Buena Vista." Extra copies of this opinion are available and anyone interested is invited to request a copy by writing to Mr. Roger P. Marquis, Chief, Appellate Section, Lands Division.

Staff: Harold S. Harrison (Lands Division)

Condemnation; Right of Private Irrigation District to Make Future Assessments Against Privately Owned Land in District Held To Constitute "Equitable Servitude" or "Restrictive Covenant" and Irrigation District Was Therefore Entitled to Compensation Under Fifth Amendment When Land Was Condemned. Adaman Mutual Water Co. v. United States, (C.A. 9, May 26, 1960). The United States condemned 233 acres or 8.3% of the land area within the reclamation project operated by appellant. Appellant is a mutual, non-profit corporation organized to pump underground water and distribute to the farms within the project. Appellant was owned by the project landowners on the basis of one share of stock for each acre of land. Each share of stock entitles its owner to a prorata share of the water, and both the water rights and stock are made appurtenant to the land. The stock and the land are subject to prorata assessments for the capital, operating and maintenance costs of the water company. The stock and appurtenant water rights are transferred automatically when title to the land is transferred.

The only question presented in this appeal was whether appellant was entitled to compensation because the taking of 8.3% of its lands increased the assessments for the remaining landowners. "In other words, does the diminution of appellant's assessment base constitute the taking of a compensable interest under the Fifth Amendment." The Court took as its "point of departure" the Supreme Court's statement in United States v. General Motors Corp., 323 U.S. 373 at 377-380, that the term "property," as used in the Fifth Amendment, refers not to the physical thing, but has "been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." The term "taken" has been construed broadly so that "the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking." The Ninth Circuit interprets the General Motors case to mean that "the Government must pay for all tangible interests actually condemned and for intangible interests directly connected with the physical substance of the thing taken," although the Court quickly notes that "The consequential loss rule * * * is with us still" and cannot be ignored.

Courts have tended to identify direct, compensable losses with interests includable in the bundle of rights which form the fee itself, "rights which are said to be interests or estates in land." Therefore, if an interest in land is lost as a result of the taking, "a direct connection with the physical substance condemned is established, and the pitfalls of the consequential loss doctrine are avoided." To find the requisite interest in land, the Court held that the duty to pay assessments in the instant case "is an equitable servitude or restrictive covenant" enforceable under original law, and that the Government has destroyed this intangible right "directly connected with the physical substance of the land condemned."

By calling appellant's interest an equitable servitude, the Court noted that it had concluded no issue, "for the courts are split as to

whether such a restriction is an interest in land for purposes of compensation when the property to which it attaches is taken for public use. The federal rule is uncertain; * * *." The Court states that two lines of thought emerge from the cases that hold a restrictive covenant is not compensable. " * * * one, that a restrictive covenant is not a property interest and therefore too remote to merit compensation when the land to which it attaches is condemned, and two, that a restrictive covenant is an impermissible means of enhancing one's own property and thereby burdening the power of eminent domain."

The Court's answer to the first argument is that a restrictive covenant is "generally deemed a property right under federal law," and that "any right or duty, benefit or burden, which moves or is transferred as one with either the land or an estate in it must be deemed an interest in that land and compensable upon condemnation of the fee. * * * Accordingly, we think that under the Fifth Amendment a restrictive covenant imposing a duty which runs with the land taken constitutes a compensable interest." The Court dismisses the argument that a restrictive covenant is an impermissible means of enhancing one's own property as "untenable." The Court equates the restrictive covenant with an easement right that enhances one's property. "Both interests are directly connected to the land and we are unable to find a distinction between them which will justify dissimilar treatment at the hands of a condemning authority."

Finally, the Court distinguishes that line of cases founded upon Mullen Benevolent Corp. v. United States, 290 U.S. 89 (1933), holding that the right to assess in the future for presently existing improvements did not constitute compensable interest when the lands were condemned. The Court here referred to those cases as ones in "which the loss of the power to assess amounted to no more than a diminution of the statutory taxing power possessed by the instrumentality claiming the loss." The Court also stated in a footnote that it did not derive any support from those cases that "attempt to distinguish special assessments from taxes and to differentiate the power to tax in general from the special circumstances which surround public projects involving agricultural use of land." The result of the decision is in effect to create different rules for public irrigation districts established pursuant to statute and private districts created by contract.

The Department now has under consideration whether to seek a writ of certiorari in this case.

Staff: A. Donald Mileur (Lands Division)

Tucker Act; Claim for Just Compensation; Necessity of Proof That Government Project Caused Damage. Atchison, Topeka and Santa Fe Railway Company v. United States, (C.Cls., June 8, 1960). Plaintiff sought to recover $4,000,000, representing just compensation for the alleged impairment of its right-of-way and damages caused by the loss of locomotives and expenses for making changes in its grade. Plaintiff

asserted that it suffered these losses as a result of construction and operation by the United States of Elephant Butte Dam and Reservoir on the Rio Grande in New Mexico.

Plaintiff's railroad was constructed in 1880 and the right-of-way in question extends along the bank of the Rio Grande crossing the river on a railroad bridge south of the former town of San Marcial, New Mexico. Elephant Butte Dam and Reservoir were put into operation in 1915. The dam is about 42 miles south of the bridge, crossing near San Marcial, but the head of the reservoir extends to a point immediately south of that bridge. Plaintiff contended that beginning about 1949 the bed of the river had aggraded, that is, built up with silt and sediment due to the backwater effect of the reservoir, and plaintiff further contended that the aggradation would require it to move about 12 miles of its right-of-way at a cost of approximately $3,000,000. Plaintiff also sought to recover approximately $700,000 which it spent in making repairs to its right-of-way in 1949 and expenses which it incurred when two locomotives fell into the river because of the saturated railroad embankment. The Government contended that if any of the aggradation which occurred was caused by the reservoir, it was only an insignificant and unmeasurable part of the total aggradation caused by natural and unnatural conditions in no way related to the operation of the dam and reservoir.

After the trial, the Commissioner filed a report, opinion and recommended conclusion of law, holding the United States liable for $750,000, together with interest at 4% per annum from March 1949, on the ground that in the future the plaintiff will be required to incur greater expenses in maintaining its right-of-way in the valley because of the effect of the reservoir.

The Court held that the proof established that there are numerous factors which have a part in producing the conditions about which plaintiff complained. The Rio Grande, which is a "highly capricious stream," has aggraded during the past years about 18 feet because of increased erosion in the tributary streams, the effect of the growth and spread along the riverbed, beginning about 1930, of a new plant which tends to slow down the flow of the water in the river, and the constriction of the valley caused by the presence of the railroad embankment and bridge at the specific location in question.

Accordingly, the Court held that plaintiff did not prove the Government project caused any damage. The Court further held, however, that "The plaintiff's action is premature. It may happen that in the future a condition may develop in which it is possible to determine, with reasonable certainty, that the defendant's reservoir has produced an ascertainable harmful effect upon the plaintiff's property. Our instant judgment is not intended to operate as a bar to a future suit based upon such a condition."

Staff: Herbert Pittle (Lands Division)

Avigation Easement; Permanent Taking Where United States Retains Lease of Municipal Airport But Turns Over Use to State Air National Guard. I. Robert Wright, et al. v. United States, (C. Cls., June 8, 1960). Plaintiffs sought to recover damages of $50,000 representing the diminution in value of their property allegedly caused by low and frequent flights of military aircraft operating from McGhee-Tyson Airport, Knoxville, Tennessee.

In 1951 the United States leased a portion of the airport from the City of Knoxville, constructed a 9,000 foot military runway parallel to the civilian runway, and in 1953 commenced operating F-86 fighter interceptor Sabre Jets whose mission was to protect various industrial and governmental installations near Knoxville, Tennessee. The lease provided that it was to remain in force and effect from year to year until September 1, 1971, at a rental of $28,593.62 a year, and $1.00 a year thereafter until September 1, 1986, when it was to terminate. The lease also provided that it could be terminated by the Government at any time upon 30 days' notice in writing. In 1958 the Air Force deactivated the fighter group stationed at the airport and turned over its facilities to the Tennessee Air National Guard which continued flight operations consisting of approximately 400 take-offs and landings a month. Since January 1958 the only Federal military operations conducted at the airport have been one daily "scramble" alert made by reserve officers of the Air National Guard called to active duty with the Air Force for that purpose. The Government's lease was amended in 1958 to permit the use of the premises for "military purposes" and "Tennessee Air National Guard purposes." The amendment recited that the Air Force had "deactivated" the military units stationed at the airport and "suspended" operations on the leased premises.

The plaintiffs' residence was located within the approach zone about a mile from the end of the runway and nearly two miles from the point of take off. Although there was a sharp conflict of evidence on this point, the Court found that the Sabre Jets frequently flew over plaintiffs' property at altitudes of less than 300 feet. The Government argued that at most it should be held liable for the taking of a temporary avigation easement over the property between 1953 and 1958 and that it was not responsible for the activities of the Tennessee Air National Guard. The Court rejected this contention and held that the Government had taken a permanent avigation easement over plaintiffs' property and rendered judgment in their favor for $15,000, with interest from the date of taking as part of just compensation. The Court said: "The easement taken by the United States was not abandoned; it was merely suspended except for the times it was used by pilots called into the service of the Air Force for the scrambles." The Court did not say that the United States would be liable under all circumstances for the acts of a State National Guard which had not been called into Federal service. "We merely say that under the circumstances of this case the United States is liable to pay compensation for the

easement it took and which it asserts the right to continue to use, and which in the meantime it has permitted the Tennessee Air National Guard to use."

Staff: David D. Hochstein (Lands Division)

Indian Tribal Business Enterprise as Federal Agency; Removal to Federal Court; Garnishment of Funds Held by Tribal Enterprise. Roy L. Wilcox v. Oliver Willow v. Officers of Board of Trustees of Arapahoe Ranch, etc., (D. Wyo.) This action and eight related cases were brought to garnishee funds in the hands of the Arapahoe Ranch in satisfaction of money judgments obtained in a Wyoming state court against certain Arapahoe Indians. The garnishment actions were instituted in the state court and were removed to the federal court on petitions for removal filed on behalf of the officers of the Board of Trustees of the Arapahoe Ranch. Upon removal, motions to quash the garnishee notices served upon the officers of the Board of Trustees of the Arapahoe Ranch were filed. Following a hearing on the motions, the Court entered an order sustaining the motions to quash and denying plaintiff's motion to remand.

The Arapahoe Ranch was established by authority of the Secretary of the Interior in 1940 as a tribal enterprise of the Arapahoe Tribe of Indians of the Wind River Reservation. Title to the land comprising the Ranch is in the United States in trust for the Tribe and revenues from the operations are under the control of the United States. The Court held that the Arapahoe Ranch is an instrumentality and agency of the United States and that the actions were properly removed to the federal court under 28 U.S.C. 1441 et seq.; that actions against the officers of the Board of Trustees of the Arapahoe Ranch are suits against the Arapahoe Tribe, which is not subject to suit without the consent of Congress, and that revenues and profits from the operation of the Arapahoe Ranch are restricted funds held in trust by the United States and are not subject to garnishment, attachment, or execution without authorization of Congress.

Staff: United States Attorney John F. Raper, Jr. (D. Wyo.)

Condemnation; Date of Taking; Date of Order Awarding Right to Possession Controls Over Later Physical Entry. United States v. 37.37 Acres of Land in Kern and Tulare Counties, Calif. (S.D. Calif.) In March 1953 proceedings were instituted to condemn a pipe line easement. In April of the same year an order was entered granting the right of immediate possession under 40 U.S.C. 258a. At that time Joemarsh Reed owned the land. In October 1953 he conveyed to the State of California. In April 1954 the Government took actual physical possession by commencing excavation for the pipe line. Three years later, in September 1957, the State conveyed to Douglas Armstrong and in May 1958 the Government filed a declaration of taking, $50 being deposited as estimated compensation for the tract. That amount has been

found to be just compensation. The question is whether Reed, the State or Armstrong is entitled to the award. The Court held that Reed was so entitled. It reasoned, first, that under United States v. Dow, 357 U.S. 17, Armstrong was not entitled. It recognized that Dow did not resolve the question here as between the date of the order giving the right to possession and the date of actual physical entry. Comparing the reasons Dow gave for rejecting the date of filing the declaration of taking as the date of taking, the Court concluded that here the same objections applied to date of actual physical entry. It said, "Moreover, the right to possess and occupy the land is basically the right for which the Government is paying. As a matter of fairness, then, and of common-sense judicial administration too, just compensation should be paid to the owner of the fee as of the time the right to immediate possession is granted."

Staff: United States Attorney Laughlin E. Waters and Assistant United States Attorney Ray H. Kinnison (S.D. Cal.)

* * *

TAX DIVISION

Assistant Attorney General Charles K. Rice

CIVIL TAX MATTERS
Appellate Decision

Immunity of Government Contractors from Payment of Local Sales Taxes; Right of Federal Courts to Enjoin Collection of State Taxes. Livingston v. United States (Sup. Ct., June 27, 1960). This case was an important one in the field of immunity of Government contractors from local taxation. The DuPont Company had been employed by the Atomic Energy Commission to operate the latter's Savannah River nuclear plant at a fee of $1. DuPont was authorized to purchase the necessary materials and supply personnel for the operation of such plant with funds supplied by A. E. C. and all of DuPont's expenditures and operations were subject to review by A. E. C. which maintained a sizeable staff at the plant for that purpose. The contract with DuPont was a management contract with no fee, other than $1, and no profit to DuPont. The total purchases made by DuPont during the period in issue exceeded $500,000,000 and the State of South Carolina attempted to levy a sales tax upon such purchases. The United States and DuPont instituted an action in the district court to enjoin the collection of such taxes and this action came on for hearing before a three-judge court. South Carolina contended that a federal court had no jurisdiction to enjoin the collection of state taxes in view of the provisions of 28 U.S.C. 1341, and also maintained that DuPont had a beneficial interest in the contract and an expectation of profit which rendered it constitutionally liable for the taxes in question. In an exhaustive opinion the district court, one judge dissenting, overruled both contentions and enjoined the collection of the tax. It held that 28 U.S.C. 1341 was no bar since it is not applicable to actions by the United States and that in any event there was no adequate remedy in the state court in view of the fact that if DuPont paid the taxes and sued for a refund it could not recover interest under state law. On the merits the court held that under the circumstances of the contractual relationship between A. E. C. and DuPont the purchases in question were those of the United States and could not constitutionally be subjected to state taxation. The court pointed out that the fact that DuPont itself sold materials amounting to one quarter per cent of the total purchased would not establish a significant opportunity for private profit. Likewise it held that the training of DuPont personnel in a field which was a Government monopoly was too indirect and tenuous to establish an opportunity for private profit.

On direct appeal to the Supreme Court by the South Carolina Tax Commission the United States and DuPont filed a motion to affirm upon the ground that there was no substantial question presented warranting full review. This motion was granted by the Supreme Court, two justices dissenting.

Staff: Myron C. Daum (Tax Division); Lionel Kestenbaum (Atomic Energy Commission)

District Court Decision

Levy on Debtor, Owing Sum of Money to Taxpayer, Prior to Bankruptcy of Taxpayer Gave District Director Possession of Debt Prior to Bankruptcy, So That Under Section 67c of Bankruptcy Act the Lien for Taxes on Personal Property Was Prior to Expenses of Administration and Wage Claims. In re Venda Mfg., Inc., (S.D. California, 5 AFTR 2d 1430.) Prior to the commencement of bankruptcy proceedings against Venda Mfg., Inc., the District Director of Internal Revenue served on Douglas Aircraft Company, Inc., a notice of levy in the amount of $10,744.08 for tax liens against Venda Mfg., Inc. Notices of lien against Venda had been filed in the office of the County Recorder of Los Angeles County. At the time of the levy on Douglas Aircraft Company, Inc., it was indebted to Venda Mfg. Inc., in the amount of $15,316.50. This indebtedness was not represented by any note or other evidence of indebtedness and was unsecured. On June 29, 1959, the referee in bankruptcy entered an order that Douglas Aircraft Company, Inc., pay the sum of $15,316.50 owing to the bankrupt to the trustee in bankruptcy of Venda Mfg. Inc., and that of said sum, $10,744.08 subject to the levy of the District Director be subordinate to the costs of administration and labor claims to the extent of their priority as provided in Sections 67c and 64(1) and 64(2) of the Bankruptcy Act. On review the District Court reversed the referee stating that by serving a notice of levy on Douglas Aircraft Company, Inc., the United States took the debt owed by Douglas to the bankrupt into possession within the meaning of Section 67c of the Bankruptcy Act. United States v. Eiland, 223 F. 2d 118, C.A. 4; and that the lien claims of the United States should be satisfied in preference to payment of costs of administration and wage claims against the bankrupt estate. An order was entered that Douglas Aircraft Company, Inc., pay the sum of $10,744.08 to the United States, pursuant to the levy served upon it and pay the balance of the debt owing from Douglas to the bankrupt to the trustee in bankruptcy of Venda Mfg., Inc.

Staff: United States Attorney Laughlin E. Waters and Assistant United States Attorneys Edward R. McHale and Lillian W. Stanley (S.D. Calif.); C. Stanley Titus (Tax Division)

CRIMINAL TAX MATTERS
Appellate Decision

Production of Treasury Agents Reports for Use of Defense Counsel in Cross-Examination. John J. Burke v. United States; Frank W. Jacobs v. United States (C.A. 8, June 22, 1960.) In both of these cases the Eighth Circuit reversed convictions for the wilful attempted evasion of income taxes on the ground that the so-called Jencks statute, 18 U.S.C. 3500, had not been complied with. After the investigating agents had testified on direct examination as witnesses for the Government, defense counsel requested production of all their written reports for possible use in cross-examination. The Government opposed the request with respect to all reports which were not "contemporaneous". The district court denied the defense motions for production and inspection, except for a few memoranda of conversations between the agents and the taxpayers.

As the Court of Appeals pointed out, the statute provides that after a witness has testified for the Government on direct examination "the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness ***." Section 3500(e)(1) defines the term "statement" as a "written statement made by said witness and signed or otherwise adopted or approved by him". The reference to an oral statement of a third party to a Government agent "recorded contemporaneously with the making of such oral statement" occurs in Section 3500(e)(2), which relates to an entirely different category of statements producible under the statute. The Tax Division is of the opinion that in each case the district court should have ordered the agents' reports produced for possible use in cross-examination, and has recommended against certiorari. The Solicitor General has made a determination of "No certiorari."

Staff: United States Attorney William H. Webster and Assistant United States Attorney Wayne Bigler (E.D. Mo.)

District Court Decision

Sentencing-Considerations in Tax Fraud Cases. United States v. Morris Greenberg (D. Maine.) On June 4, 1960, Morris Greenberg, a lawyer of Portland, Maine, was found guilty by a jury on two counts of income tax evasion. The following is a portion of the statement on June 24, 1960, of District Judge Gignoux giving his reasons for imposing a sentence of one year imprisonment and a $10,000 fine:

> "Now, as the Court has previously stated, there can be no question that prior to conviction the bulk of tax violators have exemplary reputations and spotless previous records. Judged solely on that basis, very few tax violators would be imprisoned. However, the life of this nation depends upon and requires the protection of its public revenues; and today in this country the major part of those revenues is derived from income taxes directly or indirectly payable by individuals such as you. Our income tax laws provide for a system of self-assessment by the taxpayer which is and must be based upon expected integrity in compliance by the vast majority of individuals, whether they be rich or poor. With some seventy million personal and corporate income tax returns filed last year, yielding income taxes totalling in excess of sixty billion dollars, it is apparent that this system could easily and quickly collapse unless there is nearly unanimous full and true tax reporting by all persons who are required by law to file returns. Viewed in this light, every wilful violation of the federal tax laws, whatever the amount of tax involved, is important and significant, both for its reprehensible character and for the potential harm and menace to the nation which is created thereby.

This Court is convinced that many millions of American citizens know and understand this and deeply resent tax evasions by others even though the evaders be otherwise excellent in character and of high community position. Public confidence in the integrity of our tax system and of its enforcement is essential to the security of our Government, and this Court is convinced that if tax frauds such as that of which you stand convicted go unpunished or are dealt with too leniently by the courts, the only result can be to undermine the efficacy of that system."

Staff: United States Attorney Peter Mills and Assistant United States Attorney Elmer Runyon (D. Me.); James D. O'Brien (Tax Division.)

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