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

August 6, 1965

United States
DEPARTMENT OF JUSTICE

Vol. 13 No. 16

UNITED STATES ATTORNEYS
BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 13 August 6, 1965 No. 16

APPOINTMENTS--DEPARTMENT

As of August 2, 1965, the nomination of the following appointee was pending before the Senate:

Solicitor General--Thurgood Marshall

APPOINTMENTS--UNITED STATES ATTORNEYS

In addition to those listed in previous Bulletins, the nomination of the following United States Attorney to a new four-year term was pending before the Senate as of August 2, 1965:

New Jersey--David M. Satz, Jr.

The nominations of the following United States Attorneys to new four-year terms have been confirmed by the Senate:

Georgia, Southern--Donald H. Fraser
Virginia, Western--Thomas B. Mason

The nomination of the following appointee as United States Attorney has been confirmed by the Senate:

Wisconsin, Western--Edmund A. Nix

Mr. Nix was born May 24, 1929 in Eau Claire, Wisconsin, and is single. He attended Eau Claire State Teachers College from 1947 to 1951 when he received his B.S. degree, and the University of Wisconsin from 1952 to 1954 when he received his LL.B. degree. He was admitted to the Bar of the State of Wisconsin in 1954. He served in the United States Army from 1954 to 1956. During a part of 1954 he served as law clerk to Darrell MacIntyre, Madison, Wisconsin, and from 1957 to 1959 was a law associate of John Kaiser, also of Madison. From 1959 to 1964 Mr. Nix was District Attorney for Eau Claire County, and from 1964 to his entry on duty as United States Attorney he was engaged in the private practice of law. His nomination as United States Attorney was confirmed by the Senate on July 29, 1965.

MONTHLY TOTALS

Fiscal 1965 marked the sixth consecutive fiscal year in which the pending caseload has increased. During that six year period, 1960-1965, the caseload has risen by 9,383 cases. The increase in 1965 was the third largest in the past six years. For the first time since the beginning of the litigation reporting system, cases filed exceeded 63,000. During fiscal 1965, the

gap between cases filed and cases terminated was 3.9 per cent, as compared with 2.2 per cent in fiscal 1964. Following is a table giving a comparison of the cases filed, terminated and pending during fiscal year 1964 and 1965.

	Fiscal Year 1964	Fiscal Year 1965	Increase or Decrease Number	%
Filed				
Criminal	33,001	33,919	+ 918	+ 2.78
Civil	28,361	29,232	+ 871	+ 3.07
Total	61,362	63,151	+ 1,789	+ 2.91
Terminated				
Criminal	32,674	32,576	- 98	- .30
Civil	27,328	28,101	+ 773	+ 2.83
Total	60,002	60,677	+ 675	+ 1.12
Pending				
Criminal	10,164	11,255	+ 1,091	+ 10.73
Civil	23,457	24,099	+ 642	+ 2.74
Total	33,621	35,354	+ 1,733	+ 5.15

Cases terminated exceeded cases filed during the month of June. This was the third time during fiscal 1965 that more cases were terminated than were filed. Approximately two-thirds of the increase in terminations was in criminal cases. The following table shows the number of cases filed and terminated in each of the 12 months of fiscal 1965.

	Filed			Terminated		
	Crim.	Civil	Total	Crim.	Civil	Total
July	2,321	2,460	4,781	2,230	2,391	4,621
Aug.	2,176	2,224	4,400	1,846	1,590	3,436
Sept.	3,284	2,214	5,498	2,054	2,556	4,610
Oct.	3,284	2,464	5,748	3,251	2,131	5,382
Nov.	2,497	2,005	4,502	2,741	2,132	4,873
Dec.	2,574	2,204	4,778	2,612	2,059	4,671
Jan.	2,698	2,593	5,291	2,529	2,566	5,095
Feb.	2,769	2,411	5,180	2,341	2,134	4,475
Mar.	3,337	2,780	6,117	3,281	2,490	5,771
Apr.	3,142	2,912	6,054	3,055	2,608	5,663
May	2,819	2,586	5,405	3,227	2,729	5,956
June	2,912	2,679	5,591	3,450	2,844	6,294

For the month of June, 1965, United States Attorneys reported collections of $8,343,105. This brings the total for fiscal year 1965 to $65,072,053. Compared with the previous fiscal year this is an increase of $8,681,161 or 15.39 per cent from the $56,390,892 collected in that year.

During June $8,378,092 was saved in 108 suits in which the government as defendant was sued for $8,897,986. 62 of them involving $6,681,700 were closed by compromises amounting to $439,123 and 11 of them involving $196,086 were

closed by judgments amounting to $80,771. The remaining 36 suits involving $2,020,200 were won by the government. The total saved for the fiscal year amounted to $106,376,464 and compared to fiscal year 1964 decreased by $15,666,675 or 12.8 per cent from the $122,043,139 saved in that year.

The cost of operating United States Attorneys' Offices for fiscal year 1965 amounted to $18,710,643 as compared to $17,344,326 for fiscal year 1964.

DISTRICTS IN CURRENT STATUS

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

CASES

Criminal

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

CASES

Civil

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

MATTERS

Criminal

Ala., N.	Ga., S.	La., W.	N.C., M.	Tenn., W.
Ala., S.	Hawaii	Me.	N.D.	Tex., N.
Alaska	Idaho	Md.	Okla., N.	Tex., E.
Ariz.	Ill., E.	Mich., W.	Okla., E.	Tex., S.
Ark., E.	Ind., N.	Miss., S.	Okla., W.	Tex., W.
Ark., W.	Ind., S.	Mont.	Pa., E.	Utah
Calif., S.	Iowa, N.	Neb.	Pa., M.	Wash., E.
Colo.	Iowa, S.	N.H.	Pa., W.	W.Va., N.
Conn.	Kan.	N.J.	S.C., E.	Wyo.
Del.	Ky., E.	N.Mex.	S.C., W.	C.Z.
Ga., M.	Ky., W.	N.Y., N.	S.D.	Guam

MATTERS

Civil

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

* * *

ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

Beer Company Charged With Violation of Section 7 of Clayton Act. United States v. Falstaff Brewing Corporation, et al. (D. R.I.) D.J. File 60-0-37-845. On July 13, 1965, a civil complaint was filed alleging that the proposed acquisition of the assets of Narragansett Brewing Company by Falstaff Brewing Corporation violated Section 7 of the Clayton Act. The Government also filed a motion for a temporary restraining order and a motion for a preliminary injunction to stay the consummation of the acquisition agreement which, as alleged in the complaint, was set for July 15, 1965.

Falstaff is the fourth largest brewer in the United States and in 1964 accounted for approximately 5.90 percent of all beer sales. It operates in 32 states but does not sell in the northeast area of the country in which the acquired company, Narragansett, has its principal sales volume.

Narragansett is the twenty-first largest producer accounting for 1.29 percent of all national sales. It is the largest seller of beer in New England, accounting for about 21% of all New England beer sales.

The complaint alleges that the New England market is a concentrated one with, for example, five companies accounting for over 60% of all beer sales in Massachusetts; that Falstaff is a likely potential competitor in that market and, further, is the most substantial and probable of the potential entrants; and that, by the proposed acquisition, it would acquire the leading company in that market.

The complaint alleges that the acquisition would have the following effects:

potential competition between Falstaff and Narragansett would be eliminated;

potential competition in the production and sale of beer generally may be further substantially decreased; and

industrywide concentration in the United States will be further increased.

On July 14, 1965, Judge Day directed that both motions proceed to an immediate hearing even though only one defendant, Narragansett, had appeared. After hearing, the Court denied the Government motions for a stay of the acquisition agreement stating that it was not persuaded "that there is a reasonable probability that the Government will prevail in this case after a trial on the merits," and adding that it also considered "the adverse effect which the entry of a preliminary injunction at this time would have upon the defendants."

Staff: John J. Galgay and William J. Elkins (Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURTS OF APPEALS

AGRICULTURAL ADJUSTMENT ACT

Timely Motion For Reopening Does Not Toll Time Within Which Judicial Review Must Be Sought Under 7 U.S.C. 1365. Jilka v. Mickley, et al. (C.A. 10, No. 8022, June 28, 1965). D.J. File 106-29-225. Two Kansas wheat farmers sought to upset the denial of their application for an additional wheat allotment and the imposition upon them of a penalty for overproduction under the Agricultural Adjustment Act of 1938. They had petitioned their Agricultural Stabilization and Conservation County Committee for an additional wheat allotment. The petition was denied and a penalty for overproduction was imposed. This was administratively affirmed by the ASC Review Committee. Although the farmers had only 15 days within which to seek judicial review (7 U.S.C. 1365, 1366 and 1367) they did not do so for almost a year. When they finally did file their suit, the district court dismissed it as untimely. The Tenth Circuit affirmed. See United States Attorneys Bulletin, Volume 10, p. 239.

About a month later, the farmers filed this action. They alleged that, within 15 days after the Review Committee's decision, they had made a timely motion for reopening (as permitted by Marketing Quota Review Regulations) and that they had only recently learned of the denial of the motion. It was claimed that this action was commenced within 15 days thereafter. The district court dismissed the action as untimely.

The Tenth Circuit affirmed. The Court noted that 7 U.S.C. 1365 requires the bringing of the action within 15 days after the mailing of the Review Committee's decision. The Court found nothing in the Agricultural Adjustment Act or the regulations which extends that time because a motion to reopen is filed. In answer to the farmer's contention that they would be denied due process of law if they would not have court review of the rejection of their motion to reopen, the Court said that Congress, consistent with due process, has the power to provide the conditions under which an administrative proceeding may be reviewed in the courts, to create rights without providing a remedy in the courts, and, upon the creation of such rights, to withhold all remedy or to provide an administrative remedy only and make it exclusive.

Staff: Martin Jacobs and Frederick B. Abramson (Civil Division)

ATTORNEYS

Counsel Ordered by Court to Represent Indigent Is Not Entitled to Just Compensation Under Fifth Amendment. United States v. Dillon (In the Matter of the Petition of Manley B. Strayer). (C.A. 9, No. 19629, June 16, 1965.) D.J. File 29-100-2198. In this case, the district court, pursuant to an order of the Court of Appeals, had appointed counsel to represent an indigent in a

collateral proceeding under 28 U.S.C. 2255. At the time of the appointment, the district court stated to counsel that he felt he was taking his professional services, that this was a taking of property under the Fifth Amendment, and that counsel ought to make application for compensation on this basis upon completion of his services. This the counsel did, and the district court awarded him $35 an hour, despite the lack of any Congressional authorization for payment of counsel in these cases (the Criminal Justice Act of 1964 does not apply to collateral proceedings). The Court found jurisdiction in the provision of the Tucker Act relating to claims based on the Constitution.

The Court of Appeals reversed. The Court pointed out that the legal profession has a long tradition of representation of indigents upon court order without adequate compensation. The Court reasoned that lawyers accept this traditional professional obligation upon joining the bar, and that there is no "taking" when a lawyer is called upon to fulfill that obligation.

Staff: Assistant Attorney General John W. Douglas and Robert V. Zener (Civil Division)

FEDERAL CIVIL PROCEDURE

Appeal Dismissed For Failure to Note Timely Appeal From Proper Amended Judgment. County of Imperial, et al. v. United States (C.A. 9, No. 19751, June 30, 1965). D.J. File 105-12-47. In the district court, the United States obtained a judgment that tax liens of the County of Imperial, California, and the City of El Centro, California, on certain parcels of California real property had been junior to the lien thereon of the Small Business Administration and therefore had been extinguished by SBA's acquisition of title in foreclosure proceedings. The Court's judgment was entered on July 10, 1964. It was amended on July 30, 1964, to add the description of a parcel of land which was not included because of a clerical omission. To correct a clerical error, the judgment was further amended on August 13, 1964, resulting in the change of a March 9 date to March 1. This change did not effect any party's legal rights. The County and the City filed a notice of appeal on October 12, 1964.

The Government argued that the appeal had not been taken in time and therefore there was no appellate jurisdiction. The Ninth Circuit agreed, holding that only when an amendment to a judgment changes matters of substance or resolves a genuine ambiguity does it start the appeal time running anew. Since in the Court's view the first amendment made a change of substance but the second amendment did not, the entry of the second amended judgment did not start the appeal time running anew, and the notice of appeal, filed more than 60 days after the first amended judgment was out of time.

Staff: Frederick B. Abramson (Civil Division)

MANDAMUS AGAINST GOVERNMENT OFFICIALS

Where Congress Knowingly Declined to Appropriate Sufficient Funds For Such Purposes, Court Will Not Issue Mandamus to Compel Secretary of Defense to Institute Payment of Salary Increases. Christine Mitchell, et al. v.

Robert S. McNamara, Secretary of Defense, et al. (C.A. D.C., No. 19132, July 6, 1965). D.J. File 145-15-78. The National Education Association, et al., sought mandamus to compel the Defense Department to pay higher salaries for some 6,000 teachers employed overseas in teaching dependents of military personnel. The N.E.A. based its case on its reading of the Defense Department Overseas Teachers Pay and Personnel Practices Act, 5 U.S.C. §§ 2351 ff. If successful, the suit would have required increased expenditures in excess of $4,000,000 annually for teachers' salaries, and opened the Government to a possible liability of $10,000,000 in back pay claims.

The Court of Appeals accepted the Government's position that the Act did not impose a ministerial duty on the Secretary to maintain overseas teachers' salaries on a par with comparable teachers' salaries in this country in circumstances where Congress had knowingly declined to provide appropriations adequate for such purposes. Accordingly, the Court affirmed the district court's dismissal of the action as an unconsented suit against the United States, and its refusal to issue a writ of mandamus.

Staff: Richard S. Salzman (Civil Division)

PUBLIC VESSELS ACT - SALVAGE

British Partnership as Professional Salvor, Meets Reciprocity Requirement of Public Vessels Act, 46 U.S.C. 785, in Spite of Its Failure to Show that Libyan Employees Also Meet Requirement; Excessive Salvage Award Reduced. W. E. Rippon & Son v. United States (C.A. 2, No. 29291, June 18, 1965). D.J. File 61-18711. After grounding on a reef in the vicinity of Tripoli Harbor, Libya, a Government-owned tanker, USNS OCKLAWAHA, operated by a private company, requested assistance. The Rippon responded dispatching launches and a derrick barge worth $56,000, which vainly attempted to free the vessel by putting out a sea anchor and performing various salvage services. Five days later, with the assistance of a higher than normal tide, the pulling power of three Government vessels and her own engines, the OCKLAWAHA was refloated.

The District Court (S.D. N.Y.) determined that the Rippon was a professional salvor and entitled to $45,230.53 for salvage services but that the Rippon's Libyan employees should receive no award because they were employees of a professional salvor and because they did not satisfy the reciprocity requirement of the Public Vessels Act.

On appeal by respondent United States, the Second Circuit rejected the Government's contention that the Rippon's recovery should be reduced by excluding the value of the services of its Libyan employees because reciprocity under Libyan law had not been shown pursuant to 46 U.S.C. 785. The appellate court held that Rippon's unchallenged status as a British partnership satisfied the requirement of the Public Vessels Act that nationals of foreign governments may only sue for salvage when the court is convinced that said governments would permit suits by nationals of the United States under similar circumstances.

Staff: Philip A. Berns (Civil Division)

Greek Salvors Satisfy Reciprocity Requirement of Public Vessels Act, 46 U.S.C. 785 and May Sue United States; Employees of Professional Salvors Entitled to Separate Awards; Excessive Salvage Awards Reduced. Nicholas E. Vernicos Shipping Co., et al. v. United States (C.A. 2, No. 293, June 21, 1965). D.J. File 61-51-3334. During a heavy storm, two Naval vessels broke loose from their moorings in a Greek harbor. After the storm had subsided, libelant's two tugs helped return the vessels to their moorings and were released. Later, the tugs were recalled and spent the night pushing against the side of one of the vessels to relieve a strain on the lines.

The District Court (S.D. N.Y.) determined that salvage had been performed and held that the Greek salvors satisfied the reciprocity requirement of the Public Vessels Act, 46 U.S.C. 785. The Court awarded a bonus of three month's expenses to the tug owners and made a separate award of two month's wages to the crews.

The Court of Appeals for the Second Circuit affirmed the District Court's findings of reciprocity and the crew-members' right to a separate award. The Court examined a Greek treaty, to which the United States was not a party, in which Greece waived sovereign immunity only as to nationals whose countries made the same concession to Greek nationals, and reasoned that this treaty and 46 U.S.C. 785, evidenced a willingness of both governments to allow suits by nationals of the other, meeting the reciprocity requirement of 46 U.S.C. 785.

In agreeing that the crew members were entitled to separate awards, the Court stated that the right of employees of a professional salvor to separate awards depends on the facts of each case. In this case, the employees' low wages revealed that crew members had not intended to relinquish their share of salvage rights.

The award of three month's expenses to the tug owners and two month's wages to the crew members was reduced to two month's expenses and one month's wages, respectively.

Staff: Philip A. Berns (Civil Division)

SOCIAL SECURITY ACT

Social Security Widower's Insurance Benefits; Widower Entitled to Benefits If Receiving at Least One-half of His Support From His Wife at Time She Actually Applied For Old-Age Benefits. John J. Clark v. Celebrezze (C.A. 1, No. 6422, April 21, 1965). D.J. File 137-36-109. A widower sought benefits under Section 202(f) of the Social Security Act, as amended, 42 U.S.C. 402(f), which provides entitlement to benefits if the claimant, inter alia, was receiving at least one-half of his support from his deceased wife at the time she became entitled to old-age benefits. Claimant's wife reached retirement age in March 1960 but did not make successful application for old-age benefits until October 1960. She died the same month. The Secretary denied benefits finding that claimant was not receiving one-half of his support from his wife in October 1960. The district court affirmed the Secretary's action.

On appeal claimant argued that the date on which his wife became entitled to apply for old-age benefits, i.e., March 1960, was controlling and that as of that time he was receiving at least one-half of his support from her. The First Circuit affirmed. The date of entitlement to old-age benefits within the meaning of section 202(f) is the first month in which the applicant meets three requirements of section 202(a) of the Act, 42 U.S.C. 402(a): (1) an insured status; (2) attainment of retirement age; and (3) the filing of an application for benefits. In claimant's wife's case, she first met these requirements in October, 1960.

Staff: United States Attorney W. Arthur Garrity, Jr. and
Assistant United States Attorney Thomas P. O'Connor (D. Mass.)

Owner-manager of Apartment House Entitled to Old-Age Insurance Credit For Rental Income Where He Renders Services to Occupants Not Required to Maintain Premises in Condition For Occupancy. Delno v. Celebrezze (C.A. 9, No. 19348, June 7, 1965). D.J. File 137-11-185. Under Section 211(a) of the Social Security Act, "rentals from real estate" are excluded from the self-employment income which entitled its recipient to old-age insurance credit. Claimant in this case was an owner-manager of an apartment house. The hearing examiner found that he rendered extensive service to his tenants, including cleaning apartments, emptying wastebaskets, providing laundry service, and cleaning and servicing the swimming pool. Despite this finding, the Appeals Council of the Department of Health, Education and Welfare denied old-age insurance benefits, on the ground that these services were not sufficient to take claimant's income out of the "rentals" category. The Appeals Council reasoned that a substantial portion of claimant's time had been spent on services necessary to maintain the premises in a condition for occupancy, and that any other services were gratuitously performed since they were not required by the lease. On review, the district court sustained the position of the Appeals Council and granted the Secretary's motion for summary judgment.

The Court of Appeals vacated the district court judgment and ordered the case remanded to the Secretary on the ground that the Appeals Council had applied erroneous standards. The Court agreed that services necessary to maintain the premises in a condition for occupancy would not take the case out of the "rentals" category. However, the Court felt that the Appeals Council had erroneously taken a strict view of the statute, including borderline items within the "rental" category. The Court also suggested that the fact that services are customary for apartment houses does not mean that they do not suffice to take the case out of the "rental" category. Nor would the services come within the rental category simply because they may be described as "maintenance and repair", so long as the maintenance and repair is not necessary to maintain the premises in a condition for occupancy.

The Court also held that the Appeals Council erred in basing its conclusion on the fact that a substantial portion of claimant's time had been spent on services necessary to maintain the premises in a condition for occupancy, while ignoring evidence that claimant also spent substantial time on other services. Finally, the Court held that the Appeals Council erred in holding that the other services were gratuitous because not required by the lease. Despite the

lease, the Court concluded that the services which claimant offered his tenants were "a portion of the total package of rights and services which was extended to the tenants and for which the tenants were willing to pay."

Staff: United States Attorney Cecil F. Poole and Assistant United States Attorney Jerry K. Cimmel (N.D. Cal.)

DISTRICT COURT

FEDERAL CIVIL PROCEDURE

Granting of Summary Judgment Not Appropriate to Decide Factual Issue Whether Insured Intended to Change Beneficiary. Archer v. United States (E. D. N.Y., Civil No. 63-C-1030, May 19, 1965). D.J. File 146-55-3633. Plaintiff, the insured's second wife and designated beneficiary, brought this action to recover the proceeds under a National Service Life Insurance Policy (38 U.S.C. 784). The insured had been married to plaintiff for less than one year. Marital difficulties developed and plaintiff had told the insured several times that she would obtain an annulment. Several days before his death, while working as an engineer on board ship, the insured wrote to his mother advising that he was writing to the Veterans' Administration "for the necessary forms to change the beneficiary of my policy back to you. Should get the required form when we get back to Marcus Hook." The insured also wrote to the VA requesting, without specifically designating his mother, that the forms to change the beneficiary under his policy be sent to him at Marcus Hook. Before reaching Marcus Hook, the insured died. VA administratively determined that an effective change of beneficiary had been made from plaintiff to the insured's mother. The proceeds of the policy were then paid to the mother.

Plaintiff moved for summary judgment, contending that as a matter of law, the insured had not evinced the necessary intent, and had further not performed an act sufficient to consummate his intent, to effect a change of beneficiary under the policy.

The District Court denied the motion, holding that the central issue of whether the insured had formed a settled and inflexible intention to name his mother as the primary beneficiary presented a question of fact which could be resolved only by a plenary trial. The underlying elements necessary to effect a change of beneficiary were summarized by the Court, as an intent of the insured to change a beneficiary designation, and "some significant act or circumstantial context which can be equated with an act tending to confirm the intent . . . If intent is established with an adequate demonstration that carries conviction the courts will find in what might otherwise be equivocal conduct . . . a sufficient satisfaction of the requirement that an overt act in some sense complement this intent and nail it down." The Court further held that the trier of the facts could reasonably infer that the insured intended to change the beneficiary to his mother; and if this finding of intent were made at trial, under the authorities, such finding would support a decision that a change of beneficiary had been effectively made by the insured to his mother.

Staff: United States Attorney Joseph P. Hoey and Assistant United States Attorney Barry Bloom (E.D. N.Y.)

FEDERAL TORT CLAIMS ACT

Soldier's Dependant May Not Bring Wrongful Death Action Under Federal Tort Claims Act When Accident Causing Death Happened on Military Reservation Where Deceased Was Stationed And Resulted From Orders Given Deceased by Military Police. Adams v. United States (Civil No. 1032, M.D. Ga., June 2, 1965). D.J. File 157-19M-190. Military policemen observed the decedent driving against traffic on U.S. Highway 27 within the confines of Fort Benning, Georgia. He was apprehended when his car stalled on the highway. The military police asked him to restart his car and drive it onto a median strip dividing the northbound and southbound lanes. Decedent drove his car onto the median strip, stopped it and stepped out. He was struck almost immediately by a northbound automobile and taken to Martin Army Hospital where he was declared dead on arrival. Decedent was identified as a soldier on active duty in the Army stationed at Fort Benning, who, at the time of the accident, was off duty, and had an off-base pass in his possession. Decedent's wife filed suit alleging in substance that the military policemen directed her husband to park in a dangerous location. The United States moved for summary judgment contending that the soldier's death was incident to duty and, therefore, the Federal Tort Claims Act was not a proper remedy. The District Court agreed with the Government's position and entered summary judgment for the United States.

Staff: Melford O. Cleveland and Denis E. Dillon (Civil Division)

Seven Year Old Infant Who Burrowed Under Industrial Fence and Was Burned When He Climbed 20 Foot Electrical Transformer Held Contributorily Negligent. Taylor v. United States (E.D. Va., June 4, 1965). D.J. File 157-79-537. This tort claim action was commenced to recover damages for a seven year old child who was severely burned on an enclosed electrical transformer at Ft. Belvoir, Virginia. The electrical transformer was enclosed within an industrial type chain link fence seven feet high. The child gained entrance to the enclosure by burrowing under the fence. The District Court found first (213 F. Supp. 545) that the transformer was enclosed according to the normal practice in the community. The Court held, therefore, that there was no negligence on the part of the United States which proximately caused plaintiff's injuries. The Fourth Circuit reversed and remanded for a new trial (326 F. 2d 284). After retrial, the District Court found the same facts as had been previously found, and concluded that plaintiff was contributorily negligent. The child had been warned by his parents not to enter the transformer enclosure, and even after he was in the enclosure and was in the process of climbing the transformer, he was warned by a playmate to come down. Accordingly the Court again found for the United States and dismissed the plaintiff's complaint.

Staff: United States Attorney Claude V. Spratley, Jr. Assistant United States Attorneys Plato Cacheris and MacDougal Rice, (E.D. Va.); Eugene N. Hamilton (Civil Division)

Placement of Spoil Dredged From River Bed A Discretionary Function; Contractor also Cloaked With Governmental Immunity. Dolphin Gardens, Inc. v. United States and Western Contracting Corp. (Civil No. 7867, D. Conn., June 18, 1965). D.J. File 157-14-195. The damages sought by plaintiff to its housing

project were allegedly caused by fumes from the dredged materials deposited by the Government contractor co-defendant on land owned by it and on land owned by the United States under a dredging contract with the United States to deepen the Thames River. Plaintiff alleged negligence in the Government's decision to dump the soil at the particular shoreside areas utilized instead of carrying it out to sea by barge so as to prevent the escape of fumes containing hydrogen sulphide which resulted in a darkening of the paints on the plaintiff's nearby housing project. The affidavit of the Naval Executive Officer in charge showed exhaustive search for alternative deposit sites and showed the sites selected were the only ones adequate in order to comply with the high time priority given to the project. These sites had also been given final approval by the Board of Contract Changes, District Public Works Office, Third Naval District. The Court held the Navy's action to be within the discretionary function of 28 U.S.C. 2680(a). The Court also held defendant contracting company to be within the cloak of the Government's immunity since it was merely acting pursuant to a Government contract and could not be held liable for carrying out the terms thereof according to the Government's directions.

Staff: United States Attorney Jon O. Newman (D. Conn.); Irvin M. Gottlieb (Civil Division)

* * *

CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

MANDAMUS

Petition for Writ of Mandamus to Vacate Order Granting Defendant's Motion to Take Depositions Under Rule 15(a), F.R. Cr.P. In the Matter of United States of America (C.A. 1, July 16, 1965). D.J. File 49-65-134. During the pendency of an indictment in the District of Puerto Rico, the Government's answer to a bill of particulars having disclosed the names of its two principal witnesses, a motion was filed pursuant to Rule 15(a), F.R. Cr.P., to take their depositions. That Rule permits depositions in Criminal cases if a prospective witness (1) may be unable to attend or is prevented from attending a trial or hearing (2) his deposition is material and (3) it is necessary to take the deposition in order to prevent a failure of justice. At the hearing defendant alleged that one witness resided in Florida and the other in Puerto Rico, but made no showing with respect to their ability or inability to attend the trial except the bare assertion that they might not be able to appear. The Government stated the case was essentially dependent upon said witnesses and it had every intention and expectation of producing them. However, the District Court concluded, contrary to such assurances, that it was always possible a witness might not attend a trial and granted the motion. The order was entered May 5, 1965, and on May 21 the Government moved for permission to file a petition for a writ of mandamus.

In holding the District Court's order must be vacated, the Court of Appeals first considered the Government's right to such extraordinary relief in a criminal case where its rights to appeal are severely limited. It concluded this was a case where appellate relief might be sought before verdict. As illustrations, it pointed out that should the order remain in effect and thereafter if the witnesses refuse to testify or the Government fail to produce them, appeal would lie from an order of contempt or, alternatively, in the event of dismissal of the indictment because of the Government's noncompliance, an appeal would lie. The Court saw no reason why the Government could not do directly what it could effectuate indirectly.

It then commented on the timeliness of the petition, noting that remedy by way of mandamus must be promptly sought, suggesting as an appropriate time, the normal appeal period. Observing that the Government ordinarily had 30 days, Rule 37(a)(2) F.R. Cr.P., and a like period to question suppression of evidence in narcotics cases, 18 U.S.C. 1404, and making allowance for the fact that remedy by way of mandamus might not readily occur to counsel, the Court held the Government acted with sufficient diligence.

With respect to defendant's contention that if the Court erred at all, it merely abused its discretion, and the Government's counter-argument that the Court was without power to act as it did, the Court of Appeals noted that unfounded action could be highly efficacious. It also found that while there is a large measure of discretion in applying the Federal rules, a misconstruction of a particular rule could be regarded as an act without power which is

reviewable at the appellate level. In the instant case the Court determined that the District Court's interpretation of Rule 15(a) was plainly wrong because it either made the Rule's provision regarding inability to attend trial meaningless for all practical purposes, or adopted defendant's assertion that the criteria set forth in the Rule were alternative grounds for relief, a conclusion supported neither by grammar nor reason.

Remanding the matter to the District Court, the Court of Appeals noted:

> In accordance with our usual practice we shall refrain from issuing a writ of mandamus at this time because we may assume that the District Judge will vacate his order without such.

Staff: John L. McCullough and Jay M. Vogelson (Criminal Division).

BRIBERY; OBSTRUCTION OF JUSTICE

Attempt to Influence Prospective Witness in Civil Case Is Violative of Obstruction of Justice Statute (18 U.S.C. 1503) and Bribery Statute (18 U.S.C. 201(d)). United States v. Robert Sewell Cunningham (D. Ariz., June 3, 1965). D.J. File 51-8-64. On February 18, 1964 and February 19, 1964, Albert T. Becher, a proposed witness in a civil case in which the United States was not a party, was approached on behalf of Robert Sewell Cunningham, the defendant in the civil case, and offered $3,000 to change testimony he had already given by deposition. The proposed change was directed toward the enhancement of Cunningham's position as defendant. At the time of the solicitation, Becher had not been served with a subpoena.

An indictment was returned charging Cunningham with violation of 18 U.S.C. 2, 201(d) and 1503. The trial was held in the United States District Court, Tucson, Arizona on June 2 and 3, 1965. The defendant was found guilty by the jury of attempted bribery and obstruction of justice and was sentenced by the court to three years with the provision that he serve six months in a jail type institution with the execution of the remainder of the sentence suspended for a period of three years.

The instant case marks the initial successful prosecution under 18 U.S.C. 201(d) (bribery of witness) and the successful application of 18 U.S.C. 1503 (obstruction of justice) to a situation in which the witness sought to be influenced had not been subpoenaed or subjected to any other process of the District Court at the time of the endeavor. This application of 18 U.S.C. 1503 finds its basis in Roberts v. United States, 239 F. 2d 467 (C.A. 9, 1956). In that case the Court of Appeals found that any corrupt endeavor to influence any party or witness, whether successful or not, constituted an obstruction of justice and that the obstruction of justice statute was broad enough to cover the attempted corruption of a prospective witness in a civil action in a Federal District Court.

United States v. Frederick Fiegenberg (D.C. E.D. Pa., 1965), involved similar problems. In that case the individual approached was a possible defendant in a criminal action and at his second hearing on the criminal complaint, he pleaded the Fifth Amendment. The Government successfully contended that the individual approached fell within the meaning of "witness" as that term was used in 18 U.S.C. 1503 and 18 U.S.C. 209 (now 18 U.S.C. 201(d)) since the determination is made with a view toward substance rather than form. United States v. Grunewald, 233 F. 2d 556 (C.A. 2, 1956). The defendant was convicted of violating 18 U.S.C. 209 and 1503 and, in addition, he was convicted of conspiring to violate 18 U.S.C. 1503 and conspiring to defraud the United States of its function and duty to enforce the criminal laws, particularly 18 U.S.C. 220 (now 18 U.S.C. 215), and of its right to evidence for such purposes.

Staff: United States Attorney William P. Copple (D. Ariz.).

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Second and Ninth Circuits Disagree on Interpretation of Immigration Statute. Giuseppe Errico v. Immigration and Naturalization Service (C.A. 9, No. 19,282, July 9, 1965, D.J. File 39-1772) and Muriel May Scott v. Immigration and Naturalization Service (C.A. 2, No. 27,826, July 14, 1965, D.J. File 39-51-2423.) In the above cases the Second and Ninth Circuits differed as to the interpretation to be placed on Section 241(f) of the Immigration and Nationality Act, 8 U.S.C. 1251(f), which provides as follows:

> "The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence."

Both alien petitioners had procured their visas by fraud and both sought to escape deportation under Section 241(f) upon the basis of having a United States citizen child. The crucial issue was whether they were otherwise admissible at time of entry within the meaning of the statute. The Board of Immigration Appeals ruled that they did not qualify for the relief of Section 241(f) because at time of entry they were inadmissible under Section 211(a) of the Immigration and Nationality Act, 8 U.S.C. 1181(a), as not being of the proper status specified in their immigrant visas. Both petitioners in these deportation review proceedings have challenged the ruling of the Board.

The Ninth Circuit in the case of petitioner Errico disagreed with the Board, holding that the phrase "otherwise admissible" required reference only to Section 212(a) of the Immigration and Nationality Act, 8 U.S.C. 1182(a), which defines many excludable classes of aliens. Since Errico was not inadmissible under Section 212(a), the Ninth Circuit found him to be otherwise admissible at time of entry except for the fraud, and entitled to escape deportation under Section 241(f).

The Second Circuit in the case of petitioner Scott approved the Board's denial of relief, concluding that the phrase "otherwise admissible" in Section 241(f) encompassed all grounds of inadmissibility, other than fraud, including inadmissibility under Section 211(a).

Staff: Errico: United States Attorney Cecil F. Poole and Assistant United States Attorney Charles E. Collett (N.D. Cal.)

Scott: United States Attorney Robert M. Morgenthau (S.D.N.Y.); Francis J. Lyons and James G. Greilsheimer (I&N)

* * *

TAX DIVISION

Acting Assistant Attorney General John B. Jones, Jr.

CIVIL TAX MATTERS

District Court Decisions

Priorities of Liens; Federal Tax Lien Arising After Assessment of Local Personal Property Tax, But Prior to Time Amount of Personal Property Tax Was Established, Held Entitled to Priority Over Lien For Personal Property Tax Which Did Not Relate Back to Date of Assessment of Such Tax. In the Matter of Gust Elis Johnson. (D. Ore., April 6, 1965). (CCH 65-1 U.S.T.C. ¶9378). Federal tax assessments against the bankrupt for unpaid income taxes were made on August 16, 1963. Multnomah County, Oregon, imposed a personal property tax for the year 1963 on the bankrupt's personal property, and, under Oregon law, all personal property in the county was assessed on January 1, 1963. The mileage rate applicable to the appraised values was determined by the county assessor on August 15, 1963; however, from August 15, 1963, to October 14, 1963, the assessor was engaged in checking the accuracy of the computations made by the data processing machine and in posting the property tax to each taxpayer's account.

The referee in bankruptcy held, in accordance with the test set forth in United States v. City of New Britain, 347 U.S. 81, that Multnomah County's personal property tax lien did not become choate until the identity of the lienor, the subject of the lien and the amount of the lien had been established. Because the amount of the county's lien did not become established until October 14, 1963, when the county assessor certified the accuracy of the assessment roll, the referee determined that the county's lien did not become choate until that date. Thus, the referee held that the federal tax lien, which had arisen by assessment of the tax prior to the time the county's lien became choate, was entitled to priority over the county's lien. Furthermore, the referee ruled that the county's lien could not relate back to the date of the assessment of the personal property tax, January 1, 1963, so as to defeat the federal tax lien, relying on United States v. Security Trust and Savings Bank, 340 U.S. 47.

Staff: United States Attorney Sidney I. Lezak; and Assistant United States Attorney Jack Collins (D. Ore.).

Responsible Officer Penalty; Government Established Prima Facie Case and Was Entitled to Judgment After Introducing Assessment Data Where Defendant Rested Without Introducing Any Evidence. United States v. J. Maurice Galtrof. (S.D. N.Y., May 18, 1965). (CCH 65-1 U.S.T.C. ¶9435). This action was brought by the Government to reduce to judgment tax assessments made against defendant on the ground that he was the responsible officer of a corporation who wilfully failed to withhold and pay over certain payroll taxes.

At a pretrial conference the parties had stipulated that defendant was the secretary of the corporation during the periods involved and that the corporation had withheld the taxes from the employees' salaries but had not paid them over to the United States. It was also stipulated that the assessments had been made against defendant and that he was notified of them and that demand for payment was made. The questions of whether defendant was a responsible person within the meaning of Section 6672 of the Internal Revenue Code and of whether he wilfully failed to perform the statutory duties of a responsible officer were reserved for trial.

On trial of the case, the Government introduced evidence of the tax assessment with respect to the account of defendant, and then rested. Defendant moved for dismissal on the ground that the Government had failed to prove a prima facie case, and the Court reserved decision on the motion. Defendant then rested his case without introducing any evidence whatsoever, and both parties moved for judgment.

The District Court held that, with respect to the issues, whether defendant was a responsible officer of the taxpayer corporation and whether he had wilfully failed to perform his duty to account for and pay over the taxes involved, the Government had established a prima facie case by introducing evidence of the assessment, citing United States v. Molitor, 337 F. 2d 917, 922 (C.A. 9); United States v. Strebler, 313 F. 2d 402, 403-4 (C.A. 8). Therefore, the Court granted the Government's motion for judgment against defendant.

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

Internal Revenue Summons; Claim of Attorney-Client Privilege Held Governed by Federal Rather Than State Law. United States v. J. E. Threlkeld. (W.D. Tenn., April 12, 1965). (CCH 65-1 U.S.T.C. ¶12,308). In connection with the investigation and audit of an estate tax return prepared by respondent, an Internal Revenue summons was issued to him and he appeared but refused to answer certain questions and to produce certain documents, claiming, as an attorney, the attorney-client privilege. His refusal was allegedly based upon his concern that he might be subject to fine, imprisonment and having his name stricken from the rolls of attorneys under a provision of state law providing these penalties for any attorney who violates his obligation under the state created attorney-client privilege. This enforcement proceeding was then instituted.

The District Court, in ordering compliance with the summons, ruled that federal rather than state law governed the applicability of the attorney-client privilege. Thus, the Court followed Colton v. United States, 306 F. 2d 683 (C.A. 2), rather than Baird v. Koerner, 279 F. 2d. 623 (C.A. 9), and noted that uniformity is desirable in the application of this privilege to tax investigations.

The Court required respondent to divulge with whom he contracted for his services; what services he contracted to render; the fee arrangement; from whom he received information used for preparing the return; any communication by the client given as information for insertion in the return; and the

decedent's assets of which he had knowledge together with the decedent's legal relation to those assets at the time he prepared the return. The Court also required respondent to produce all documents in his possession such as financial books and records, deeds and instruments of inter vivos transfers, unless, under the principles set forth by the Court, they were privileged communications. Information communicated by the client with the direction that it not be inserted in the return or with the direction that it be, or not be, so inserted in the discretion and judgment of respondent did not have to be divulged unless respondent had already voluntarily divulged the contents of such communications to an Internal Revenue agent thereby waiving the privilege.

Staff: United States Attorney Thomas L. Robinson (W.D. Tenn.); and Frank N. Gundlach (Tax Division).

* * *