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UNITED STATES ATTORNEYS

BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 9 August 25, 1961 No. 17

NEW APPOINTMENTS

The nominations of the following United States Attorneys have been confirmed by the Senate:

Alabama, Northern - Macon L. Weaver

Mr. Weaver was born January 6, 1919 at Huntsville, Alabama, is married and has three children. From 1938 to 1941 he was employed by the Works Progress Administration and the Civilian Conservation Corps. He served in the United States Army from March 25, 1941 to December 22, 1945 when he was honorably discharged as a First Lieutenant. He entered the University of Alabama on January 2, 1946 and received his LL.B. degree on January 28, 1950. He was admitted to the Bar of the State of Alabama that same year. Since February 1, 1950 he has engaged in the private practice of law in Huntsville. He has also served in the Field Service of the Census Bureau from March 2 to May 1, 1950; as area director and attorney for the Office of Rent Stabilization from October 10, 1951 to July 22, 1953; as Assistant Director for Urban Renewal for the Huntsville Housing Authority from 1956 to 1958; and as Circuit Solicitor for the 23rd Judicial District of Alabama since January 7, 1958.

Alabama, Southern - Vernol R. Jansen, Jr.

Mr. Jansen was born May 20, 1923 at Whistler, Alabama, is married and has one daughter. He attended Springhill College in Mobile from September 5, 1940 to May 1941. He entered the University of Alabama on September 16, 1941 and received his A.B. degree on December 18, 1943. He served in the United States Navy from September 23, 1943 to July 9, 1946 when he was honorably discharged as a Lieutenant, Junior Grade. He returned to the University of Alabama on September 26, 1946 and received his LL.B. degree on December 17, 1948. He was admitted to the Bar of the State of Alabama in 1949. From January 7, 1949 to December 1, 1951 he was an attorney with the firm of Howell and Johnston, and since that time he has been in partnership with Mr. Fletcher Gordon, both in Mobile. He also served as Assistant Solicitor for Mobile from January 8, 1951 to March 31, 1956 and as City Judge from April 1955 to November 1956.

Iowa, Northern - Donald E. O'Brien

Mr. O'Brien was born September 30, 1923 at Marcus, Iowa and is married. He attended Trinity College at Sioux City from September 8, 1941

to February 23, 1943 and again from September 1945 to February 1946. He entered Creighton University in Omaha on February 6, 1947 and received his LL.B. degree on February 7, 1948. He was admitted to the Bar of the State of Iowa in 1948. He served in the United States Army from February 14, 1943 to October 7, 1945 when he was honorably discharged as a First Lieutenant. From December 18, 1946 to December 30, 1947 he was employed by the Mutual Benefit Health and Accident Association in Omaha. Since 1948 he has engaged in the practice of law in Sioux City. He has also served as Assistant City Solicitor for Sioux City from November 27, 1948 to December 31, 1953; County Attorney for Woodbury County from March 3, 1955 to March 1, 1959; and Municipal Court Judge of Sioux City from January 2, 1959 to June 1, 1960.

Nebraska - Theodore L. Richling

Mr. Richling was born October 13, 1911 at Spalding, Nebraska, is married and has six children. He entered Creighton University in September 1931 and received his Ph.B. degree on June 6, 1935 and his LL.B. degree on June 3, 1937. He was admitted to the Bar of the State of Nebraska in 1937. From June 1937 to January 1943 he engaged in the private practice of law in Omaha. He served in the United States Army from December 30, 1942 to June 27, 1946 when he was honorably discharged as a Major. He then returned to the practice of law in Omaha and also served as Deputy County Attorney from 1948 to 1950 and Chief Deputy County Attorney from 1950 to 1951 of Douglas County, Nebraska. Since 1951 he has been in law partnership with Mr. Clayton Shrout in Omaha.

Washington, Western - Brockman Adams

Mr. Adams was born January 13, 1927 at Atlanta, Georgia, is married and has two children. He attended the University of Washington from September 1946 to June 1949 when he received his A.B. degree and Harvard Law School from September 1949 to June 1952 when he received his LL.B. degree. He was admitted to the Bar of the State of Washington that same year. He served in the United States Navy from July 1, 1944 to July 9, 1946 when he was honorably discharged as an Electronics Technician's Mate, Third Class. From June 1952 to June 1960 he was an attorney with Little, Le Sourd, Scott and Slemmons and since that time he has been a law partner in the firm of Le Sourd, Patten and Adams, both in Seattle. He was also an instructor at the American Institute of Banking in Seattle during the 1954-55-56-58 sessions.

The names of the following appointees as United States Attorneys have been submitted to the Senate:

Kentucky, Eastern - Bernard T. Moynahan, Jr.
Kentucky, Western - William E. Scent
New York, Western - John T. Curtin

As of August 18, the score on new appointees is: Confirmed - 58; Nominated - 4.

JOB WELL DONE

The General Counsel, CIA, has commended Assistant United States Attorneys Joseph M. Hannon and Thomas D. Quinn, Jr., District of Columbia, for their excellent work in a recent case in which the Government's motion for summary judgment was granted.

Assistant United States Attorney Robert E. Scher, Southern District of New York, has been commended by the District Engineer, Corps of Engineers, for his preparation for trial of a recent case and for the successful prosecution thereof. The District Engineer observed that the favorable decision rendered by the court in this matter was to a large degree attributable to the efforts of Mr. Scher.

In a letter from the Chief Postal Inspector, United States Attorney Joseph D. Tydings and Assistant United States Attorney Arnold M. Weiner, District of Maryland, were commended for their work in a recent case involving mail fraud. The letter stated that the skill with which Mr. Tydings personally directed the prosecution of the case, and the brilliant summation of the facts by Mr. Weiner contributed immeasurably to the jury's returning a verdict of guilty on all six counts, after deliberating for only one-half hour. The letter further stated that this marks the first mail fraud conviction of a Maryland savings and loan association and will go a long way to protect the public from being victimized.

The Postal Inspector in Charge has commended United States Attorney Charles L. Goodson, Northern District of Georgia, for his very excellent work in a recent case involving mail fraud and SEC violations in which the defendant pleaded guilty. The Inspector particularly mentioned the able manner in which the prosecution was handled by Assistant United States Attorney John W. Stokes, Jr., and expressed appreciation for his fine work.

Assistant United States Attorney George F. Roberts, Southern District of New York, has been commended by the FBI Director for the excellent manner in which he represented the Government in a recent matter. The Director stated that Mr. Roberts' diligence in pretrial preparation and the vigorous fashion in which he presented the case before the court were largely responsible for the successful results achieved, and that his efforts were even more noteworthy in view of the complicated nature of the evidence and other complexities inherent in this type of case.

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ANTITRUST DIVISION

Assistant Attorney General Lee Loevinger

CLAYTON ACT

Government Survey Admissible Into Evidence. United States v. National Homes Corporation. (N.D. Indiana). On August 4, 1961, Judge Luther M. Swygert, in the Northern District of Indiana, ruled that a Government conducted survey of an industry, pending trial, and for purposes of trial is properly admissible into evidence as a means of passing on "underlying economic data" in a section 7 Clayton Act case. Similar surveys have been admitted into evidence before administrative agencies, but this is reportedly the first time in a section 7 proceeding before a court.

The survey was conducted by the Economic Section of the Antitrust Division. The mechanics consisted of devising a questionnaire, submitting it for approval of the Bureau of the Budget in conformity with the Federal Reports Act and then circularizing it to some 571 companies reputed to be engaged in the prefabricated house industry. 93% of the companies were heard from or accounted for either in the first instance or as the result of follow-ups by letter, telephone and telegram. The questionnaire carried a Department of Justice masthead, and called for the signature of the person answering the questions. Defendant was aware at all times of the survey in progress and was kept fully informed of and given complete access to the responses of the questionnaire.

Basically the issue was whether the responses to the questionnaire should be admitted into evidence as an exception to the hearsay rule. The question turned on whether the responses were accurate and reliable and whether there were compelling reasons of necessity to make the exception. Defendant maintained there was no necessity and above all that the responses were untrustworthy because of the manner in which they were obtained. Specifically, defendant charged lack of impartiality in that the Government had conducted the survey ex parte and ostensibly to serve its own purposes at trial. The economist who conducted the survey, it was alleged, was not qualified, the questions were ambiguous, the responses incomplete and inconclusive. It was further contended that the survey did not adequately cover the industry universe.

After five days of hearing, with both sides introducing testimony and documentary evidence, the court held (with reservations as to a limited number of responses to one question of the questionnaire) that sufficient necessity and sufficient circumstantial guarantees of trustworthiness existed to admit the survey into evidence. The exigencies of the big case, the court held, required the adoption of streamline methods. An accurate and reliable survey was one such method. In the court's view, the Government's survey met the test. It found specifically that the fact that the Government "prepared" the survey was no

reason in itself to reject it. In the words of the court:

> * * * There are several reasons for this view. First of all, the survey was designed at least with regard to questions 1 through 3 and questions 6 through 18 to elicit objective factual information. Secondly, the method employed by the Government to survey the universe is not that of sampling the universe and accordingly possibilities of bias in the selection of a sample are avoided. Additionally, the questionnaire form was prepared by a competent economist and was reviewed by statisticians in the Bureau of the Budget. Finally, since all of the questionnaires and the answers are available to the court and to counsel there is ample opportunity for correcting or modifying any conclusions or judgments which the Government has made based on the survey.
>
> The court is also of the view that the Government economist who prepared this questionnaire and survey had the necessary qualifications to administer the survey.

On the question of whether the survey reached all of the companies which properly should be included in an industry-wide survey, the court reserved opinion until all of the evidence is presented at trial.

Staff: John W. Neville, Clement A. Parker, Edward R. Adwon and Robert D. Elliott. (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General William H. Orrick, Jr.

SUPREME COURT

PRISONER OF WAR ACT

"Turncoat" American Soldiers Who Aided Communist Chinese While in Prisoner of War Camps, and Who Refused Repatriation to United States Held Entitled to Pay. Bell v. United States, (May 22, 1961). Petitioners were enlisted soldiers in the United States Army who were captured by the enemy during the Korean hostilities. While detained in prisoner of war camps, they actively assisted the enemy by acting as squad monitors and leaders, informers, and propagandists. Petitioners declared their allegiance to the enemy cause and their hostility to the United States, mixed socially with enemy troops and wore enemy uniforms and medals. There was no evidence that these actions were in any way coerced. After the signing of the Korean armistice, petitioners refused repatriation and elected to go to communist China. Petitioners were given dishonorable discharges, without court martial, in January 1954. They returned to the United States in July, 1955, and in November of that year filed claim for pay and allowances from the date of their capture until the date of their discharge. The Army denied the claim relying upon a statute which had been repealed the previous year.

The Court of Claims upheld the Army's denial of the claim on the ground that petitioners were not in "captivity" within the meaning of the Prisoner of War Act (now 37 U.S.C. 242), and that to grant the claim would be to make a mockery of the law. 181 F. Supp. 668.

The Supreme Court reversed, holding (per Stewart J.) that petitioners were entitled as prisoners of war to pay under 37 U.S.C. 242 and under the Missing Persons Act, 50 U.S.C. App. 1001, et seq., at least until the time they were released from the prisoner of war camps. The Court found that it was a basic principle of military pay that a soldier who has not received a sentence from a duly constituted court martial was entitled to statutory pay, "however ignoble a soldier he may be." Relying upon Straughan v. United States, 1 Ct. Cl. 321, and Jones v. United States, 4 Ct. Cl. 197, the Court rejected the Government's arguments, based upon Landers v. United States, 92 U.S. 77, that a soldier who wilfully breaks his oath of faithful service is entitled to no pay, and that petitioners who were in the active service of the enemy could not be considered in the service of the United States. The Court found it unnecessary to consider the effect of an administrative decision that petitioners were not in active service, or that they were absent without authority, since no such determination had been made and the only administrative determination had been based upon a repealed statute.

Staff: Geo. S. Leonard and David L. Rose (Civil Division)

COURTS OF APPEALS

LONGSHOREMEN'S AND HARBOR WORKERS' ACT

Persons Working on Launched But Uncompleted Vessels Under Construction Are Covered by State Workmen's Compensation Laws and Not Longshoremen's and Harbor Workers' Act. Travelers Insurance Co. v. C.D. Calbeck; Avondale Shipyards, Inc. v. Donovan (C.A. 5, July 13, 1961). These are cases involving the application of the Longshoremen's and Harbor Workers' Act to injuries sustained by workers while engaged in completing construction of vessels floating on navigable waters. In Travelers, the worker sustained fatal injuries while he was welding on the port side of the deck of an oil drilling barge which had been launched and the superstructure of which was being constructed. In Avondale, the worker suffered total and permanent disability when struck and knocked from a scaffold while working on an oil drilling barge which had been launched but not completed. In each case the respective employer brought suit in the district court to enjoin enforcement of the award made by the Deputy Commissioner asserting that the claim was not within the jurisdiction of the Act; and the district court held that the injury was covered by the Act.

The Court of Appeals reversed holding that claims filed by persons who have been injured while working on vessels located on navigable waters which are under construction are not within the jurisdiction of the Longshoremen's Act, but fall exclusively under the Workmens' Compensation Act of the state wherein the accident occurred.

Staff: David L. Rose (Civil Division)

RAILWAY LABOR ACT

Federal Courts Lack Jurisdiction to Review Determinations of Class or Craft Determination Under Section 2, Ninth, of Act Placed on Ballot UNA Chapter, Flight Engineers' International Assn. AFL-CIO v. National Mediation Board, et al. (C.A.D.C., July 13, 1961); Air Line Stewards and Stewardesses Assn. International v. National Mediation Board (C.A.D.C., July 13, 1961). These suits were brought against the National Mediation Board and its members to set aside determinations by the Board as to who was eligible to participate in the election of a representative for collective bargaining purposes. In Flight Engineers the Board had determined that all flight deck crews on United Air Lines, in the job classifications of pilot or captain, reserve pilot, co-pilot, and second officer or flight engineer, constitute one craft or class and should vote together on a single ballot in selection of a collective bargaining representative. In Air Line Stewards and Stewardesses the Board recognized the Stewards and Stewardesses as a craft or class and permitted the Airlines Pilots Association (ALPA) to be on the ballot for election of a collective bargaining representative.

The Flight Engineers' International Association (FEIA) brought suit in the district court to enjoin further proceedings in connection with the Board's determination. While suit was pending elections were held and ALPA was elected and certified as the bargaining agent. Before the district court FEIA contended that the flight engineers historically constituted a separate class from the pilots and that the Board had destroyed this class by its determination. It further contended that it was deprived of due process.

The Air Line Stewards and Stewardesses Association, in its suit, contested the determination of the Board placing ALPA on the ballot. It asserted that pilots perform supervisory and managerial functions in regard to stewards and stewardesses, and therefore, ALPA was not eligible to represent them.

The district court dismissed both complaints for lack of jurisdiction, and in Flight Engineers' further held that no substantial constitutional question had been raised. The Court of Appeals relying on Switchmen's Union v. National Mediation Board, 320 U.S. 297, affirmed in both instances. In Flight Engineers' it held (1) that a class or craft determination by the Board was not judicially reviewable; (2) and that the hearing required under Section 2, Ninth, of the Act was investigative and legislative and not adjudicative and that appellant had been given fair notice and opportunity. In Air Line Stewards it held that the courts did not have jurisdiction to determine whether pilots constituted part of management and stewards and stewardesses could not be represented by the pilots' bargaining representative.

Staff: Morton Hollander
Pauline B. Heller
Ronald A. Jacks (Civil Division)

SOIL BANK ACT

Availability of Judicial Review of State Committee Determinations: Determination That Landlord's Contract Should Not Be Terminated Held Not Reviewable Under 7 U.S.C. 1831(d). Siegent Caulfield v. U.S. Dept. Of Agriculture; Wilson Dickson v. Mrs. C.O. Edwards, et al. (C.A. 5, July 31, 1961). Plaintiffs-appellants in these two cases were tenants who complained that their landlords had driven them off their farms in order to prevent them from sharing in benefits under the Soil Bank Program. Dickson was a large-scale farm operator with abundant equipment who held tenancies with several farmers at one time. He was well aware that his business fortunes with Edwards depended upon his success at negotiating a contract with her at the end of his current three-year lease -- a matter in which he was unsuccessful. He did not live on Edward's land. Caulfield was characterized by his attorney as a poor and ignorant sharecropper. He did live on the land under a tenancy which had begun about five years earlier and which had been renewed from year to year.

On January 13, 1961, the Fifth Circuit had held in Dickson that judicial review of the determinations of the State committee concerning soil bank matters was limited to those which involved the termination of a Soil Bank contract. Since in these cases the tenants were not parties to the Soil Bank contracts, all that the State committee passed on was whether the tenants' proof that they had been forced off their farms warranted termination of the landlord's Soil Bank contract. The Fifth Circuit held that under the limited review provisions of the Act, district courts lacked jurisdiction to review these determinations and that the proof did not warrant termination of the landlords' contracts.

After hearing argument in the Caulfield case, the panel which heard it was disposed to disagree with the Dickson panel. Upon rehearing en banc on briefs and without oral argument, the Fifth Circuit, by a 4-3 vote, reinstated the Dickson opinion which had been temporarily withdrawn, and decided Caulfield the same way as Dickson. The majority predicated the unavailability of judicial review on the limited jurisdictional grant made by 7 U.S.C. 1831(d), the conclusiveness given administrative findings of fact in 7 U.S.C. 1809, and the Congressional intention, adequately evidenced in the legislative history, to leave to local committees enforcement of the Act's provisions for protection of tenants against their landlords.

Staff: Anthony L. Mondello (Civil Division)

DISTRICT COURT

CONTRACTS

Finding of Armed Services Board of Contract Appeals Not Final on Effect of Regulation Closing Ocean Commerce to Shipments of Monkeys; Regulation Constituted Embargo Excusing Performance of Contract for Supply of Monkeys Pursuant to Contract Provisions. United States v. Meems Brothers and Ward. (S.D.N.Y., July 25, 1961). Defendants defaulted under a contract for supplying Rhesus monkeys to the Department of the Army. The Government purchased the monkeys at an excess cost of $3,057.39. Defendants appealed to the Armed Services Board of Contract Appeals from a determination of the Army Chemical Center which had held that the default did not come within the terms of the contract that excused the contractor from failure to perform because of causes beyond his control and without fault or negligence on his part. The Board denied the appeal.

Thereafter, the Government filed suit for the excess cost in the District Court, and relying on the determination of the Board moved for summary judgment. The Court refusing to give finality to the determination of the Board held that it erred in finding that the limitation of the shipment of monkeys to air transport did not constitute an embargo but was merely an increase in freight rates. Accordingly, it held that

the failure to perform was the result of the embargo on shipments of monkeys by sea, and that such failure came within the terms of the contract which excused the contractor from performing.

Staff: United States Attorney Robert M. Morgenthau and Assistant United States Attorney Robert E. Scher (S.D.N.Y.). Hadley W. Libbey (Civil Division)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Election Fraud in November 8, 1960, General Election, Telfair County, Georgia. United States v. Seay, et al. (S.D. Ga.)

On July 31, 1961, a grand jury in Savannah, Georgia, returned an indictment in two counts charging two Telfair County, Georgia, election officials and fourteen poll workers with casting and counting and allowing to be cast and counted fictitious ballots in the presidential election last November.

The first count charged all sixteen individuals with conspiring to cast and count and permitting others to cast and count forged, fraudulent and fictitious votes for Presidential and Vice Presidential Electors in two of rural Telfair County's thirteen precincts and thereby "dilute, diminish and destroy the value and effect of the votes legally cast" in violation of 18 U.S.C. 241.

The second count charged the fourteen poll officials with violation of 18 U.S.C. 242 by executing the conspiracy.

Besides returning the indictment, the grand jury also issued a resolution asserting that the county's Board of Registrars and the Deputy Registrar failed to register voters properly or purge voters' lists of ineligibles.

Extensive investigation has shown that many votes were cast in the names of non-residents and residents of Telfair County who did not vote in Telfair County on November 8, 1960. A few votes were cast in the names of dead persons.

Staff: United States Attorney Donald Fraser, Assistant United States Attorney William T. Morton (S.D. Ga.); Henry Putzel, Jr., Warren S. Radler (Civil Rights Division).

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

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

Checks Issued by Foreign Corporation. United States v. John Calvin Smith, Wayland Smith, et al. (E.D. Tenn., June 2, 1961). Defendants were charged in a single count under 18 U.S.C. 371 with conspiracy to violate Section 2314 of Title 18 U.S.C. by transporting in interstate commerce forged and counterfeited securities. One defendant was alleged to have obtained blank numbered check forms of the payroll account for a Canadian construction corporation, drawn on a Canadian bank, which check forms were filled out by other defendants and made payable to fictitious persons. Some of the checks were negotiated by defendants in Knoxville, Tennessee and were subsequently transported in interstate commerce.

The memorandum opinion of the Court granted defendants' motion to dismiss the indictment, holding that checks of a foreign corporation are included within the proviso of Section 2314 which exempts from the operation of that statute "any falsely made, forged, altered, counterfeited or spurious representation of an obligation . . . issued . . . by a bank or corporation of any foreign country." The Court stated that "The overt acts show that defendants dealt only with spurious obligations of a foreign corporation . . ."

Section 480 of Title 18 U.S.C., which punishes possession or delivery with intent to defraud, of "any false, forged, or counterfeit . . . obligation . . . issued by a bank or corporation of any foreign country," closely parallels the language of the Section 2314 proviso.

We therefore infer from the Court's opinion that forged or counterfeited checks of a foreign corporation would be held to be obligations within the meaning of 18 U.S.C. 480, and that prosecution with respect to such checks should be considered under that statute.

Requests for investigation of violations of 18 U.S.C. 480 should be made to the Secret Service, which exercises investigative jurisdiction generally over Federal counterfeiting statutes.

Staff: United States Attorney J. H. Reddy;
Assistant United States Attorney Cecil D. Meek
(E.D. Tenn.).

KIDNAPPING

Indictment After Dismissal of Information and Vacation of Judgment and Sentence Thereunder; Statute of Limitations; Right to Speedy Trial. United States v. Roy Orlen Hattaway (W.D. La.). On July 20, 1961 the Court upheld the right of the Government to recharge by indictment a

defendant whose judgment and sentence under an information filed seven years previously were vacated as the result of a motion brought pursuant to 28 U.S.C. 2255.

Defendant had waived indictment and pleaded guilty on January 8, 1954 to an information charging him with kidnapping. On March 27, 1961, on his motion, the information was dismissed and judgment and sentence thereunder were vacated, on the authority of Smith v. United States, 360 U.S. 1, because the information by its terms did not preclude the possibility of his being convicted of a capital crime. He was immediately recharged by indictment. Reliance was placed on 18 U.S.C. 3288, which provides that if an indictment is dismissed because it is found defective or insufficient for any cause a new indictment charging the same offense shall not, if returned not later than the next succeeding regular term of court, be barred by the statute of limitations.

Defendant moved to quash the indictment, bringing one motion based on the statute of limitations and a second alleging the deprivation of his right to a speedy trial. As to the statute of limitations, he claimed that Section 3288 must be interpreted strictly and hence applies only to indictments and not to informations. His contention concerning the right to a speedy trial was based on United States v. Provoo, 17 F.R.D. 183, affirmed per curiam 350 U.S. 857; United States v. Barnes, 175 F. Supp. 60; and United States v. Chase, 135 F. Supp. 230. The Court, however, held that the word "indictment" as used in Section 3288 should be interpreted in its "broad general sense to indicate a charge of an offense by some undefined legal proceeding," citing Quinones v. United States, 161 F. 2d 79, and includes an information, and that defendant waived his right to a speedy trial by pleading guilty to the original information.

The effect of this decision is to close the door opened by the Smith case whereby prisoners presently incarcerated for the heinous crime of kidnapping might have obtained their complete freedom because of a technical defect in the instrument under which they were charged.

Staff: United States Attorney T. Fitzhugh Wilson (W.D. La.).

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INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Conspiracy to Commit Espionage: United States v. Robert Soblen (S.D. N.Y.). (See BULLETIN, Vol. 8, No. 26 and Vol. 9, No. 16) On August 7, 1961 Judge William Herlands sentenced the defendant to imprisonment for ten years on Count One of the indictment (conspiracy to violate 18 U.S.C. 793(a) and (c)) and to life imprisonment on Count Two (conspiracy to violate 18 U.S.C. 794(a). The defendant is in custody under $100,000 bail. Notice of appeal has been filed.

Staff: Assistant United States Attorneys Richard C. Casey and David Hyde (S.D. N.Y.)

Department of Defense; Industrial Personnel Security Regulations; Suspension of Security Clearance. Harold J. and Evelyn B. Silver v. McNamara (C.A.D.C., August 3, 1961). The Silvers, husband and wife, were officers of a corporation which held classified Defense Department contracts, and both had been issued security clearance for access to classified material. On November 30, 1953, they were notified that the Screening Division of the Central Industrial Personnel Security Board had tentatively decided to deny them access to classified material, and that their clearances were suspended pending the Screening Division's final determination. In this notification was included a statement of Reasons outlining the basis for such action, reply to which could be made within ten days. On January 7, 1954, following their reply, appellants were informed that the Screening Division had made a final decision to deny them access. A hearing before the Appeal Division of the Board resulted in a decision — on April 30, 1954 — that a grant of clearance to them was "not clearly consistent with the interests of national security." In the years following, appellants and the Defense Department corresponded concerning reconsideration under new regulations, production of certain documents, and a new hearing.

Subsequent to the Supreme Court's decision in Greene v. McElroy, 360 U.S. 474, the Silvers demanded that the Secretary of Defense, in view of Greene, reverse the Board's actions and vacate and expunge them from all records. On that same day — March 21, 1960 — they filed in District Court a civil action for a declaratory judgment that the suspensions and denials were unlawful and should be ordered, along with subsequent refusals to revoke the suspensions and denials, to be annulled and expunged from Government records. Four months later, the Department of Defense promulgated new industrial personnel security regulations which provided in part that prior decision, might be reconsidered under certain circumstances, and, in order to comply with Greene, that in the case of a final determination of denial or revocation which was based on an "unauthorized" personal appearance proceeding

the Director of the program might vacate such determination, and take such other steps as might be deemed necessary to complete reconsideration of the case. 32 C.F.R. §155.5-2(a). Appellants were notified on August 23, 1960, that pursuant to their request and under the authority of §155.5-2(a), the Appeal Division determinations had been vacated and expunged from official records by the Director. The original suspension and denial by the Screening Division were not mentioned. Appellants rejected the offer, therein enclosed, of a new hearing.

The District Court denied the Silvers' motion for summary judgment and granted the Government's motion to dismiss the complaint on the ground that the Silvers had not exhausted their available administrative remedy. Unanimously reversing the lower court, the Court of Appeals held that there was no administrative remedy which could provide the relief which the Silvers sought, i.e., vacation and expunction of the determinations of the Screening Division. Under Section 155.5-2(a), the Court reasoned, the Director was not given authority to expunge final determinations, nor to either vacate or expunge preliminary determinations such as those rendered by the Screening Division. Thus, the District Court erred in dismissing the complaint on the ground the court stated.

The Government had contended that Greene v. McElroy did not invalidate the pre-hearing decisions of the Screening Board. The Court expressed no opinion in this contention, but merely noted that were it correct the proper disposition would have been a dismissal for failure to state a claim upon which relief may be granted.

Staff: Kevin T. Maroney (Internal Security) argued the case. With him on the brief was Carol Mary Brennan (Internal Security)

False Statement. United States v. Edward Robison Lyman (D. Colo.). On August 8, 1961, a grand jury returned an indictment against Lyman charging that he falsified and concealed a material fact in an application for bonus payment filed with the Atomic Energy Commission. The indictment alleges that a portion of uranium ore upon which the application for bonus was based was high-grade ore derived from a source other than the mine operated by Lyman which was certified by the Atomic Energy Commission as being eligible for bonus.

Staff: Assistant United States Attorney Yale Huffman (D. Colo.) John H. Davitt and Robert J. Stubbs (Internal Security Division)

Trading With the Enemy Act. United States v. Joseph Adjmi, et al. (S.D. Fla.) On July 19, 1961 five individuals and four corporations were charged in a 13 count indictment with violations of the Trading With the Enemy Act (50 App. U.S.C. 5(b)) and the Foreign Assets Control regulations issued thereunder (31 C.F.R. 500.101 et seq.). One of the counts charges a conspiracy to violate these regulations and the smuggling provisions of 18 U.S.C. 545. The remainder of the counts charges substantive violations of the FAC regulations.

The investigation of this case was conducted jointly by the Bureau of Customs and Foreign Assets Control, Treasury Department. The investigation disclosed that Joseph Adjmi and his sons, Leon and Charles, and their Florida corporation, the J. and C. A. Corporation were involved since at least 1958 in purchasing and causing to be imported, via Canada, from Hong Kong, embroideries and embroidered articles contrary to the provisions of the FAC regulations in that these transactions were not authorized by the Secretary of the Treasury or his designee. Canadian, English and Hong Kong corporations and two of their officers are named as defendants. It has been determined that the transactions involved more than $100,000.

The Adjmis and the J. and C. A. Corporation have entered pleas of not guilty. The Adjmis are free on bail.

Staff: Assistant United States Attorney Lloyd G. Bates, Jr. (S.D. Fla.)

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Cost of Construction of Primary and Secondary Treatment Plant Plus Cost of Operation for Thirty Years Claimed by Condemnee for Deprivation of "Right" to Discharge Raw Sewage Directly into Navigable River from Construction of Dam and Reservoir Project Denied. United States v. Certain Interests in Land in the City of Eufaula, Alabama (M.D. Ala., 1961). The Government acquired all right, title and interests of the City of Eufaula, Alabama, in 1.32 acres of land in Barbour County, Alabama, which was to be flooded in the construction of the Walter F. George Lock and Dam Project. This parcel of land was used by the city as a sanitary sewer outfall line for the dumpage of raw sewage into the Chattahoochee River. The United States filed a motion for possession and constructed for the city a substitute outfall line. An offer of settlement was made by the Government to consist of a forced main system at a cost in excess of $100,000, but refused by the city which claimed that the Government was liable to it for the estimated cost in the amount of $1,247,250 of a primary and secondary sewage treatment plant, together with the cost of operation thereof for a period of 30 years. This contention was based on the fact that since the plan for construction of the dam had become known, the State Health Department for the State of Georgia, which had jurisdiction of the waters involved, its action being concurred in by the Alabama Water Improvement Commission, had advised the city authorities that it would require the primary and secondary treatment of the sewage discharged from Eufaula, Alabama, after impoundment of the waters of the river. A stipulation of facts between the parties was filed with the Court in connection with the pretrial hearing for determination of whether the United States was liable for such construction and future operation costs.

In its order ruling that the city should recover nothing from the United States on the basis of its claim of "right" to discharge raw sewage directly into the Chattahoochee River or for the construction and future operation costs of the treatment plant, the Court not only distinguished, but rejected the decision in Town of Clarksville, Virginia v. United States, 198 F. 2d 238 (C.A. 4, 1952), cert. den., 344 U.S. 927 (1952). In that case, the Government flooded 41% of the town including parts of its water and sewer line and gravity disposal system and voluntarily agreed to construct a substitute facility as compensation for the taking. The United States was held liable for the cost of construction of a treatment plant and estimated future costs of operation as constituting the substitute facility for the old gravity system. The Court commented that in the Clarksville case, pecuniarily speaking, the town had obtained a windfall at the Federal taxpayers' expense, and also that the case has been impliedly reversed by the Supreme Court in United States v. Twin City, 350 U.S. 222 (1956).

Staff: United States Attorney Hartwell Davis (M.D. Ala.); Naneita A. Smith (Lands Division)

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

SPECIAL NOTICES

Cooperation With Internal Revenue Service and Participation of Revenue Service Attorneys in Tax Litigation

In the course of handling litigation involving collection of taxes and in preparing for the trial of criminal cases, the United States Attorneys will find it necessary and desirable to maintain close liaison with the offices of the Regional Counsel, Internal Revenue Service. These offices are in a position to furnish valuable technical and legal assistance in those particular areas. Accordingly, United States Attorneys should encourage their staffs to cooperate fully with the Regional Counsels' Offices and to make maximum use of the services available in those offices consistent with the responsibilities of the respective departments. The attention of all United States Attorneys is invited, however, to items published in prior issues of the Bulletin with respect to the participation of Internal Revenue Service attorneys in civil and criminal tax litigation. Those items emphasize that the handling of tax cases in court is the responsibility of Department of Justice personnel and that attorneys of other executive departments may not appear in court without specific authorization. An item appearing in Vol. 4 No. 23 provides that in the rare cases in which it is considered necessary to enlist the assistance of an attorney of the Internal Revenue Service in the actual trial of a criminal tax case, prior written authorization must be obtained from the Attorney General. An item appearing in Vol. 7 No. 5 makes a similar provision with respect to civil tax litigation involving the collection of taxes. Both of these items are reproduced in the manual prepared by the Tax Division for the Department's 1961 Orientation Program for the United States Attorneys, pp. 4 and 16.

Health Policy in Direct Referral Cases. A recent inquiry posed the question of how United States Attorneys should handle health questions arising in criminal tax cases referred directly to them. (For categories of cases which may properly be referred directly from the Revenue Service to United States Attorneys see United States Attorneys' Manual, Title 4, 43-44.)

Health questions in such cases should be handled in accordance with the procedure indicated on pp. 3 and 4 of the Tax Division's Trial Manual "The Trial of Criminal Income Tax Cases". The objective of the procedures there stated is to secure a judicial finding, after a hearing in open court, on the physical competency of the defendant to stand trial. On the basis of this finding "on the record" a proper decision to dismiss or proceed can then be made. In direct referral cases the United States Attorneys may, on a proper court record, discontinue prosecutive action without first securing departmental approval from the Tax Division.

Tax Fraud Bibliography. At a recent United States Attorneys' Orientation Conference a request was made for a list of texts to which resort can be had in connection with the preparation and trial of criminal tax matters. The following is a partial list of texts which have been published in the past few years:

Balter, Fraud Under Federal Tax Law, 2d Edition 1953, Commerce Clearing House, Inc.

Kostelanetz and Bender, Criminal Aspects of Tax Fraud Cases, American Law Institute, 1957.

Gutkin and Beck, Tax Avoidance v. Tax Evasion, Roland Press Co., New York, 1958.

Mortenson, Federal Tax Fraud Law, Bobbs-Merrill, 1958.

It should be borne in mind that much of the material in the above treatises is heavily slanted toward the defense point of view. The only official treatise on the subject is the manual "The Trial of Criminal Income Tax Cases", prepared by the Tax Division. A copy of this manual has been furnished to each United States Attorney's office, and its use is restricted to personnel of the Department.

CIVIL TAX MATTERS
District Court Decisions

Injunctions; Injunction Against Collection of FICA and Withholding Taxes from Educational Institution Denied. Walt Whitman School v. Kenneth W. Moe (S.D. N.Y.) Plaintiff, an educational institution, sought an injunction against the collection of FICA and withholding taxes, and the District Director moved to dismiss the complaint. Since matters outside the pleadings were presented, the Court treated the motion to dismiss as one for summary judgment.

The Court found that the judicial exception to the bar against injunctions of Section 7421 of the Code was inapplicable, since plaintiff failed to show that the taxes assessed were illegal and that special and extraordinary circumstances existed which were sufficient to invoke the equity powers of the Court. Illegality was not established because plaintiff was an educational institution exempt from such taxes by virtue of Section 3121(b)(8)(B) since the school filed a certificate requesting social security coverage which under Section 3121(k) waived this exemption and the school had failed to terminate the request by giving two years advance notice in writing as provided by Section 3121(k).

The allegation that extraordinary circumstances existed because distraint or levy would force the school to close was not considered sufficient by the Court, since the monies which the Government was seeking to collect

were, in fact, deducted from wages paid to employees and under no construction of the facts could such monies have belonged to the school. Instead, they were trust funds which the school had misappropriated for its own use, and, in light of this conduct, this would not serve as a basis for exercising the equity powers of the court.

Staff: United States Attorney, Robert M. Morgenthau and Assistant United States Attorney Joseph M. Field (S.D. N.Y.)

Injunctions; Taxpayer Enjoined from Selling, Transferring, Etc., All of His Property Wherever Situated and Ordered to Assign and Deliver Certain Stock Wherever Located to Receiver. United States v. Leon I. Ross, et al. (S.D. N.Y., July 28, 1961). Based upon a complaint alleging that defendant Leon I. Ross was liable for unpaid income taxes, penalties, and interest in the amount of $2,224,675.85, for which jeopardy assessments had been made, and that Ross had recently transferred assets controlled by him valued at over $600,000 from the Southern District of New York to Canada after becoming aware that the Internal Revenue Service was investigating his affairs, the Government sought the appointment of a receiver and an injunction pendente lite. Ross, an American citizen residing in Nassau, entered a general appearance.

The Court restrained Ross and all persons in concert with him from selling, transferring, pledging, encumbering or in any way removing from its present location any and all property of Ross wherever situated, pending the determination of the action. In addition, the Court ordered the appointment of a receiver of the property of Ross within the United States, although it denied the contention of the Government that the receiver should be appointed with respect to assets wherever located. However, the Court did order Ross to assign, transfer and deliver to the receiver any and all shares of stock in two corporations which were standing in his name or in his possession or ownership, wherever they may be located. It was in connection with these two corporations, which were controlled by Ross, that the Government claimed his tax liability arose by virtue of their being foreign personal holding companies.

Staff: United States Attorney, Robert M. Morgenthau; Assistant United States Attorneys Robert J. Ward and Robert Arum (S.D. N.Y.).

Liens; Enforcing Tax Lien on Cash Values of Insurance Policies Pledged to Bank. United States v. Hancock, et al. (N.D. Ill., May 9, 1961, (7 A.F.T.R.2d 1615, CCH USTC 61-1 par. 9471)). This was an action to enforce federal tax liens on the cash values of two insurance policies on the life of the taxpayer. The total amount of the cash values was approximately $1,500, and the total face amount of the policies was $5,000. The policies had been pledged to a bank as security for a loan in the amount of $1,200, after filing of notice of the federal tax liens. While admitting priority of the tax liens, the bank argued that the Government could not recover the cash values until a person entitled to do so had elected to take the cash values, and that it was entitled to have the

policies remain in force until death of the taxpayer-insured, so that it could collect the amount of its loan out of the proceeds in excess of the cash values. On motion of the Government, the Court rejected these arguments, and ordered the bank to elect the cash values and surrender the policies to the insurer, and the insurer to pay the cash values to the Government.

Staff: United States Attorney James P. O'Brien (N.D. Ill.); and Robert L. Handros (Tax Division)

State Court Decision

Liens: Department of Justice has Confessed Error Where the Court Held Federal Tax Liens Entitled to Payment Prior to, and to the Exclusion of, a Mechanic's Lien, Even Though Proceeds Were Insufficient to Satisfy Entire Lien of Purchaser Admittedly Prior to the Federal Tax Liens. Remold Realty Corp. v. Kensico Acres, Inc., United States of America, et al., (S.Ct., Westchester Cty., N.Y., Nov. 10, 1960).

This was a surplus money proceeding to determine priority as to surplus proceeds of a foreclosure sale in the sum of $8,700. The purchaser possessed a lien on the property for over $17,000 which was entitled to priority over the federal tax lien. A mechanic's lien in the sum of $3,150 was filed prior to the purchaser's deed but was subordinate to the federal tax lien. The referee in surplus money proceedings awarded the mechanic's lienor his full claim, distributing the entire balance to the purchaser on the ground that the admittedly prior purchaser's claim would exhaust the proceeds, and that, if state law then required a prior mechanic's lienor to be first paid, the federal Government could not be heard to complain. This was the holding in Niagara County Savings Bank v. Reise, 12 Misc. 2d 489, appeal dismissed 6 App. Div. 2d 991 (Niagara County Court, 1959). On the Government's petition for review, the Court held that in the circuity situation involved in this case that the Government should receive the amount represented by the mechanic's lien since the federal lien was entitled to priority over the mechanic's lien. The Department of Justice has decided to confess error as this case does not follow the solution to the circuity problem reached by the Supreme Court in City of New Britain v. General Laundry Service, 374 U.S. 81. The Supreme Court's holding is to the effect that an amount equal to the lien which is entitled under federal law to priority over the federal tax lien will be set aside as clearly not subject to the federal tax lien. If liens under state law are entitled to priority over the lien which under federal law is entitled to priority over the tax lien, then no matter what priority the federal lien might have over these liens, they are entitled to payment out of the fund set aside. Under this rationale, the mechanic would be entitled to the $3,150 since the purchaser possessed a lien clearly ahead of the federal lien in an amount which absorbed all of the sale price.

Staff: Assistant United States Attorney, Morton L. Ginsberg (S.D. N.Y.)

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