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Vol. 12 May 29, 1964 No. 11

ADMINISTRATIVE DIVISION

Assistant Attorney General S. A. Andretta

MEMOS AND ORDERS

The following Memoranda applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 6, Vol. 12 dated March 20, 1964:

MEMO	DATED	DISTRIBUTION	SUBJECT
367	2-27-64	U.S. Attorneys	Form of order Appointing Receivers in Foreclosure of FHA Insured Mortgages on Apartment Projects.
368	3-10-64	U.S. Attorneys	Reduction in Cost of Publications and Reports
370	4- 8-64	U.S. Attorneys	Internal Revenue Summonses-Procedure
371	5- 4-64	U.S. Attorneys	Fines Levied in Narcotics Cases
372	5-15-64	U.S. Attorneys & Marshals	Promotion Plan (Revised)

ORDER	DATED	DISTRIBUTION	SUBJECT
314-64	3-16-64	U.S. Attorneys & Marshals	8 U.S.C. 1182(a)(22), Exclusion of Aliens Who Have Departed From or Remained Outside United States to Avoid or Evade Training or Service in Armed Forces.

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ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

SHERMAN ACT

Indictment Under Section 1 of Act And Complaint For Damages. United States v. Arcos Corporation, et al., (N.D. Ohio). DJ File Cr. 60-138-129, DJ File Civ. 60-138-149. On May 11, 1964, a Cleveland grand jury returned an indictment naming as defendants the following manufacturers of stainless steel welding electrodes: Arcos Corporation; The McKay Company; Air Reduction Company, Incorporated; and Alloy Rods Company.

The indictment charges that defendants conspired, beginning sometime in 1958 until sometime in 1962, to fix and maintain prices for the sale of these electrodes and to bid uniform prices for the sale of them to the Government.

A companion civil case was filed on the same date against the same defendants asking double damages and forfeitures under the False Claims Act in Count One and alternatively, in Count Two, for single damages.

In the indictment and the complaint the 1961 dollar volume of sales of these electrodes by defendants and co-conspirators was stated to be in excess of $17,500,000.

Staff: Lester P. Kauffmann and Rodman M. Douglas (Antitrust Division)

Court Holds That Partnership Can Be Indicted Under Act. United States v. The Brookman Co., Inc., et al., (N.D. Calif.). DJ File 60-191-9. In an opinion filed May 14, 1964, Judge William T. Sweigert denied a motion by a partnership to dismiss the indictment against it on the ground that partnerships are not subject to criminal prosecution under the Sherman Act.

The Court held that the "definition of 'person' [in Section 8] as including 'corporations and associations' does not in our opinion indicate that the word 'person' was intended to be used in a limited sense that would exclude partnerships," but rather that "the statutory use of the word 'person' as including 'associations' is broad enough to include a partnership ...."

This is the first time a court has adjudicated the criminal liability of a partnership under the Sherman Act.

Staff: Lyle L. Jones, Marquis L. Smith, William B. Richardson and Patrick M. Ryan (Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General John W. Douglas

ATTENTION UNITED STATES ATTORNEYS

Use of Interrogatories in Tort Cases.

We have recently been criticized by some District Court Judges for using "canned interrogatories" in our tort cases. It should be emphasized that the sample interrogatories set out in the Tort Claims Manual are in fact mere samples, and they should in each instance be edited, tailored and supplemented to meet the factual situation in each particular case. Failure to do this will result in further justified criticism of the Department and could prejudice the Government's position generally before the courts.

SUPREME COURT

UNITED STATES SAVINGS BONDS--TREASURY REGULATIONS

Designated Beneficiary of Bonds Must Receive Proceeds, Unless Actual Fraud or Its Equivalent Proven. Yiatchos v. Yiatchos (March 9, 1964.) A husband, residing in a community property state, purchased United States Savings Bonds with community funds. The bonds were registered in the husband's name alone and made payable on death to his brother. The husband died, survived by his wife and brother.

On facts stipulated before the decision in Free v. Bland, 369 U.S. 663, the Supreme Court of Washington ruled that the purchase of the savings bonds with community funds by the husband constituted a "constructive fraud" upon his wife. The Court concluded that the purchase was void ab initio, so that the proceeds should be distributed in accordance with the husband's will, and none should be paid to the husband's brother named as beneficiary. These holdings were made in the face of the ruling in Free v. Bland, supra, that Federal law, in the form of Treasury regulations, governs the ownership of savings bonds; and, except in cases of fraud or an equivalent breach of trust, the designated owner is entitled to the proceeds pursuant to those regulations.

In its order granting certiorari, the Supreme Court invited the filing of a brief expressing the views of the United States.

The Supreme Court accepted the Government's contention that no actual or constructive fraud under Federal Law had been shown, because the wife had not proven that the purchase had been made without her consent or knowledge. The Court also adopted our suggestions that the case should be remanded for proof of the facts concerning her consent or ratification, and that the husband's one-half interest in the bonds should pass to his brother in accordance with the designation in the bonds, regardless of any finding of constructive fraud in regard to the wife's half interest.

Justices Clark and Douglas agreed with the majority on the foregoing propositions, but would have foreclosed any recovery on the part of the wife, unless the estate other than the bonds was too small to satisfy the wife's one-half interest in the total community assets.

Staff: David Rose (Civil Division)

COURT OF APPEALS

ADMINISTRATIVE LAW-COMPULSORY ARBITRATION IN RAILROAD DISPUTE

Courts Sustain Compulsory Arbitration Award Resolving Major Issues in Dispute Between Nation's Major Railroads and Their Operating Employees. Brotherhood of Locomotive Fireman and Enginemen, et al. v. Carriers, et al. (C.A. D.C., February 20, 1964, certiorari denied, April 27, 1964). This litigation arose out of the long standing controversy over work rules between the nation's major railroads and the labor organizations representing their operating employees. After almost four years of negotiations, study, and mediation, recommendations by two impartial Presidential boards, and a decision by the Supreme Court, in August 1963 Congress enacted Public Law 88-108. This law was intended to provide for a binding resolution by an arbitration board of the two major issues of the controversy for a two-year period. These major issues concerned (1) the need for firemen on freight and yard locomotives, and (2) the composition of train crews.

The Arbitration Board consisted of seven members: two carrier members, two labor organization members, and three neutral members named by the President. After extensive hearings and proceedings the Board issued its award in late November 1963. The award provided a procedure which could eventually eliminate up to 90% of the fireman positions; but provided that presently employed firemen with more than ten years experience were not to be eliminated through other than natural causes, i.e., death, disability, discharge for cause, or retirement, and that firemen with two or more years were to be offered comparable positions with equivalent pay, before they could be discharged. On the second issue the Board provided a procedure for determining at the local level the composition of the train crews, under specified standards and guide lines, with complete job protection for the presently employed trainmen.

Four of the five interested labor organizations filed actions seeking review of the award pursuant to the specified review procedure (Section 9 of the Railway Labor Act, 45 U.S.C. 159), and also challenged the award on the ground that Public Law 88-108 was unconstitutional. The district court refused to convene a three-judge court, ruling that in substance the action was not to enjoin the enforcement of a statute, but was one to impeach and set aside the award, so that the request for an injunction was unnecessary. In regard to the constitutional challenge, the court ruled that Congress had authority to provide for a binding resolution of the dispute (Wilson v. New, 243 U.S. 332);

and that, since the statute set forth intelligible standards to guide the Board in making its determinations, there was no unconstitutional delegation of authority, and no substantial constitutional question. The court further held that the Board had complied with the statutory standards in reaching its decision, including the requirements that the Board give due consideration to the matters on which the parties were in tentative agreement. 225 F. Supp. 11.

On appeal by the labor organizations, the Court of Appeals affirmed, largely on the basis of the district court's opinion. All members of the panel agreed that the award satisfied the standards of the statute. The Court was divided as to whether or not a three-judge court was necessary. In addition to the reasons given by the district court, the majority noted that an injunction was unnecessary because there was no possibility of the enforcement of the award until after the courts had reviewed it. Judge Skelly Wright dissented on the ground that a three-judge court should have been convened. He believed that, under Section 9 of the Railway Labor Act, questions as to the constitutionality of the statute could not be raised, and that the constitutional issues were substantial.

The labor organizations' petitions for certiorari were denied on April 27, 1964.

Public Law 88-108 was the first federal statute providing for compulsory arbitration to resolve labor disputes.

Staff: Assistant Attorney General John W. Douglas, J. William Doolittle, Carl Eardley, Howard E. Shapiro, David L. Rose, and Peter B. Edelman. (Civil Division)

COMMODITY CREDIT CORPORATION

Commodity Credit Corporation Loan Documents and Regulations, Providing for CCC's Assumption of Loss of Mortgaged Grain by Fire, Do Not Constitute Additional Insurance Contract; Parole Evidence Inadmissible to Prove Insurance Company's Written Contract Was to Be Forfeited Upon Loan by CCC. Drake and Beemont Mutual Aid Society Against Fire and Lightning v. United States (C.A. 8, April 14, 1964). The Court of Appeals held that the Government could collect for proceeds of a fire insurance policy assigned to it by a borrower under a CCC loan. The Court rejected the contention of the Mutual Aid Society, which had insured the borrower's grain, that the Government had "insured" the grain in violation of the Society's contractual provision against coverage by another insurer.

Under the CCC regulations (incorporated in the loan agreement), a borrower is not required to insure grain upon which it has given the CCC a mortgage to secure the loan. However, if a borrower does insure the grain--as was the case here--the insurance inures to CCC to the extent of its interest. In the event of no insurance, the regulations provided that "physical loss * * * will be assumed by CCC."

The Eighth Circuit held that the insurance society's provision was for the purpose of prohibiting duplicate insurance, and did not relate to such a provision as the foregoing. The Court also rejected the use of parole evidence purporting to show the understanding of the insurance society and the mortgagor that the prohibition against additional insurance was applicable against the Government.

The insurance society further sought to show that the Government, under the various documents, had in fact become the owner of the grain. The Court of Appeals rejected the contention and held, in addition, that the mortgaging of the grain did not invalidate the insurance.

The Court found, lastly, with respect to a release given the insurance company by the mortgagor, that the release did not apply to the insurance proceeds for grain mortgaged to the Government.

Staff: J. F. Bishop (Civil Division)

FEDERAL TORT CLAIMS ACT - LIMITATION OF RECOVERY

State Statute Limiting Sum Recoverable for Wrongful Death Applicable to Suits Against United States. Marian E. Bartch v. United States (C.A. 10, March 1964). This Tort Claims suit arose out of the death of plaintiff's husband, an employee of a sub-contractor working at a missile site in Colorado. In the Court of Appeals the United States did not dispute that its negligence resulted in decedent's death. At issue was solely the question whether the Colorado Wrongful Death Act limited recovery against the Government. The district court had calculated damages in the amount of $122,894, but pursuant to the Colorado Statute had reduced the damages to the statutory maximum of $25,000.

The Colorado Statute states that in every wrongful death action "the jury may give such damages as they may deem fair . . ., not exceeding twenty-five thousand dollars." Relying on the statutory reference to the jury, and the fact that there is no jury in Tort Claims suits against the United States, plaintiff appealed. He urged that the statutory limitation did not apply to actions tried before the Court alone. The Tenth Circuit rejected this contention, holding: (1) under Colorado State court practice the limitation had been applied both to jury trials and to suits tried to the court; and (2) the established rule is that state damage law, including a statutory limit upon the amount of recovery, is applicable to suits against the United States under the Tort Claims Act.

Staff: Assistant Deputy Attorney General Joseph F. Dolan and Barbara W. Deutsch (Civil Division)

FEDERAL TORT CLAIMS ACT - ELECTION OF REMEDIES

Under Arizona Law, Right to Sue Negligent Third Party Not Cut Off by Written Election to Take Workmen's Compensation Benefits Where Election Executed Under Misapprehension That United States Could Not Be Sued; Lump Sum Award of Damages Not Sufficiently Specific to Satisfy Rule 52(a), F.R. Civ. P., But Error Harmless Where Record Supports Award. United States v. Miller (C.A. 9, April 1964). This action was brought by the widow of a civilian passenger killed in the crash of an Army plane. Negligence was conceded. The single issue in the district court (in addition to an assessment of damages) was whether plaintiff's right of action against the United States had been cut off by her written election to take workmen's compensation benefits under the Arizona Workmen's Compensation statute. The district court held that plaintiff had not waived her right to sue the United States because, at the time of her written election, she was laboring under the misapprehension that she could not sue the United States by reason of sovereign immunity.

On appeal, we argued that the foregoing rule, in effect allowing refutation of an election on the basis of unilateral mistake, would only be applied by the Arizona Supreme Court in cases involving election by conduct -- i.e., cases arising under the Arizona statute providing that the right to sue a negligent third party is deemed waived by application for or acceptance of workmen's compensation benefits--and that where a written election is involved the Arizona courts would not look behind it except for evidence of fraud, misrepresentation or mutual mistake, none of which were alleged or proven here. The Ninth Circuit rejected our argument and held that, while the Arizona Supreme Court had not yet ruled in a written election case, that Court would apply to such a case the same rule applicable in election-by-conduct cases.

We also argued in the Court of Appeals that the district court's lump sum damage award failed to meet the specificity requirements of Rule 52(a), F.R. Civ. P. That Court agreed that the award was not sufficiently specific, but held the error harmless in view of the fact that the award was plainly not excessive on the basis of the record before it.

Staff: David J. McCarthy, Jr. (Civil Division)

FEDERAL TORT CLAIMS ACT--DISCRETIONARY FUNCTION

Federal Agents' Issuance of Permits to Graze Livestock on Public Grazing Land Held "Discretionary Function," For Which Government May Not Be Held Liable. 28 U.S.C. 2680(a). United States v. Morrell, et al. (C.A. 10 April 28, 1964, D.J. #157-77-86). Plaintiffs, livestock operators owning or controlling lands interspersed among the "Federal Range" (publicly owned grazing lands), brought suit under the Tort Claims Act, alleging that Federal Range officials "aided and abetted" other livestock operators to trespass on plaintiffs' private holdings. The district court entered judgments for plaintiffs, totalling in excess of $300,000.

The Tenth Circuit reversed the lower court's decision. The appellate court noted that the only action taken by the Federal officials was to grant or deny permits to graze livestock on the Federal Range, matters entrusted to their discretion under the Taylor Grazing Act, 43 U.S.C. 315, and the Federal Range Code, 43 C.F.R. 161.1-19. The Court of Appeals, citing its earlier decisions to the same effect, held that these actions were "discretionary functions" and thus exempt as a basis for governmental tort liability under 28 U.S.C. 2680(a). Since that section exempts the Government from tort liability "whether or not the discretion involved be abused," the Court held that even if the Government agents were aware that, by granting permits to graze on the Federal Range, plaintiffs' intermingled lands would also be grazed by the permittees' livestock, suits under the Tort Claims Act would not lie. The Court, noting that the real issue concerned conflicting claims of right to use the public range, held that such matters could not be settled in a Tort Claims Act suit where many of the vitally interested parties were unrepresented.

Staff: Richard S. Salzman (Civil Division)

FEDERAL TORT CLAIMS ACT--WILD ANIMALS

Government Not Liable for Bear Bite in Yellowstone National Park. Ashley v. United States (C.A. 8, January 22, 1964). Plaintiff was sleeping in the right seat of an automobile driven by his wife in Yellowstone National Park, with his right arm resting on the sill of the open car window. During a period when the car was stopped, a wild bear bit plaintiff's elbow, causing serious and permanent injury.

After a full trial, the district court ruled: (1) the United States is not liable without fault under the Tort Claims Act for the acts of dangerous animals, such as bears; (2) under the applicable law of Wyoming, the Government owed plaintiff the duty of using ordinary care to keep the park safe, and of warning him of any hidden dangers; and (3) plaintiff's injury was not due to any negligence on the part of the Government either in failing to give him an adequate warning, or in failing to remove the particular bear which bit him. 215 F. Supp. 39. In addition, the court indicated its belief that the handling of troublesome bears was within the discretionary function exception to the Tort Claims Act. 28 U.S.C. 2680(a).

The Eighth Circuit ruled that the district court's findings were amply supported by the record and therefore not clearly erroneous. It affirmed the decision on the grounds given by the district court, except for the lower court's discussion of the discretionary function exception, on which point the appellate court reserved its views.

Staff: David L. Rose (Civil Division)

SOCIAL SECURITY ACT

Fifth Circuit Reaffirms Position That Claimant For Disability Benefits Must Do More Than Show Inability to Do Former Work. Celebrezze v. Raley (C.A. 5, April 23, 1964). Claimant applied for disability benefits under the Social

Security Act on the basis of a chronically infected ear and some degree of deafness. While the Secretary found that claimant was unable to do his former work, heavy manual labor in the oil fields, he rejected claimant's application. The Secretary ruled that claimant failed to establish that he could not perform other work of a light or sedentary nature, "such as driving a truck or motor vehicle, which the evidence shows him qualified to do."

The district court upset the Secretary's decision, but the Court of Appeals reversed the lower court and reinstated the Secretary's determination in a per curiam opinion. The Fifth Circuit reaffirmed the position it has repeatedly taken that, to establish disability, a claimant must do more than show that he is unable to do his former work.

This case constitutes the eleventh consecutive victory for the Secretary in the Fifth Circuit in social security disability cases, starting with Celebrezze v. O'Brient in October 1963.

Staff: Martin Jacobs (Civil Division)

DISTRICT COURT

FEDERAL TORT CLAIMS ACT

Litigation Expenses Recovered in Addition to Taxable Costs in Indemnity Cases. Wiseman v. Zurich Insurance Co., (W.D. Pa., April 9, 1964). The Torts Section, as a matter of policy, is now undertaking to recover from Government indemnitors litigation expenses and the reasonable value of legal services provided by Government attorneys. In our first collection effort, $800 has been recovered representing travel and printing expenses on appeal and the reasonable value of the time spent by Appellate Section attorneys in preparing and arguing the appeal. This recovery is in addition to the amount of the judgment paid by the United States and all taxable costs, to which the Government ordinarily is entitled from indemnitors. Because no proof on the question of prejudgment litigation expense had been offered at the trial, we did not press for the recovery of this expense.

Staff: United States Attorney Gustave Diamond and First Assistant United States Attorney Samuel J. Reich (W.D. Pa.) William A. Gershuny, (Civil Division)

FEDERAL TORT CLAIMS ACT - DRIVERS

Enactment of Drivers Act, Amending, 28 U.S.C. 2679, Did Not Alter Insurance Company's Obligation to Grant Coverage to Government as Insured Under Terms of Government Employee's Liability Policy. H.L. Patterson v. United States and Vickie D. Patterson v. United States (E.D. Tenn., April 17, 1964.) Plaintiffs were injured by a private automobile owned by a rural mail carrier. The accident occurred while the employee was driving the vehicle during the course of his employment. The Government impleaded the employee's insurance company as third party defendant, relying upon the clause in the employee's policy which included, under the definition of an insured, "any person or

organization legally responsible for the use [of the owned automobile] by an insured."

The United States took the position that, since there was no specific exclusion denying coverage to the United States, the United States was an organization legally responsible for the use of the insured automobile belonging to the insured Government employee. The insurer, third party defendant State Farm Mutual Automobile Insurance Company, relying on Gibson v. Shelley, 219 F. Supp. 915 (E.D. Tenn., 1963) argued that, due to the amendment of 28 U.S.C. 2679, the United States could no longer claim coverage as an insured and moved to dismiss.

The District Court denied the insurance company's motion to dismiss. The Court's opinion, reviewing several other cases upholding the Government's claim of insured status under similar policies, should be very helpful in opposing the attempts of insurance companies to dismiss third-party complaints.

Staff: United States Attorney John H. Reddy and Assistant United States Attorney B. B. Guthrie (E.D. Tenn.)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

JENCKS ACT

Destruction of Investigators' Notes Taken During Interview. United States v. Joseph Spatuzza and James Cozzo (C.A. 7, 1964) and Gloria Alexander v. United States and Margaret M. Watkins v. United States (C.A. D.C., 1964). Two recent appellate cases involving the question of the application of the Jencks Act sanction, 18 U.S.C. 3500(d), where the Federal investigators have destroyed their original notes of interview, are worthy of note.

In the Seventh Circuit case involving a prosecution for possession of stolen goods in violation of Section 659, Title 18, U.S.C., the issue involved was one which has previously been decided by several Federal appellate courts. The defendants asserted that the enforcement of Section 3500 was thwarted when the FBI agents destroyed notes taken during interviews with witnesses who testified in the criminal trial. The agents testified that the interview report forms furnished the defendants accurately reflected and included all the information contained in the notes. The Court concluded that Section 3500 does not require Government agents to preserve their notes after they have been transcribed and the reports checked for accuracy, citing United States v. Greco, 298 F. 2d 247 (C.A. 2), cert. denied, 369 U.S. 820 (1962). See also Killian v. United States, 368 U. S. 231 (1961), Campbell v. United States, 365 U. S. 85 (1961) (Concurring opinion, Frankfurter, J.); Ogden v. United States, 323 F. 2d 818 (C. A. 9, 1963); and, United States v. Thomas, 282 F. 2d 191 (C.A. 2, 1960). The novel aspect of the Court's ruling in this case is the observation that the defendants did not demand production of the notes but rather were concerned with the circumstances of their destruction and thus without a request for production, no issue was presented to the district judge to rule upon.

The second case, a prosecution for robbery under the District of Columbia Code, involved the question of the application of Section 3500(d) where the Government investigator is the witness and has destroyed, after preparing a formal police report, his notes of what he had observed at the time of the robbery. This is the first reported case to our knowledge involving the investigator as a witness and the question of the application of the Jencks Act sanction of striking his testimony where his original notes are destroyed. The typed formal report was produced at trial and used by the defense to impeach the officer's testimony as to the events he witnessed. The officer testified that his notes went in the trash after the formal report was typed.

On appeal the defendants contended that the trial judge should, upon his own initiative, have held a hearing. The Court of Appeals rejected this contention, stating that the trial judge, having the officer before him and hearing his testimony, was satisfied that there was no cause for a hearing, and since there was no suggestion of bad faith or that the destruction was not in normal course, the trial court did not commit reversible error in failing to initiate

an inquiry which no one who heard the officer's testimony thought necessary. As to the contention that the destruction of the notes per se made the officer's testimony inadmissible, the majority summarily rejected this contention citing Killian, supra.

Staff: United States Attorney Frank E. McDonald, Jr.; Assistant United States Attorneys John Peter Lulinsky, John Powers Crowley, and Richard T. Sikes (N.D. Ill.); United States Attorney David C. Acheson; Assistant United States Attorneys Frank Q. Nebeker, Daniel Resneck, and Anthony A. Lapham (Dist. of Col.).

SEARCH WARRANT - Execution of
18 U.S.C. 3109

Adequacy of 4 or 5 Seconds Wait After Announcing Identity and Purpose Before Breaking and Entering; Use of "Twin Phone" Under 47 U.S.C. 605; Illegally Obtained Testimony, if Cumulative, Need Not Be Prejudicial. Robert McClure, Jr. and Donald Gaxiola v. United States (C.A. 9, May 4, 1964). McClure and Gaxiola were indicted on two counts of violating 21 U.S.C. 174 for selling and concealing heroin based on two separate sales to Donald Hopping. Federal Narcotic agents got Hopping to call Gaxiola (promising that they would seek to have him not prosecuted on a narcotics charge), while the agents listened to the conversation with a "twin-phone." After a sale was set up, the agents placed a "Fargo transmitter" on Hopping and thereby listened to the sale, which took place in Gaxiola's residence. McClure was present at the sale and split the proceeds. The same procedure was followed on a second occasion.

An arrest warrant for Gaxiola and a search warrant for his residence were obtained and subsequently executed in the following manner: Before reaching the front door, the agents saw through a bay window Mrs. Gaxiola in the house turn to run or turn and run. When they reached the door, they announced, "We are Federal officers and have a search warrant, open up", and then, after hearing footsteps running in the "wrong direction", kicked in the door to gain entrance; the total time spent at the door was four or five seconds. When the agents gained entry, it was evident Mrs. Gaxiola had been approaching the door.

On appeal the entry was challenged under 18 U.S.C. 3109. The Court, however, sustained it, holding that when the officer heard what he thought were footsteps running in the wrong direction "he had grounds to believe that his request had been rejected." This holding is significant since it recognizes that under Section 3109 (1) "refusal" may be by implication and (2) that the test is the situation as it appears to the officer as a reasonable man. For a review of other state and federal cases, see generally, Blakey, The Rule of Announcement and Unlawful Entry; Miller v. United States and Ker v. California, 112 U. of Pa. L. Rev. 499 (1964).

The appeal also challenged the use of the "twin phone" under 47 U.S.C. 605. The Court first found that Hopping's "authorization" under Section 605 for the officers to listen under Weiss v. United States, 308 U.S. 321 (1939) was not coerced. It then found, assuming the contrary to be true, no prejudice resulted since Hopping, who was a party, testified in addition to the agents; their testi-

mony was only cumulative. The Court also found that the purchases were not "fruit of the poisonous tree", assuming that the calls were illegal, since they were the product of what Hopping did; they were not made by the exploitation of any illegality. This holding is significant because it recognizes that "illegally obtained testimony", if cumulative, need not be prejudicial; it also constitutes another particularization of the Supreme Court's "exploitation" test announced in Wong Sun v. United States, 371 U.S. 471, 487-8 (1963).

The Court also held that the "possession" required to invoke the presumption of 21 U.S.C. 174 can be "constructive."

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

EXPATRIATION

Supreme Court Affirms Second Circuit Ruling That Statute Expatriating Citizens for Service in Foreign Armed Forces is Constitutional. Herman Frederick Marks v. Esperdy (Supreme Court No. 253; May 18, 1964). The Supreme Court affirmed by an equally divided Court (4-4) the decision of the Second Circuit holding that petitioner Marks had expatriated and is now subject to deportation. Justice Brennan did not participate in the decision.

Marks, a native-born citizen of the United States, went to Cuba in 1958 and joined Castro's revolutionary forces in the Sierra Maestra Mountains. After the overthrow of Batista, he served as captain in the Cuban Rebel Army and presided over the execution of numerous prisoners. He lost face with Castro in May 1960 and returned to the United States. In administrative deportation proceedings brought after his entry, it was held that he had expatriated under Section 349(a)(3) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(3), by reason of his service in the Cuban armed forces and that he was deportable for having illegally entered the United States. These rulings were contested in the United States District Court for the Southern District of New York and the Second Circuit. The latter Court approved the administrative rulings that petitioner had expatriated and was deportable.

The questions before the Supreme Court were -

1. Whether Marks' service in the Rebel Army of Cuba for seventeen months following Castro's accession to power was voluntary service in the armed forces of a foreign state.

2. Whether Section 349(a)(3), providing for the expatriation of a native-born American citizen for voluntary service in the armed forces of a foreign state, is constitutional.

3. Whether it was proper for the administrative tribunal, in conducting a deportation proceeding, to determine whether Marks previously had lost his American citizenship through foreign military service, and whether, in any event, he is prejudiced by the administrative determination, having now obtained a de novo judicial review of that issue.

4. Whether the deportation order was validly entered on the basis of Marks' admitted entry into the United States without an immigrant visa.

Staff: Solicitor General, Archibald Cox, Assistant Attorney General Herbert J. Miller, Jr. (Criminal Div.), General Counsel L. Paul Winnings, and Deputy General Counsel Charles Gordon (Immigration and Naturalization Service).

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Subversive Activities Control Act of 1950; Registration of Communist Party Members. Attorney General v. Ralph William Taylor, et al. On March 17, 1964, a consolidated hearing was conducted at St. Paul, Minnesota, before the Subversive Activities Control Board to show membership in the Communist Party of Ralph William Taylor and Betty Mae Smith.

On May 1, 1964, the Subversive Activities Control Board issued separate orders against each of the respondents directing them to register as members of the Communist Party (See United States Attorneys Bulletin, Vol. 11, No. 23, November 29, 1963).

Staff: James A. Cronin, Jr., Carl H. Miller (Internal Security Division)

Communist Political Propaganda. Corliss Lamont d/b/a Basic Pamphlets v. Postmaster General (S.D. N.Y.). D.J. File No. 146-1-51-2892. 39 U.S.C. 4008 establishes a screening program for Communist political propaganda originating abroad and deposited in the United States mail as unsealed mail matter. When it is determined that particular mail matter is Communist political propaganda, a Post Office Department form notice is sent to the addressee identifying the material being detained and advising the addressee that the propaganda will be destroyed within 20 days unless delivery is requested. Part of the form notice is a reply card on which the addressee may instruct the Post Office whether or not he wants the publication listed and similar publications delivered in the future. An index is kept of those requesting delivery of such material so that thereafter their mail will not be detained.

Rather than return the reply card, plaintiff instituted this suit against the Postmaster General attacking the constitutionality of 39 U.S.C. 4008 and demanding the delivery of all propaganda mail now and in the future.

His suit was treated as a request for delivery and instructions were issued to send all such mail to him in the future. The Post Office Department acted pursuant to that portion of 39 U.S.C. 4008 which provides "that such detention shall not be required in the case of any matter * * * which is otherwise ascertained by the Postmaster General to be desired by the addressee."

Thereafter, by amended complaint, Lamont demanded that his name be removed from any index maintained by the Post Office Department.

Defendant moved to dismiss the action as moot. A majority of the three-judge district court, Circuit Judge Hays and District Judge Levet, agreed with the Government. District Judge Feinberg dissented.

In an opinion handed down on May 5, 1964, the Court held the dispute moot because the Postmaster General had ordered Lamont's mail not detained in the future, and further decided that Lamont had made no sufficient showing of a threat of injury by reason of the indexing of his name.

On the second point, the Court stated, "We hold that present circulation of the list to Post Office personnel does not constitute such a legal injury as will permit plaintiff to maintain this suit, and that the threat of future public distribution of the list is not sufficiently imminent to present a controversy ripe for adjudication."

The Court also ruled that Lamont had no standing to assert the rights of persons "who are not willing or able to sue."

Staff: Assistant United States Attorney Anthony J. D'Auria (S.D. N.Y.) argued the cause for defendant. Of counsel: Assistant United States Attorney Eugene R. Anderson (S.D. N.Y.); F. Kirk Maddrix and Benjamin C. Flannagan (Internal Security Division).

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LANDS DIVISION

Assistant Attorney General Ramsey Clark

Condemnation: Fair Market Value Is Measure of Compensation for State-Owned Property; Necessity for Substitute Facility Not Involved in Market Value Test. United States v. State of South Dakota (C.A. 8, April 8, 1964) D.J. File No. 33-43-250-7. The United States condemned Farm Island, a public park in the Missouri River at Pierre, South Dakota, for use in the Big Bend Reservoir Project. Rejecting the Government's argument that market value should be the measure of compensation, the district court submitted the case to the jury on a substitute site theory. The jury returned a verdict for $1,062,250 and the Government appealed.

The Court of Appeals quoted extensively from Kimball Laundry Co. v. United States, 338 U.S. 1 (1949), and Olson v. United States, 292 U.S. 246 (1934), to the effect that the compensation due under the Fifth Amendment is for the transferable value of the property taken and that this value is measured by fair market value, and it emphasized that the sum to be paid does not depend on the uses made of the land by the owner or his unique need for or idiosyncratic attachment to it. The Court then concluded that there was no justification in this case for departure from the market value standard and that use of the substitute site theory was prejudicial error requiring reversal. The Court added that its decision was not to be understood as denying to the trial court "such liberality and flexibility in the reception of evidence as the circumstances may require so long as market value is not abandoned as the ultimate test in this case."

In what must be viewed as dictum in the light of the disposition of the case, the Court commented on the inconsistent rulings of the trial court on the question of the necessity of substitute facilities. After a pretrial conference at which no evidence was taken on the point, the trial court ruled: "In this case a need exists to replace the property and facilities taken." At the trial, the court submitted to the jury an interrogatory on whether "There is an obligation and need" for the State to establish a substitute park. The Court of Appeals ruled that the question of "obligation" was one of law for the court rather than of fact for the jury. "The question of 'need' would, of course, be a factual question for jury determination if the interrogatory were either necessary or proper." Since the case should have been tried on the fair market value theory, submission of the interrogatory was erroneous, but the Court added: "Moreover, to the extent that the subject matter was appropriate for jury consideration, we think it could have been included in the general instructions to the jury."

Staff: Edmund B. Clark (Lands Division).

Indians: Validity of Tribal Constitution; Authority of Tribal Governing Body to Manage Tribal Funds. Green v. Wilson (C.A. 9, May 12, 1964) D.J. File No. 90-2-4-72. An individual member of the Nez Perce Tribe brought suit against the members of the tribal governing body alleging that the tribal constitution was invalid and that the governing body was misusing tribal funds. The allegation of misuse of funds was based upon the fact that the tribe, under a plan prepared by the Department of the Interior, was using a seven million dollar judgment fund obtained under the Indian Claims Commission Act for tribal resource development instead of distributing the fund to the individual tribal members.

The Court of Appeals, in a per curiam opinion, affirmed the district court's dismissal of the suit. The Court noted that the motion to dismiss was based upon absence of a federal question, failure to join indispensable parties (the tribe and the United States) and failure to state a claim upon which relief can be granted, and agreed that the action was properly dismissed.

Staff: Richard N. Countiss (Lands Division)

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
Appellate Decision

Foreclosure of Tax Liens: Marshalling of Assets Not Applicable Where Prejudicial to Federal Tax Collection. American National Ins. Co. v. Vine-Wood Realty Co., et al. (S. Ct. Pa., April 21, 1964). Federal tax liens for 1948 income taxes were recorded on September 24, 1955, and for 1959 income taxes on October 6, 1960. The first federal tax lien was involved in the senior mortgage foreclosure of hotel property, as to which there were also three junior creditors, a subsequent transferee, a second mortgage, and a judgment creditor, all of whom acquired real property liens before the second federal tax lien was recorded. A judgment of foreclosure was entered on July 19, 1960, and the property was sold May 1, 1961, but distribution of the surplus proceeds was held up on exceptions of the three junior creditors. In the meantine, taxpayers acquired certain securities which were pledged with a bank for a loan, and the Government filed notice of levy with the bank for the 1948 taxes on February 9, 1960, and for the 1959 taxes on August 25, 1961. On September 12, 1961, the Government entered into an agreement with the bank and taxpayers providing for the sale of the securities to satisfy the bank's first and prior lien, a release of $22,618.66 to taxpayers, and retention of a certificate of deposit for the balance of $36,130 by the bank to be held for the payment of the 1948, 1959, and any other federal tax claims. On October 3, 1961, the United States moved in the mortgage foreclosure case for a distribution of the surplus proceeds in payment of the 1948 income tax liability. At this point, the junior creditors opposed the petition on the ground that the 1948 tax lien should be deemed to have been paid out of the securities, and if not, then they were entitled to a marshalling of assets compelling the United States to look for payment of its senior tax lien out of the securities so that the junior creditors could be paid out of the mortgaged property. The Pennsylvania Supreme Court has upheld the lower court's determination rejecting these claims and awarding the United States payment of its 1948 tax lien out of the foreclosure proceeds, thereby leaving the deposit available for payment of the 1959 and other taxes. It held that the junior creditors could not compel the United States to accept a payment when it had only bargained for security for 1948 and all other tax claims. It further held that it was not necessary to decide whether marshalling of assets could be invoked against the federal tax lien, since on the facts of this case, the doctrine was wholly inapplicable. Marshalling, the Court held, can only be invoked where both funds are in control of the court and equally available for the payment of senior creditors' demands, and the claim of marshalling has been timely raised. At the time of the mortgage foreclosure proceedings, the only asset clearly available for the payment of the 1948 federal tax lien was the hotel property. Moreover, when the Government made the arrangements to hold the certificate of deposit for the payment

of 1948 and other taxes, no claim for marshalling had been raised in the foreclosure proceedings. Finally, the Court held that the junior creditors cannot delay foreclosure proceedings in the hope that the Government tax lien involved in the foreclosure will be paid out of some later-discovered property of the taxpayer to the detriment of other federal tax claims. The decision is helpful and puts to rest a contention that would have seriously prejudiced federal tax collection.

Staff: United States Attorney Drew J. T. O'Keefe; Assistant United States Attorney Joseph R. Ritchie (E.D. Pa.); and Joseph Kovner (Tax Division)

District Court Decisions

Federal Tax Liens: Liens of Judgment Creditor Under State Law: Priorities: In the Matter of Nicholas Fornabai, Individually and t/a Fornaby Equipment Co., Bankrupt. (D. N.J., March 26, 1964). (CCH 64-1 USTC ¶9339). Two judgment creditors had received their judgments prior to the recordation of the federal tax liens here involved. In the bankruptcy proceeding there are enough assets to satisfy substantially two of the three claimants. Here, the Referee awarded priority to the two judgment creditors over the United States. His opinion was affirmed by the District Court on a petition for review.

Unlike many other states, New Jersey has a statute which allows a junior judgment creditor who levies on the property of the judgment debtor to take all right and interest in the property to the exclusion of a senior judgment creditor who does not so levy. This statute has been enforced for over 100 years in the state courts without question. In a recent state court case, Smith v. Smith, 78 N.J. Super. 28, it was held that a judgment creditor who has not executed on his judgment does not have a choate lien by federal standards. This court refused to accept the state court ruling as to the meaning of its statute. An appeal is under consideration by the Solicitor General.

Staff: United States Attorney David Satz, Jr.; Assistant United States Attorney Martin Tuman (D. N.J.); and Maurice Adelman, Jr. (Tax Division)

Lien for Federal Taxes Held Entitled to Priority Over Claims of Subsequent Purchaser and Mortgagee and Subsequent Lien Asserted by State. United States v. Stanley Crews, et al. (E.D. Ill., March 12, 1964). (CCH 64-1 USTC ¶9384). This was an action brought by the United States to reduce outstanding tax liabilities to judgment and to foreclose on certain real property owned by taxpayers at the time the lien arose. The facts are briefly as follows: On May 9, 1958, 100 per cent penalty assessments were made against the taxpayers. Notice and demand was made on May 20, 1958, and notice of lien was properly filed with the county recorder of deeds on July 9, 1958. On the above dates, taxpayers were the owners of the real property which was the subject of this action. On August 20, 1958, taxpayers conveyed the property to the defendants, Stanley and Callie Crews

who, in turn, gave a mortgage to the Vergennes State Bank on the same date. Taxpayers did not file an answer to the action. The purchasers and the mortgagee claimed that the lien was not effective against them since the failure of the taxpayers to pay the tax was not wilful. The State of Illinois filed an answer and cross-complaint alleging taxes due under a Retailer's Occupation Tax which became a lien on January 13, 1959. The Government served requests for admissions on the purchasers and mortgagee as a means of avoiding certain factual questions. The purchasers admitted having purchased the property from taxpayers and further that taxpayers had owned the property on July 9, 1958, the date on which notice of lien was filed. The mortgagee did not answer the request for admissions.

The Court found that the Government was entitled to a default judgment against taxpayers and that the Government had a valid lien against the real property. Since the interests of the purchaser and mortgagee arose after notice of lien was filed, the Government was entitled to priority over those claims as well as over the claim asserted by the State of Illinois based on the Retailer's Occupation Tax which was perfected after the federal tax lien. Accordingly, the property was ordered sold and the Government's claim satisfied out of the proceeds.

Staff: United States Attorney Carl W. Feickert; Assistant United States Attorney Robert F. Quinn (E.D. Ill.); and John G. Penn (Tax Division)

Injunction: Declaratory Judgment: 26 U.S.C. 7421(a) Prohibits Enjoining Issuance of 90-day Letter; Defendants Immune From Action For Damages Under 42 U.S.C. 1985; Declaratory Judgment With Respect to Federal Taxes Prohibited by 28 U.S.C. 2201; Issuance of Treasury Card Not Compelled. Lew M. Warden, Jr. and Nadja Warden v. Mortimer Caplin, et al. (N.D. Calif., January 8, 1964). (CCH 64-1 USTC ¶9300). This suit was brought by taxpayers to enjoin the issuance of statutory notice of deficiency (90-day letter), for a declaratory judgment directing defendants to admit plaintiff, Lew M. Warden, Jr., to practice before the Internal Revenue Service and for damages alleged to be due from harassment, etc., from defendants. Defendants' motion to dismiss was treated by the Court as a motion for summary judgment. The Court held that it could not say that the Government would not prevail on the issues which may be raised in a "90-day letter" and since the issues could be decided on the merits in the Tax Court or in a refund suit, plaintiffs have an adequate remedy at law. The Court also held that the individual defendants are immune from an action for damages pursuant to the Civil Rights Act (42 U.S.C. 1985), that a declaratory judgment with respect to Federal taxes is prohibited by the Federal Declaratory Judgment Act (28 U.S.C. 2201), and that defendant may not be compelled to admit plaintiff, Lew M. Warden, Jr., to practice before the Treasury Department but he may be compelled to act on plaintiff's application. Plaintiff appealed and while appeal was pending, filed a second motion for injunctive relief in the same action. This motion was denied for lack of jurisdiction.

Staff: United States Attorney Cecil F. Poole; Assistant United States Attorney Richard L. Carico (N.D. Calif.); and Wallace E. Maloney (Tax Division)

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