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BULLETIN

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Vol. 12 August 7, 1964 No. 16

FORM 792

The Board of Parole has advised that, generally speaking, the United States Attorneys are very cooperative in forwarding Form 792, Report on Convicted Prisoner by United States Attorney. Some districts, however, fail to supply the form as requested.

As Form 792 is very helpful to the Board, the United States Attorneys are urged to forward Form 792 on all convicted cases prosecuted by them.

MONTHLY TOTALS

Set out below are preliminary figures for fiscal year 1964. As can be seen, there was no reduction in the caseload--instead it rose by almost five percent. The sharp increase in the number of civil cases filed, and the failure of civil terminations to keep pace with this increase, accounted for most of the increase.

	Fiscal Year 1963	Fiscal Year 1964	Increase or Decrease Number	Increase or Decrease %
Filed				
Criminal	33,235	33,153	- 82	- .25
Civil	26,371	28,850**	+ 2,479	+ 9.40
Total	59,606	62,003	+ 2,397	+ 4.02
Terminated				
Criminal	32,546	32,780	+ 234	+ .72
Civil	26,473	27,727	+ 1,254	+ 4.74
Total	59,019	60,507	+ 1,488	+ 2.52
Pending				
Criminal	9,796*	10,169	+ 373	+ 3.81
Civil	22,290*	23,413	+ 1,123	+ 5.04
Total	32,086*	33,582	+ 1,496	+ 4.66

* Pending figures as of close of fiscal year 1963 adjusted to reflect corrections reported by United States Attorneys during the year.

** Does not include June, 1964 Land Condemnation cases filed or terminated for Northern Florida and Middle Georgia.

As is usual in the last month of the fiscal year, filings went down during June, whereas terminations reached the high point of the year. If the high rate of cases closed in United States Attorneys' offices in June each year could be maintained during the other months of the year, the caseload would be quickly reduced.

	Filed			Terminated		
	Crim.	Civil	Total	Crim.	Civil	Total
July	2,252	2,456	4,708	2,305	2,129	4,434
Aug.	2,245	2,228	4,473	1,771	1,852	3,623
Sept.	3,365	2,267	5,632	2,584	1,920	4,504
Oct.	3,298	2,440	5,738	3,164	2,465	5,629
Nov.	2,794	1,789	4,583	3,020	1,806	4,826
Dec.	2,252	2,214	4,466	2,554	2,039	4,593
Jan.	2,855	2,496	5,351	2,853	2,461	5,314
Feb.	3,015	2,195	5,210	2,486	2,422	4,908
March	2,924	2,589	5,513	3,059	2,472	5,531
April	3,013	2,911	5,924	2,966	2,523	5,489
May	2,698	2,631	5,329	2,902	2,422	5,324
June	2,442	2,634	5,076	3,116	3,216	6,332

For the month of June, 1964 United States Attorneys reported collections of $5,138,933. This brings the total for fiscal year 1964 to $56,390,892. Compared with the previous fiscal year this is an increase of $14,279,588 or 33.91 per cent from the $42,111,304 collected in that year.

During June $19,455,526 was saved in 123 suits in which the government as defendant was sued for $20,630,414. 68 of them involving $16,188,172 were closed by compromises amounting to $933,898 and 20 of them involving $1,536,408 were closed by judgments amounting to $240,990. The remaining 35 suits involving $2,905,834 were won by the government. The total saved for the fiscal year amounted to $122,043,139 and compared to fiscal year 1963 increased by $62,971,478 or 106.60 per cent over the $59,071,661 saved in that year.

The cost of operating United States Attorneys' offices for fiscal year 1964 amounted to $17,344,326 as compared to $16,365,680 for fiscal year 1963.

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ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

MEMOS AND ORDERS

The following Memoranda and Orders applicable to United States Attorneys' offices have been issued since the list published in Bulletin No. 13, Vol. 12, dated June 26, 1964:

MEMOS	DATED	DISTRIBUTION	SUBJECT
124R-S4	6-18-64	U.S. Attorneys	Docket and Reporting System Manual
377	6-29-64	U.S. Attorneys	Juvenile delinquency; use of Brooklyn plan of deferred prosecution
378	6-30-64	U.S. Attorneys	Analysis of Public Law 88-316 (prohibiting schemes in commerce to influence sporting contests by bribery), 88th Congress, Second Session, together with House Report No. 1053, Senate Report No. 593, and the Public Law
379	7-1-64	U.S. Attorneys	Defense of suits against Federal employees arising out of their operation of motor vehicles
380	7-14-64	U.S. Attorneys	Social Security cases in which plaintiff has named wrong defendant
381	7-15-64	U.S. Attorneys	Interrogatories for use in supplementary proceedings

ORDERS	DATED	DISTRIBUTION	SUBJECT
316-64	6-23-64	U.S. Attorneys & Marshals	Amendment to Dept. of Justice Organization Order (No. 271-62) delegating to Assistant Attorney General in Charge of Civil Division authority to administer provisions of Austrian Assets Agreement of January 30, 1959 - Title 28--Judicial Administration, Chapter I - Dept. of Justice, Part 0 - Organization of Dept. of Justice, Sub-part I - Civil Division.

ORDERS	DATED	DISTRIBUTION	SUBJECT
317-64	7-13-64	U.S. Attorneys & Marshals	Amendment of regulations relating to summary dismissal of certain appeals by Board of Immigration Appeals, Title 8 - Aliens & Nationality, Chapter I - Immigration & Naturalization Sub-Chapter A - General Provisions Part 3 - Board of Immigration Appeals.

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURTS OF APPEALS

FEDERAL TORT CLAIMS ACT

United States Not Liable Under Act For Death of Employees of A.E.C. Contractor; A.E.C. Has No Mandatory Duty to Supervise Safety Operations. Jane A. Blaber, v. United States (No. 28450, C.A. 2, May 28, 1964) DJ No. 157-52-555. The Sylvania Corning Nuclear Corporation, Inc. had contracted with the Atomic Energy Commission to do atomic research and development work. Although the contract gave A.E.C. the right to make inspections, and required Sylvania to submit periodic reports on various aspects of the work, it was not disputed that Sylvania was an independent contractor and owned the building in which its work was done. The contract also provided that Sylvania was to take all reasonable precautions in the performance of the work to protect the health and safety of its employees. During the course of the work an explosion occurred at Sylvania's laboratory, killing one employee and injuring three others. The administratrix of the deceased employee and the injured employees then brought separate suits against the United States under the Federal Tort Claims Act, alleging a statutory duty on the part of the A.E.C. to control Sylvania's safety operations, and the negligent fulfillment of that duty. The district court dismissed the complaints on the merits. The appeals were consolidated. All were affirmed by the Second Circuit.

The trial court had found that the death and injuries of the employees were the proximate result of the utilization by one of them of a dangerous chemical mass. The Court of Appeals noted that the record failed to indicate that the employee had been given instructions in the use of the chemical. But, said the Court, if the failure to give such instructions was negligence, it was the negligence of Sylvania not of the A.E.C. No contention had been made that the A.E.C. was negligent in the selection of Sylvania to do the research and development work.

The Court rejected plaintiffs' contention that under the A.E.C.'s contracting power, 42 U.S.C. 2051, it must supervise and protect against manufacturing or experimental hazards the employees of the independent contractors with whom it deals. The Court ruled that, under the statute, the A.E.C. could exercise such supervision or protection, or it could, in its discretion, make arrangements with the contractors to see that such supervision and protection are provided. Since the trial court had found that the A.E.C. had exercised its discretion and, under the contract with Sylvania, had given Sylvania the primary responsibility for the safety of its employees, the Court of Appeals ruled that under 28 U.S.C. 2680(a), the discretionary function exception of the Tort Claims Act, and Dalehite v. United States, 346 U.S. 15, interpreting section 2680(a), the United States was not liable. The Court rejected plaintiffs' suggestion that the Dalehite case's holding on the scope of the discretionary function immunity had been weakened by the Supreme Court's later decisions in Indian Towing Co. v. United States, 350 U.S. 61, and Rayonier, Inc. v. United States, 352 U.S. 315.

Staff: United States Attorney Joseph P. Hoey, and Assistant United States Attorney Jerome C. Ditore (E.D. N.Y.).

Second Circuit Follows Fifth and Ninth Circuits in Holding That Federal Law Determines When Two-Year Period of Limitations Contained In 28 U.S.C. 2401(b) Begins to Run. John M. Kossick v. United States (No. 28592, C.A. 2, April 15, 1964), D.J. No. 61-51-3338. A serious injury was inflicted upon plaintiff in August 1950, while he was a patient at the United States Public Health Service Hospital in New York. He was treated at the hospital for this injury until April 1951, and again, off-and-on, between November 1951 and November 1952. He was then discharged as fit for duty, although he was warned that he would have some difficulty with the injured area for the rest of his life. He made occasional visits to the Public Health Service hospital or its out-patient clinic after November 1952.

On April 4, 1963, plaintiff commenced this suit against the United States under the Federal Tort Claims Act for the negligence of the doctors and nurses at the hospital. In an attempt to avoid the two-year period of limitations contained in 28 U.S.C. 2401(b), plaintiff relied on 28 U.S.C. 2674, generally making the Government liable to the same extent as a private individual under like circumstances, and New York's doctrine that a claim for malpractice does not accrue so long as the plaintiff is under "continuous treatment" for his injury. (See e.g., Borgia v. City of New York, 12 N.Y. 2d 151, 237 N.Y.S. 2d 319.) From an order granting the Government's motion for summary judgment on the basis of 28 U.S.C. 2401(b), plaintiff appealed.

The Second Circuit affirmed, ruling that the general language of 28 U.S.C. 2674 was controlled by the specific provision of 28 U.S.C. 2401 dealing with time limitations, and that, for purposes of determining when the period of limitations contained in section 2401(b) begins to run, one must look to federal, not state, law. In this regard, the Court's decision heavily relied upon and followed the Fifth Circuit's reasoning in Quinton v. United States, 304 F. 2d 234, a case which has also been followed by the Ninth Circuit in Hungerford v. United States, 307 F. 2d 99. The First Circuit has gone the other way ruling that state law governs the time at which the tort action accrues. Tessier v. United States, 269 F. 2d 305, 309.

The Second Circuit in this case did not go on to adopt a rule of federal law as to when the action would be held to accrue for limitations purposes. (The Fifth and Ninth Circuits adopted a federal rule that the limitations period starts to run when the plaintiff discovers or should have discovered the negligence.) But, in dictum, the Court indicated a preference for a rule that would have the period run from the end of treatment for the condition. This is the New York rule governing this situation.

Applying its rule, the Court concluded that plaintiff was out of time. The Court held that he must have discovered his grievous injury shortly after it occurred in 1950, and the course of treatment ended in November 1952, both long before the case was filed in 1963. Thus, the Court pointed out, even if New York law were to be applied, the action was far out of time.

Plaintiff has filed a petition for a writ of certiorari.

Staff: Terence N. Doyle (Civil Division)

FORECLOSURE SALES

Mortgagor Cannot Complain of Foreclosure Sale Conducted in Accordance With Authority Granted in Mortgage. Mongoose Gin Company And Clinton Manges v. United States, (No. 20939, C.A. 5, April 15, 1946) D.J. No. 105-74-43. The United States sued the defendant-mortgagors for a deficiency which remained after the foreclosure of their chattel and real estate mortgages given to the Small Business Administration and the sale of the security. Most of the material allegations of the complaint were admitted by defendants' answer. The district court ordered struck defenses raised by the defendants, and granted summary judgment in favor of the Government.

The Fifth Circuit affirmed. It first noted that, since most of the material allegations of the complaint were admitted and those not admitted were ordered struck by the trial court, judgment for the United States was concededly proper if the trial court did not err in striking the parts of defendants' pleadings. The struck portions of the defensive pleadings raised the contentions that the manner of the foreclosure sale of the mortgaged real property and of the fixtures attached to the land and covered by a separate chattel mortgage was improper. The Court, citing Metals Development Company v. United States, 322 F. 2d 210 (C.A. 5), rejected these contentions, noting that as the sales had been conducted within the precise authority granted in the security instruments, defendants could not complain that the sales were in any way unfair to them or chilled or stifled the bidding. Defendants' contentions also involved the argument that the real estate mortgage, which also purported to cover the fixtures, was inconsistent with the subsequently given chattel mortgage. To this the Court answered that defendants had no complaint since this was their voluntary act as mortgagors. Another argument for reversal of the trial court was not considered by the appellate court because it had not been raised below.

Staff: United States Attorney Woodrow Seals, Assistant United States Attorneys Robert C. Maley, Jr. and James R. Gouch. (S.D. Tex.)

GOVERNMENTAL IMMUNITY

Fifth Circuit Adheres to Doctrine That Government Official Acting Within Scope of His Duties Has Immunity From Tort Liability For His Acts Even If He Acts Maliciously. Ernest Waymire v. Robert T. Deneve (No. 20779, C.A. 5, June 17, 1964), D.J. No. 145-3-579. Ernest Waymire, an Air Force enlisted man, was accused by Robert T. Deneve, an agent of the Bureau of Customs, of illegally importing liquor into the United States, and Deneve demanded payment of the sum due as a penalty for such offense. Waymire instituted this suit for defamation, alleging that Deneve's demands had been made maliciously and without justification because an Air Force Special Court Martial had already acquitted him, Waymire, of a charge of violation of regulations specifying the illegal importation. In the trial court, after a default judgment had been entered in plaintiff's favor, the court, in an ex parte order, dismissed the complaint. Plaintiff appealed, alleging numerous procedural irregularities.

Without specifically deciding whether there had in fact been procedural errors below, the Fifth Circuit affirmed on the ground that, since plaintiff could not in any event have recovered on the facts alleged in the complaint, any

procedural errors which did occur were harmless and had to be disregarded under Rule 61, F.R. Civ. P., as not affecting substantial rights.

On the merits of plaintiff's case, the Court noted that defendant's alleged tortious acts occurred during the course of action which was a part of his official duties. Hence, said the Court, citing Barr v. Matteo, 360 U.S. 564; Ove Gustavsson Contracting Co. v. Floete, 299 F. 2d 655 (C.A. 2); and Gregoire v. Biddle, 177 F. 2d 579 (C.A. 2), defendant was shielded by immunity.

Staff: Alan S. Rosenthal and Barbara Deutsch (Civil Division)

SMALL BUSINESS ADMINISTRATION

State Law Held to Determine Liability of Party to Small Business Administration Loan; Defense Of Coverture Sustained. United States v. Yazell (No. 21154; C.A. 5, July 13, 1964), D.J. No. 105-76-41. Delbert L. Yazell and his wife, trading as a partnership in Texas, had obtained a Small Business Administration loan, executing a promissory note and a chattel mortgage on the merchandise in their store. They subsequently defaulted and, after SBA had foreclosed on the security, a deficiency remained. The Government then sued on the note, seeking the balance of the loan. Mrs. Yazell moved for summary judgment on the ground that she was a married woman and therefore, in Texas, no personal judgment and no judgment affecting her separate estate could be rendered against her. The district court granted her motion. The Fifth Circuit, two to one, affirmed.

In the view of the majority, the sole issue was whether the law of Texas, where the contract was made, was controlling, or whether, since the transaction was one with the Federal Government, inconsistent state law was nullified and abrogated. The majority agreed with the district court that Texas law controlled and that, under that law, the defense of coverture was available to Mrs. Yazell. The Court rejected the Government's contentions that, since a federal contract and a federal agency and a federal program were involved, under the rational of Clearfield Trust Co. v. United States, 318 U.S. 363, and subsequent cases, federal law controlled and superseded inconsistent state law. The majority specifically rejected and brought itself directly in conflict with a Sixth Circuit case, which holds that whether coverture is available as a defense to a party to a Federal Housing Administration note, is a question to be determined by federal not state law. United States v. Helz, 314 F. 2d 300.

In a dissent, Judge Prettyman, of the District of Columbia Circuit, sitting by designation, felt that a loan from the Federal Government was a federal matter and should be governed by federal law. He thought that any semblance of uniformity in national federal programs like that of the Small Business Act would be lost and that chaos would result if local rules were to govern. Judge Prettyman also felt that the Helz case was correctly decided.

Staff: Sherman L. Cohn and J.F. Bishop (Civil Division)

TRANSPORTATION

Exceptions Tariff Rating for Engines Held Not to Have Superseded Released

Value Rates of Uniform Classification Tariff Rating For Engines. Strickland Transportation Company, Inc. v. United States; T.I.M.E. Freight, Inc. v. United States (Nos. 20409 and 20360; C.A. 5, July 8, 1964), D.J. Nos. 78-73-102; 78-73-103; 78-73-106; 78-73-110; 78-73-112. Between 1954 and 1959, Strickland Transportation Company, Inc. and T.I.M.E. Freight, Inc., motor carriers, transported aircraft engines for the United States under Government bills of lading. The carriers submitted bills which were paid without prior audit, as authorized by 49 U.S.C. 66. After audit, the General Accounting Office determined that the Government had been overcharged. G.A.O. ruled that the applicable tariff was the uniform classification rating for engines, shipped at released (declared) value. The carriers contended that the applicable tariff was a higher, exceptions rating for engines, which had superseded the uniform classification rating, both for released and unreleased value shipments.

The Government deducted the amounts it claimed had been overpaid from other sums then due the carriers. Strickland and T.I.M.E. filed separate suits against the United States to recover the deductions. The district court granted judgments for the Government. The cases were considered together on appeal because of the common question of tariff construction and applicability.

The Court of Appeals affirmed both judgments. The Court recognized that the question of tariff construction and applicability was clearly within the primary jurisdiction of the I.C.C., citing United States v. Western Pacific, 352 U.S. 59. However, the Court accepted the Government's contention that, under the Western Pacific doctrine, referral to the I.C.C. was not necessary because that body, in prior decisions, had already construed the particular tariff in issue. The Court then followed the reasoning of the I.C.C. decisions which had held that exceptions ratings, similar in wording to the one in issue, had superseded the uniform classification ratings only to the extent of the unreleased, not the released, value items. The Court's approach to the matter is notable because although it remarked, "Whether this makes sense is beside the point," it nevertheless declined to invade the province left to the expert body, saying "Efforts by courts, no matter how plausible on traditional construction principles, to avoid the impact of the general [I.C.C.] policy by refined distinctions based on terminology will inevitably impinge on uniformity and thereby put the court in the transportation-regulating business."

In the T.I.M.E. appeal, the carrier had raised the additional contentions that the Government had failed to state on the bill of lading, that it wanted to ship at the release value rates as required by the tariff, and that 49 U.S.C. 304a precluded the Government from deducting or offsetting transportation overcharges more than two years after payment of the charges. As for the first contention, the Court ruled that there had been substantial compliance with the tariff requirement because of the wording in the standard uniform Government bill of lading. The Court disposed of T.I.M.E.'s second contention by noting that 49 U.S.C. 304a had to be read in conjunction with 49 U.S.C. 66. Although both sections had been amended in 1958, the Court held that prior to 1958, when most of these deductions had occurred, the right of the Government to deduct for overpayments was not limited as to time.

Staff: Terence N. Doyle (Civil Division)

STATE COURTS

ALIEN PROPERTY

Title to Personal Property of Minnesota Decedent Held to Have Vested in German Heirs at Time of His Death, And Thus Subsequent Vesting of Property by Attorney General Under Trading With The Enemy Act Occurred Before Joint Resolution Terminating War With Germany, or Treaty of Friendship With Germany. In re Estate of Gerhardt Paul Mokros v. United States (No. 39188 Supreme Court of Minnesota, July 10, 1964), DJ No. D28-9631. Gerhardt Paul Mokros, a resident of Minnesota, died on November 5, 1942, leaving as his sole surviving heirs-at-law his parents, citizens and residents of Germany. His estate consisted of only personal property. On April 17, 1945, an administratrix of the estate was appointed. On June 14, 1949, pursuant to the provisions of the Trading With the Enemy Act, 50 U.S.C. App. 5(b) and 7(c), the Attorney General issued a vesting order, purporting to vest all right, title, and interest in the property in the estate. The probate proceedings remained dormant for many years, during which time the decedent's parents died, survived by their children, who then became Gerhardt Mokros' sole surviving heirs. On April 17, 1959, the probate court entered a decree directing that the assets of the estate be distributed to the Attorney General. The surviving heirs appealed, contending that distribution of the estate had not legally occurred until April 17, 1959, the date of the court's decree, and that thus the 1949 vesting order did not vest the property at that time. The appellants further contended that, this being the case, the joint resolution of Congress made October 19, 1951, terminating the state of war between Germany and the United States, and on October 1954 Treaty of Friendship between the two countries, prevented vesting of the property under the Trading With the Enemy Act in 1959.

The Supreme Court of Minnesota rejected all of these contentions and affirmed the distribution decree of the lower court. It ruled that at the time of his death, November 5, 1942, title to the decedent's personal property vested in his then sole heirs, his parents, who were nationals of Germany, even though the administratrix of the estate did receive a qualified title for purposes of paying debts against the estate and the expenses of administration. Thus, the vesting order of June 19, 1949, effectively vested title to the property in the Attorney General at that time, before passage of the joint resolution or the enactment of the friendship treaty. The final decree of the probate proceedings, said the Court, did not constitute the legal conferring of title to the property. Rather, that decree merely determined the identity of the heirs and that all obligations of the estate had been paid.

The Court also rejected the appellant's contention that the joint resolution and the treaty were intended to have retroactive effect.

Staff: Stephen B. Swartz (Civil Division)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Burke Marshall

Civil Rights: School Desegregation; Interference by State Officials; Validity of State Pupil Placement and Grant-in-Aid Laws; State-wide Desegregation. Lee and United States v. Macon County Board of Education, et al. (C.A. 604E, M.D. Ala., July 13, 1964) DJ File 144-100-2-1. Class action by Negro plaintiffs resulted in a District Court order that Negro children be enrolled in the high school grades of the white public school in Tuskegee, Alabama for the Fall 1963 term. Thirteen Negro children were enrolled, but were denied entrance to the school on September 2, 1963, by state police acting pursuant to the executive order of Governor Wallace closing the school for one week. On September 9, 1963, state police barred entrance to the Negroes but not to white students, again acting upon the orders of the Governor. Upon motion of the United States, the District Court temporarily restrained the Governor from interfering with the desegregation of Macon County schools. U.S. v. Wallace, 222 F. Supp. 485 (M.D. Ala. 1963)

Thereafter, white students boycotted the Tuskegee school and transferred to other white schools in Macon County. In January 1964, the State Board, of which the Governor is ex-officio President, ordered Tuskegee High School closed. In February 1964, with the United States intervening as plaintiff, the District Court ordered that the Negroes previously attending Tuskegee High School be enrolled at either of the other white schools still open, and a three-judge court was convened to hear issues raised by the plaintiffs as to the unconstitutionality of Alabama's public placement, grant-in-aid, and school closing laws. Upon the enrollment of the Negro children in the other white schools, all the white children withdrew and entered a private school hastily organized to accommodate them.

On July 13, 1964, the three-judge court (Rives, Circuit Judge, and Grooms and Johnson, District Judges) entered its per curiam opinion and order. The court enjoined the Governor and the State Board from any further interference with school desegregation orders anywhere in the state. The Macon County Board was directed to present a school desegregation plan effective for the 1964-65 school year which covered at least one elementary grade and all high school grades.

With respect to the constitutional issues, the court declared unconstitutional the use of the state grant-in-aid statute to assist pupils attending schools that discriminate on the basis of race, and the statute's use for that purpose was enjoined throughout the state. In reaching this result the court noted that Alabama law provides for grants only where public school education is "unavailable" and that the state is precluded by Griffin v. County School Bd. of Prince Edward County, (S.Ct., May 25, 1964) from making public education unavailable in some areas while making it available in others.

The Court also found that the State Board and the Macon County Board regard the Alabama School Placement Law "as a law to be used merely when a school board is faced with demands for desegregation." Its use in that connection was

enjoined throughout the state, but the law on its face was not declared unconstitutional.

The plaintiffs had asked that the State Board, in light of its assertion of authority over local boards, be required to desegregate every school district in the state. Noting that "the State Board of Education of Alabama has general control and supervision over the public schools of this State," the court did not grant statewide relief, assuming that state officials will no longer interfere with desegregation orders. The court said that "through the exercise of considerable judicial restraint, no statewide desegregation will be ordered at this time," but if state level interference or "subtle coercion" recurs, "it will be appropriate for the Court to reappraise that aspect of the case."

Staff: United States Attorney Ben Hardeman; St. John Barrett and David R. Owen (Civil Rights Division)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT

Immunity From Prosecution Under 29 U.S.C. 521(b); Procedure to Be Followed. Investigations involving possible violations of the Labor-Management Relations Act, the Labor-Management Reporting and Disclosure Act and other statutes involving labor racketeering are frequently stymied by witnesses who refuse to testify under cover of their Fifth Amendment privilege.

Section 601 of the Labor-Management Reporting and Disclosure Act (29 U.S.C. 521) places in the Secretary of Labor the power to make an investigation when he believes it necessary in order to determine whether any person has violated or is about to violate any provision of the Act (except Title I). Section 601(b) makes applicable to such an investigation the provisions of 15 U.S.C. 49 and 50. These sections confer an automatic immunity upon anyone who is subpoenaed by the Secretary of Labor. The immunity obtained under the statute is not confined to the crimes defined in the Act. The immunity is complete as to "any transaction, matter or thing concerning which he is compelled to testify." (See Reina v. United States, 364 U.S. 507; Brown v. United States, 359 U.S. 41; Ullmann v. United States 350 U.S. 422.)

Since the Secretary of Labor would appear to have a concurrent jurisdiction to investigate these crimes, it is possible to make use of this jurisdiction and its concomitant immunity provisions in order to unblock a Grand Jury investigation. The methods used to accomplish this are as follows:

The Office of Labor-Management and Welfare-Pension Reports (OLMWPR) is requested by the United States Attorney or the Assistant United States Attorney conducting the investigation to institute its own investigation of possible violation of the Labor-Management Reporting and Disclosure Act. After opening the investigation the Bureau may issue its subpoena to the recalcitrant witness directing him to appear before an official of the Bureau. In the alternative the Bureau may be requested to designate the United States Attorney himself as the investigating agent and to make its subpoena returnable before the United States Attorney. (Wirtz v. Local 502, 217 F. Supp. 155; Goldberg v. Battles, 196 F. Supp. 749; aff'd. 299 F. 2d 937; cert. den. 371 U.S. 817.)

Upon the return of the subpoena either before the United States Attorney or the official of the OLMWPR an oath should be administered to the witness by anyone competent to administer an oath under the laws of the State in which the interrogation takes place. A stenographer should be present and a transcript made of the proceedings. The investigating officer should then propound significant questions covering the subject matter and periods of time which are pertinent to the investigation and on which it is desired to have testimony before the Grand Jury. Having so testified, the immunity of the witness is complete on the subject matter and periods covered and the witness may then be brought back before the Grand Jury. (In re Certain Grand Jury Witnesses, 211 F. Supp. 365.)

In the event the witness invokes the privilege against self-incrimination either before the investigating officer or the Grand Jury, it is appropriate to seek the aid of the Court to compel testimony (Goldberg v. Battles, supra, In re Certain Grand Jury Witnesses, supra) and finally to seek contempt if the witness fails to comply with the order of the court.

The Criminal Division would encourage the use of this technique in every appropriate case. However, it should be noted that before issuing the requested subpoena the OLMWPR will confer with the Criminal Division regarding whether immunizing the prospective witness will jeopardize any pending prosecution. Likewise, in view of the holdings in Murphy v. N. Y. Waterfront Commission, and Malloy v. Hogan, both decided by the Supreme Court June 15, 1964, that immunity conferred by a State or Federal statute is binding on all jurisdictions, consideration must be given to the desirability of consulting with local prosecuting officials regarding any objections they may have to immunizing a particular individual. While such objections cannot be considered to be binding, they are clearly entitled to great weight and consideration.

In the event that immunity is conferred upon any person under this procedure, that fact and the results of the interrogation should be transmitted to the Criminal Division at the earliest possible time.

HOBBS "ANTI-RACKETEERING" ACT

Conviction for Obstructing Commerce by Extortion (18 U.S.C. 1951). United States v. Anthony Provenzano (C.A. 3, June 30, 1964). The conviction of the defendant union officer upon an indictment charging him with obstructing commerce by extorting money from an employer through economic fear was affirmed. Defendant's contention that there was insufficient proof of interference with interstate commerce to sustain the conviction was rejected by the Court of Appeals, which quoted with approval the district court's jury charge that "where the resources of a business are depleted or diminished in any manner or degree by payments of money obtained by extortion the capacity to efficiently conduct such business is to the extent of the drain on its resources likely to be impaired. The specific amount of such money obtained by extortion or the precise manner or degree to which it has an effect on the business is of no consequence. It is merely required by the law where extortion is shown that it did in some way or degree obstruct, delay or affect commerce . . . . [Y]ou may infer if extortion is established that it did in some way or degree obstruct or delay or affect commerce, and in connection with this it is not necessary for you to find from any of the evidence submitted with respect to the congestion that any particular shipment of freight moving in or out of the [employer's] yards was obstructed or delayed. It is the depletion of the resources of a business by extortion which permits as a reasonable inference if the extortion is established that its operations are delayed, obstructed, affected."

The Court of Appeals further held that it was unnecessary to prove that defendant directly or indirectly received fruits of the extortion. It was sufficient to sustain conviction to show that payments were made at the extortioner's direction to a person designated by him. Also rejected were defendant's contentions that each separate payment made by the employer should have been alleged as a separate offense which should have been set up as a separate count in an indictment, with each count requiring proof of every element of the crime; that a new trial was warranted because insulation of the jury from outside influences deprived defendant of a fair trial; that an instruction to the jury regarding guilt for aiding and abetting the commission of the crime charged in the indictment was prejudiced; and that certain testimony regarding the making of payments should not have been admitted by the trial court.

Rejected too was the contention that payments were not made under compulsion induced by fear, the Court holding that the fact that monthly checks were automatically prepared by a machine did not indicate that the payments were not induced by fear, since the checks were prepared at the employer's direction.

Staff: United States Attorney David M. Staz, Jr.; Assistant United States Attorney Richard A. Levin (D. N.J.).

FALSE STATEMENTS

Submission of False Financial Statements to Post Exchange Officer by Theatre Concessionaire. Brethauer v. United States (C.A. 8, June 23, 1964). D.J. File 46-43-161. Appellant was convicted on a three-count indictment charging violations of 18 U.S.C. 1001. He was placed on probation for a period of two years and was fined a total of $15,000. The indictment charged him with filing false, fictitious and fraudulent profit and loss statements with the Post Exchange Officer at Fort Leonard Wood, Missouri for the years ending June 30, 1958, June 30, 1959, and June 30, 1960.

Evidence adduced at trial reflected that Brethauer had entered into a concessionaire contract with the Fort Leonard Wood Post Exchange (Exchange) under which he was granted the theatre candy, soft drinks, and popcorn concessions. Pursuant to this contract, the Exchange required appellant to render certified detailed balance sheets and operating statements showing his net profit from the operation of the concessions. The operating statements filed for the years involved were, as Brethauer admitted, false in that the net profits were shown to be substantially less than his actual profits. However, in accordance with the provisions of the contract, appellant did pay to Exchange a sum equal to 25% of his gross receipts from the operation of the business.

On appeal Brethauer advanced a two-fold argument urging reversal. First, he contended that the false statements, if material, did not relate to a matter within the jurisdiction of a department or agency of the United States, and, second, he argued that the false statements did not relate to a "material fact" within the meaning of 18 U.S.C. 1001.

The Court disposed of the first argument by quoting the language of the Supreme Court in Standard Oil Company v. Johnson, 316 U.S. 481 (1942), which the Court stated made it ". . . compellingly clear that a Post Exchange, although created by regulations, is an arm of the Government and an agency within the meaning of 18 U.S.C. § 1001."

In affirming the conviction, the Court also rejected appellant's second contention--that inasmuch as he had fully discharged his contractual obligation to pay the Exchange 25% of his gross receipts, the amount of his net profit was of no concern to the Exchange. The Court found that the purpose of requiring a true and accurate profit and loss statement was to enable the Exchange to realistically exercise its authority to supervise and control the prices to be charged for merchandise sold to members of the armed forces at Fort Leonard Wood. The Court further observed that based upon an accurate operating statement, the Exchange could fairly determine whether its share of the proceeds was commensurate with the net profit realized by the concessionaire, and whether the contract should have been renegotiated.

Staff: United States Attorney F. Russell Millin; Assistant United States Attorney William A. Kitchen (W.D. Mo.).

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IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

IMMIGRATION

Alien Eligible for Adjustment of Immigration Status. Hans Werner Tibke v. INS (C.A. 2, Docket No. 28374; July 9, 1964) D.J. File 39-51-2466. Petitioner, a native and citizen of Germany, entered the United States in 1958 as an immigrant admitted for lawful permanent residence. While residing in the United States, he was twice convicted for crimes involving moral turpitude and by reason of those convictions was ordered deported under Section 241(a)(4) of the Immigration and Nationality Act.

During the deportation proceedings he applied under Section 245 of the same Act to have his status adjusted from that of a deportable alien to a lawful permanent resident. The Special Inquiry Officer who presided at the deportation hearing found petitioner ineligible for Section 245 adjustment on the ground that it afforded relief only to nonimmigrants and not to immigrants such as petitioner. His ruling was upheld by the Board of Immigration Appeals.

The Second Circuit decided that both the Special Inquiry Officer and the Board of Immigration Appeals had erred in their interpretation of Section 245. The Court found from the legislative history of Section 245 that Congress did not intend to limit its application to nonimmigrants and that since petitioner fell within its specific terms he was entitled to apply for its relief. The case was remanded for administrative reconsideration.

Staff: United States Attorney Robert M. Morgenthau;
Special Assistant United States Attorney Roy Babitt
(S.D. N.Y.)

DEPORTATION

Stay of Deportation to Hong Kong Denied. Lam Tat Sin v. Esperdy (C.A. 2, Docket No. 28816; July 13, 1964) D.J. File 39-51-2492. Appellant, a citizen of the Republic of China on Formosa, entered the United States in January 1962 as a crewman and remained beyond the period of his shore leave. Deportation proceedings were instituted against him and at his hearing he conceded deportability and designated Communist China as the place to which he wished to be deported. When Communist China agreed to receive him as a deportee he resisted his deportation to that country contending that he would be subject to physical persecution. He was then ordered deported to Hong Kong, which order he resisted by a declaratory judgment action in the District Court, Southern District of New York. From an adverse ruling in that Court he appealed.

The Second Circuit affirmed the judgment of the District Court, finding no merit in appellant's argument that the Attorney General's refusal to stay

his deportation to Hong Kong was arbitrary and without a rational basis. Because of the crowded refugee condition in Hong Kong the Attorney General adopted a general political policy of forbearance, at present, from enforcing expulsion of Chinese to Hong Kong. Appellant argued before the lower Court and the appellate Court that by ordering him deported to Hong Kong he had been singled out for special adverse treatment. The Government pointed out that appellant, as other Chinese aliens, had designated Communist China as the place of deportation in the expectation that the Immigration and Naturalization Service could not obtain the consent of the Government of Communist China to receive the aliens as deportees. The appellate Court observed that when appellant learned that our Government had obtained the consent of the Chinese Government he exhibited a most sudden change of heart and mind and for the first time asserted his allegiance to the Nationalist Government of China and his fear that he would be physically persecuted if deported to Communist China. The appellate Court held that under all the circumstances disclosed it would not have been unreasonable for the Attorney General to conclude that the mainland of China had been chosen here to ward off deportation indefinitely, that appellant had not acted in good faith and that he ought not to be rewarded by the application of the informal general policy to stay deportations to Hong Kong.

Staff: United States Attorney Robert M. Morgenthau;
Special Assistant United States Attorney Roy Babitt
(S.D. N.Y.)

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
District Court Decisions

Federal Tax Lien; Suit to Quiet Title; District Court Has No Jurisdiction Over Suit Brought Under 28 U.S.C. 2410 to Inquire Into Validity of Tax Assessment Which Gave Rise to Tax Lien. George T. Quinn, Executor of Estate of Thomas J. Thompson, Deceased v. Kenneth O. Hook, District Director. (E.D. Pa., June 30, 1964). (CCH 64-2 USTC ¶9609). The executor of taxpayer's estate brought suit to enjoin the collection of an assessment of income taxes pending a final decision which would expunge and set aside the assessment on the ground that the Tax Court's decision, upon which the assessment was based, was invalid because taxpayer was mentally incompetent and unrepresented by a guardian during the Tax Court proceedings. It was also claimed that the assessment was greatly in excess of any taxes due. Jurisdiction was asserted under 28 U.S.C. 1340 (relating to jurisdiction of Internal Revenue matters) and 28 U.S.C. 2410 (relating to quiet title actions).

Plaintiff relied on the reasoning in Sonitz v. United States, 221 F. Supp. 762 (D. N.J., 1963), and Falik v. United States, 206 F. Supp. 181 (E.D. N.Y., 1962), that Section 2410(a) should be construed to permit review of the merits of the assessment because such review is permissible when the taxpayer is a defendant in proceedings by the Government under 26 U.S.C. 7403. The Court, after reviewing the legislative history and the cases in the area, rejected this argument stating that it was unreal to seek complete symmetry between proceedings brought by the Government and those against it, because this would ignore the all-pervasive distinction that taxpayers are private citizens subject generally to suit whereas the Government may be sued only with its consent. The Court concluded that 28 U.S.C. 1340 was not of itself a waiver of Governmental immunity from suit and that 28 U.S.C. 2410(a), construed in harmony with its purpose, was a consent to be sued only in suits to determine the priority and validity of liens.

The Court further ruled that review of the Tax Court decision could be had only by appeal and that mental incapacity or insanity would render a judgment voidable at most but not void, and, for such a ground, the judgment must be attacked directly in the court in which it was entered.

Staff: United States Attorney Drew J. T. O'Keefe; Assistant United States Attorney Issac Garb (E.D. Pa.); and Frank N. Gundlach and Wallace E. Maloney (Tax Division).

Responsible Officer Penalty Held Not Dischargeable in Bankruptcy. Sherwood, et al. v. United States, et al., (E.D. N.Y.). (CCH 64-1 USTC ¶9452). This suit was instituted by plaintiff for a refund of one unit ($47.00) of a 100 per cent penalty assessment made against him, pursuant to Section 6672 of the Internal Revenue Code of 1954, as a responsible officer of a corporation for failure to collect and pay over certain taxes. He also sought to enjoin the District

Director from collecting the balance of the assessment. The Government counterclaimed for the full amount of the assessment. Plaintiff moved to dismiss the Government's counterclaim alleging that Sherwood's debts including the penalty assessment had been discharged in bankruptcy, under Section 17 of the Bankruptcy Act. The Court in its memorandum opinion stated: "This liability is not a penalty as that term is generally used, but in reality is a liability for a tax originally imposed upon the corporation and shifted to the corporate officer upon his default. Being a tax due from the bankrupt to the United States, this penalty was therefore not dischargeable under Section 17 of the Bankruptcy Act." Therefore, the motion to dismiss the Government's counterclaim was denied.

Staff: United States Attorney Joseph P. Hoey (E.D. N.Y.); James N. McCune (Tax Division).

Lien for Taxes; Ownership of Life Insurance Policies; Tax Liens Held Prior to Claim of Beneficiary Based on Possession of Policies and Payment of Some Premiums. United States v. McWilliams, et al. (D. Conn., June 30, 1964). (CCH 64-2 USTC ¶9619). The United States brought this action to foreclose its tax liens on three insurance policies, two of which were assigned to taxpayer's wife (and the beneficiary under the policies) at a date following assessment of the taxes but prior to receipt by the insurance company of notices of lien. Two questions arose: (1) under Connecticut law did the wife by possession of the policies following assignment and payment of some of the premiums, both before and after assignment, have an interest to defeat the claim of the Government; and (2) if the Government had an interest in these policies, at what time should the amount of its interest be figured.

In granting the Government's motion for summary judgment, the Court looked to Connecticut law to determine the interest of the beneficiary and held that, in the absence of a binding contract between the insured and the beneficiary whereby the latter agrees to pay the premiums in return for the proceeds when due, a beneficiary who pays premiums and maintains possession of the policy does not acquire thereby any legal right to the proceeds. Further, payment of the premiums does not necessarily give rise to an implied contract to pay the proceeds to the named beneficiary, and, if such payments are regarded as giving rise to an equitable lien against the surrender value of the policies, such a lien cannot defeat a federal tax lien. The Court, therefore, ordered the tax liens, which had attached prior to assignment, foreclosed against the cash surrender value of the policies as of August 20, 1964, relying on the decision in United States v. Sullivan, 64-1 USTC ¶9392 (C.A. 3), for authority. An appeal from the decision which followed the Sullivan decision is being considered by the Government.

Staff: United States Attorney Robert C. Zampano; Assistant United States Attorney F. Owen Eagen (D. Conn.); and John M. Youngquist (Tax Division).

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